SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v McKellar* [2020] QSC 98
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ADAM CLIFFE MCKELLAR** (respondent)
FILE NO/S:	No 9745 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	28 April 2020
JUDGE:	Williams J
ORDER:	**Orders made on 28 April 2020:**

THE COURT being satisfied to the requisite standard that the respondent, Adam Cliffe McKellar, has contravened requirements of the supervision order made by Justice Mullins on 24 November 2014, and amended by Justice Brown on 12 June 2017 and Justice Davis on 18 December 2018–

DECLARES THAT:

1. **The period of the respondent's supervision order made on 24 November 2014 and amended by Justice Brown on 12 June 2017 and by Justice Davis on 18 December 2018, by operation of s 24(2) of the Dangerous Prisoners (Sexual Offenders) Act 2003, is extended by 318 days to expire on 8 October 2021.**

ORDERS THAT:

2. **The supervision order is amended by omitting in order (i) the words "24 November 2020" and inserting the following underlined words to read:**

   "(i) The respondent be subject to the following

conditions until 24 November 2022".

3. **The respondent be released from custody and continue to be subject to the supervision order made by Justice Mullins on 24 November 2014 and amended by Justice Brown on 12 June 2017, by Justice Davis on 18 December 2018 and this order.**

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 applicant alleged that the respondent breached a supervision order made pursuant to Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (DPSO Act) – where the respondent failed to submit to a substance testing – where the respondent admitted to the use of methylamphetamine – where the applicant sought orders pursuant to s 22 of the DPSO Act – where the issue of the suitability of a proposed residential address arose – whether the court is satisfied that the respondent contravened the requirements of a supervision order – whether the court is satisfied that the adequate protection of the community is able to be ensured by the respondent's release on the existing supervision order – whether the existing supervision order should be amended

Dangerous Prisoners (Sexual Offenders) Act 2003, s 3, s 5, s 13, s 13A, s 14, s 15, s 16, s 20, s 22, s 23, s 24

Attorney-General for the State of Queensland v KAH [2019] QSC 36, considered
Attorney-General for the State of Queensland v Ruhland [2020] QSC 33, considered
Attorney-General v McKellar [2019] QSC 92, considered
Attorney-General for the State of Queensland v Ellis [2012] QCA 182, cited
Attorney-General (Qld) v Fardon [2013] QCA 64, cited
Attorney-General (Qld) v Foy [2014] QSC 304, cited
Attorney-General (Qld) v Francis [2012] QSC 275, cited
Attorney-General (Qld) v Sands [2016] QSC 225, cited
Attorney-General (Qld) v Yeo [2008] QCA 115, cited
Attorney-General v Francis [2007] 1 Qd R 396, cited
Attorney-General v Lawrence [2010] 1 Qd R 505, cited
Attorney-General v Van Dessel [2007] 2 Qd R 1, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575, cited
Kynuna v Attorney-General (Qld) [2016] QCA 172, cited

LAB v Attorney-General [2011] QCA 230, cited
Turnbull v Attorney-General (Qld) [2015] QCA 54, cited

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

SOLICITORS: Crown Law for the applicant
Legal Aid for the respondent

Application

[1] The Attorney-General sought orders under s 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the DPSO Act) consequent upon a breach by the respondent of a supervision order made by Mullins J on 24 November 2014, amended by Brown J on 12 June 2017, and further amended by Davis J on 18 December 2018 (the supervision order).

[2] Orders were made in this matter on 21 April 2020 with reasons to follow. I set out my reasons for making the orders as follows.

Statutory scheme

[3] As identified by Davis J in his reasons for decision delivered on 9 April 2019 in relation to the respondent:[1]

> "The Act provides for the continued detention or supervised release of 'a particular class of prisoner'.[2] The objects of the Act are twofold, namely the protection of the community and the control, care and treatment of certain prisoners to facilitate their rehabilitation.[3] The prisoners the subject of the Act are those serving a term of imprisonment for a 'serious sexual offence'[4] which is 'an offence of a sexual nature … involving violence' or 'an offence of a sexual nature … against a child'.[5]"

[4] Under the statutory scheme, Part 2 of the Act provides that the Attorney-General may apply to the court for either a continuing detention order or a supervision order.[6] That is, a continuing detention order requiring the detention in custody of the prisoner beyond the date of expiry of the sentence which is then being served;

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1 See *Attorney-General v McKellar* [2019] QSC 92 at [2].

2 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 3.

3 Section 3 and see generally *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

4 Section 5(6).

5 Sections 2 and the Schedule (Dictionary).

6 See ss 13, 14 and 15 of the DPSO Act.

alternatively, a supervision order providing for the release of the prisoner under supervision notwithstanding the expiry of the sentence.

[5] A key provision of the DPSO Act is s 13 which states 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)." (Emphasis in original)

[6] Davis J, in his reasons dated 9 April 2019, also summarised the central relevance of s 13 as follows:[7]

> "[5] Therefore:
>
> (i) the test under s 13 is whether the prisoner is a 'serious danger to the community';[8]
>
> (ii) that initial question is answered by determining whether there is an 'unacceptable risk that the prisoner will commit a serious sexual offence'[9] if no order is made;
>
> (iii) if that conclusion is reached, then a supervision order (as opposed to a continuing detention order) can only be made where the adequate protection of the community can be ensured by the making of a supervision order;[10]
>
> (iv) where 'adequate protection of the community' can be ensured by a supervision order, then the making of a supervision order ought to be preferred to the making of a continuing detention order.[11]"

[7] Further, s 16 sets out certain requirements that must be contained in any supervision order. Section 16(1) states 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

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7 See *Attorney-General v McKellar* [2019] QSC 92 at [5].

8 Section 13(1) DPSO Act.

9 Section 13(1) and (2) DPSO Act.

10 Section 13(6) DPSO Act.

11 *Attorney-General v Francis* [2007] 1 Qd R 396 at [39]; *Attorney-General (Qld) v Yeo* [2008] QCA 115; *Attorney-General v Lawrence* [2010] 1 Qd R 505; *LAB v Attorney-General* [2011] QCA 230; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182; *Attorney-General (Qld) v Fardon* [2013] QCA 64.

(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

(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."

[8] Section 13A of the DPSO Act concerns the duration of supervision orders and states as follows:

"**13A Fixing of period of supervision order**

(1) If the court makes a supervision order, the order must state the period for which it is to have effect.

(2) In fixing the period, the court must not have regard to whether or not the prisoner may become the subject of—

(a) an application for a further supervision order; or

(b) a further supervision order.

(3) The period cannot end before 5 years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later."

[9] Under the statutory scheme, the supervision order should be in place whilst supervision is necessary to ensure the adequate protection of the community. The operation of s 13A has been further considered in the decision of Davis J in *Attorney-General for the State of Queensland v KAH.*[12]

[10] Relevantly to this application, breach of a supervision order has consequences under Division 5 of Part 2 of the DPSO Act. Section 20 provides:

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12 [2019] QSC 36 at [53]-[72].

"**20 Warrant for released prisoner suspected of contravening a supervision order or interim supervision order**

(1) This section applies if a police officer or corrective services officer reasonably suspects a released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the released prisoner's supervision order or interim supervision order.

(2) The officer may, by a complaint to a magistrate, apply for a warrant for the arrest of the released prisoner directed to all police officers and corrective services officers to arrest the released prisoner and bring the released prisoner before the Supreme Court to be dealt with according to law.

(3) The magistrate must issue the warrant, in the approved form, if the magistrate is satisfied the grounds for issuing the warrant exist.

(4) However, the warrant may be issued only if the complaint is under oath.

(6) The warrant may state the suspected contravention in general terms.

(7) If the magistrate issues a warrant under subsection (3), the commissioner of the police service or the chief executive must give a copy of the warrant to the Attorney-General within 24 hours after the warrant is issued.

(8) The Police Powers and Responsibilities Act 2000, sections 800 to 802, apply to the application for the warrant—

(a) as if the warrant were a prescribed authority, within the meaning of section 800 of that Act, that could be obtained under that Act; and

(b) if the application is made by a corrective services officer, as if the corrective services officer were a police officer.

(9) To remove any doubt, it is declared that a failure by the commissioner of the police service or the chief executive to comply with subsection (7) does not affect the court's ability to make a further order under section 22."

[11] Further, s 22 of the DPSO Act provides:

"**22 Court may make further order**

(1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the ***existing order***).

(2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—

(a) if the existing order is a supervision order, rescind it and make a continuing detention order; or

(b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.

(3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—

(a) act on any evidence before it or that was before the court when the existing order was made;

(b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including, for example, an order—

(i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or

(ii) for the revision of a report about the released prisoner produced under section 8A;

(c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.

(4) To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).

(5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report

about the released prisoner and, for that purpose, section 11 applies.

(6) For applying section 11 to the preparation of the report—

(a) section 11(2) applies with the necessary changes; and

(b) section 11(3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.

(7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—

(a) must amend the existing order to include all of the requirements under section 16(1) if the order does not already include all of those requirements; and

(b) may otherwise amend the existing order in a way the court considers appropriate—

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

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

(8) The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1)."

[12] Operation of s 22 of the DPSO Act was summarised by Davis J in his reasons delivered on 9 April 2019 as follows:[13]

"[12] By s 22, once a contravention is proved, the Court shall rescind the supervision order and make a continuing detention order[14] unless the prisoner satisfies the Court that continuation on supervision in the community (either on the supervision order as it stands, or with amendment) will ensure the adequate protection of the community.[15] It is well established that the concept of 'the adequate protection of the community'

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13 See *Attorney-General v McKellar* [2019] QSC 92 at [12].

14 Section 22(2) DPSO Act.

15 Section 22(7) DPSO Act.

in s 22(7) has the same meaning as it bears in s 13.[16] Therefore, prisoners facing an application under s 22 must prove that the supervision order will ensure adequate protection of the community by removing unacceptable risk that they will commit a serious sexual offence.

[13] Section 22 authorises the variation of a supervision order by extending its duration where that is necessary for the adequate protection of the community.[17]

[14] The issue under s 22 of the Act is not whether there is an unacceptable risk that the respondent will breach the supervision order. The issue is whether there is an unacceptable risk that he will commit a serious sexual offence.[18]"

Background to the present application

[13] The respondent is an indigenous man who is currently 29 years of age, having been born on 18 July 1990.

[14] The respondent has previously been convicted of the following offences:

(a) On 19 January 2006, the respondent was convicted as a juvenile of property offences, dishonesty offences, and possession of dangerous drugs in the Cunnamulla Childrens Court. He was detained but the detention was ordered to be served by way of a conditional release order.

(b) In March 2008, the respondent was convicted of one count of rape in the District Court at Beenleigh. The respondent was 16 years old at the time of the offending in 2006. He was sentenced to detention for 966 days but was released taking into account pre-sentence custody.

(c) In July 2008, the respondent was convicted and sentenced to probation for 12 months in the Magistrates Court at Charleville for property and weapons offences and obstructing a police officer.

(d) In November 2008, the respondent was convicted and sentenced to both a suspended sentence of imprisonment and a sentence of imprisonment in the Magistrates Court at Cunnamulla, with immediate release on parole for further property offences.

(e) On 12 March 2010, the respondent was convicted of five counts of indecent treatment of children and two counts of supplying dangerous drugs to minors.

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16 *Kynuna v Attorney-General (Qld)* [2016] QCA 172 at [60]; see also *Turnbull v Attorney-General (Qld)* [2015] QCA 54 at [36].

17 *Attorney-General v Van Dessel* [2007] 2 Qd R 1 at [31]; *Attorney-General (Qld) v Foy* [2014] QSC 304 at [14].

18 *Attorney-General (Qld) v Francis* [2012] QSC 275 at [64]-[67].

He was sentenced to a term of imprisonment on some counts and probation on others and as pre-sentence custody was declared, he was released on probation on the day of sentence.

(f) On 22 March 2011, the respondent was sentenced to four years imprisonment for break and enter and rape.

[15] The respondent came within the provisions of the DPSO Act on his conviction for rape on 22 March 2011 (the index offence). The circumstances of that offending was that he digitally penetrated the vagina of a sleeping woman in circumstances where, at the time of the offending, he was under the influence of a substance and the offending was opportunistic.

[16] On 24 November 2019, Mullins J ordered that the respondent be released from custody subject to the requirements of a supervision order.

[17] There have been nine previous contraventions by the respondent of the supervision order. These are set out in detail in paragraph 26 to 38 of the reasons for decision of Davis J delivered on 9 April 2019.[19]

[18] For current purposes, I set out below a summary of the previous contraventions of the supervision order:

(a) The first contravention concerned failure to comply with a reasonable direction and the use of illicit drugs. On 9 June 2015, Bond J ordered that the respondent be released and continue to be subject to the supervision order.

(b) The second contravention was a breach of the requirement that the respondent not have any direct or indirect contact with the victim of the sexual offences. At a football game in Toowoomba, the respondent approached the victim of the index offence. No orders were made in relation to that breach.

(c) The third contravention relates to a breach of the requirement that the respondent not commit any indictable offence. The respondent was convicted of stealing an Apple iPhone found in a shopping centre. No orders were made in relation to the contravention.

(d) The fourth and six contraventions relate to an assault of a woman the applicant had been in a relationship with on three separate occasions. An application was made in relation to the contraventions and the Attorney-General contended for the imposition of a continuing detention order. On 12 June 2017, Brown J released the respondent and amended the supervision order to add further requirements to facilitate monitoring the respondent's conduct with other people and his use of the internet.

(e) The seventh and eighth contraventions occurred in February and March 2018, though were not subject to any s 22 DPSO Act application.

(f) The ninth and tenth contraventions relate to the respondent's refusal to comply with a direction to provide a sample for urinalysis. On 21 June 2018,

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[19] See *Attorney-General v McKellar* [2019] QSC 92 at [26] to [38].

the respondent was directed to report for further testing and refused to comply. He later admitted to his case manager that he had used "ice". The contravention was admitted.

(g) On 23 July 2018, the respondent pleaded guilty in the Magistrates Court to the contravention and to possessing methylamphetamine. The suspended sentence imposed for the eighth contravention was activated and the respondent was sentenced to three months imprisonment for the possession of the dangerous drug methylamphetamine and five months imprisonment for the contraventions with eligibility for parole set at 24 September 2018.

(h) The ninth and tenth contraventions were the subject of the reasons of Davis J on 9 April 2019. His Honour, having found the respondent had contravened the supervision order, ordered that the respondent be released subject to the supervision order with the amendment that it be extended until 24 November 2020.[20]

The present contravention

[19] The current application alleges that the respondent has contravened a requirement of the supervision order, namely that the respondent must:[21]

> "[23] Abstain from illicit drugs."

[20] The circumstances of the alleged contravention are that on 4 February 2020, the respondent was directed to provide a urinalysis sample for substance testing in accordance with the requirements of the supervision order. The respondent initially failed to provide a sample of urine for testing.

[21] The respondent was questioned by his supervising officer about his resistance to providing a sample and the respondent initially stated that he "had somewhere to be". When it was put to him that he did not have any approved leave pass, he eventually made admissions to having "smoked" what he believed to be methylamphetamine.

[22] The respondent was redirected to submit to substance testing and the respondent was presumptive positive to methylamphetamine and amphetamine consistent with his admissions.

[23] On 6 February 2020, a confirmatory report was received and detected amphetamine at a level of greater than 800 ug/L and methylamphetamine at a level of greater than 8000 ug/L.

[24] The applicant has brought an application under s 22 of the DPSO Act seeking rescission of the supervision order and that the respondent be detained in custody for an indefinite period for care, control or treatment, or alternatively that the supervision order be amended. The application requires a determination of a

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20 See *Attorney-General v McKellar* [2019] QSC 92 at [64].

21 Applicant's Outline of Submissions dated 16 April 2020 at [3].

contravention of the supervision order and then consequently, if that contravention is proven, then the court is to exercise its discretion to rescind or amend the supervision order as appropriate.

[25] Under s 22 of the DPSO Act, the onus is on the Attorney-General to satisfy the court on the balance of probabilities that the respondent has contravened the supervision order. If the court is so satisfied, then the onus shifts to the respondent to satisfy the court on the balance of probabilities that the adequate protection of the community can, despite the contravention, be ensured by the supervision order in its current form, or as amended. The consequence is that if the respondent does not discharge that onus, then the court must rescind the supervision order and make a continuing detention order. The applicant, in its submissions, acknowledges "that on the psychiatric evidence in these proceedings, the Court could be satisfied that the adequate protection of the community could be ensured by the respondent's return to the existing supervision order."[22]

[26] However, an issue arose on the material as to whether the psychiatric evidence supported an extension of the period of the supervision order to provide, as recognised by Dr Harden, a "period of prolonged stability prior to the removal of this supportive and risk decreasing structure".[23]

[27] A subsequent issue arose as to the suitability of a proposed residential address should the respondent be released on a supervision order, and whether any amendment to the proposed supervision order was appropriate in the circumstances.

The psychiatric evidence

[28] Dr Scott Harden prepared a report dated 31 March 2020 to provide a risk assessment in relation to the respondent following his alleged contravention of the supervision order.[24] Dr Harden, in summary, addressed the risk as follows:

> "The actuarial and structured professional judgement measures I administered would suggest his future risk of sexual reoffence is moderate to high without a supervision order. My assessment of this risk is based on the combined clinical and actuarial assessment. This assessment takes into account all information made available to myself.
>
> In my view, the strict supervision associated with a supervision order decrease his risk probably to the low range.
>
> The critical issues in this man in my opinion continue to be his previous chaotic antisocial lifestyle, potential for substance misuse, difficulties with interpersonal boundaries and pattern of rule breaking behaviour.

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22 Applicant's Outline of Submissions dated 16 April 2020 at [6].

23 Exhibit GM-5 of Affidavit of G Morgan sworn 16 April 2020.

24 Exhibit GM-5 of Affidavit of G Morgan sworn 16 April 2020.

> In my opinion the contravention associated with the relapse into substance abuse while in the context of emotional collapse as described it may have temporarily increased his risk of recidivism at the time it does not substantially alter his long-term risk of recidivism.
>
> He has improved substantially over time particularly in terms of the ability to sustain a prosocial lifestyle for a longer period. Unfortunately, this continues to break down at around about the 12 month period in the community. He is not yet ready for the removal of the protective structure of the supervision order in terms of risk.
>
> **Recommendations**
>
> I would recommend that he be required to be abstinent from alcohol and drug use and undergo an appropriate random testing regime if incarcerated or in the community.
>
> I would recommend that he continue with individual psychological therapy with his psychologist.
>
> If released his employment and independent living should be resumed as soon as possible.
>
> I would recommend that the supervision order be extended by a further two years in order to observe a period of more prolonged stability prior to the removal of this supportive and risk decreasing structure."

[29] Dr Andrew Aboud, psychiatrist, provided a summary of his recommendations by email dated 16 April 2020 as follows:[25]

> "As you know, Mr McKellar has been re-released to a supervision order on 18/12/18, but was returned to custody on 7/2/20 on a count of failing to provide a urine sample for testing and then providing a urine sample that tested positive to methamphetamine. He has been incarcerated in the Brisbane Correctional Centre since that time. I assessed him in the prison on 13/3/20. My full report will be forwarded to you on Monday 20/4/20. You have requested that I provide a summary of my recommendations prior to that (namely by midday today), and to specifically address:
>
> - *Whether you consider Mr McKellar can be released back into the community on a supervision order;*
> - *Your views of whether Mr McKellar can return to his private residence, which he still has; and*

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25 Exhibit GM-7 of Affidavit of G Morgan sworn 16 April 2020.

- *Whether Mr McKellar's supervision order should be extended, and if yes, for how long.*

It is my opinion that Mr McKellar's unmodified risk of sexual reoffending is currently above moderate, but that is modified risk, in the context of a supervision order, would be between moderate and low. I recommend that he could be released back to the community subject to an unamended supervision order. I believe that, upon his release, he could reasonably return to his private residence and to live with his partner who is expecting their first child. It is my understanding that his supervision order is due to expire on 24/11/20. It is my recommendation that the order be extended for a further 2 or 3 years."

[30] Dr Aboud provided his report in relation to the respondent dated 17 April 2020.[26] Dr Aboud evaluated the overall risk as follows:

"Taking into consideration the various instruments used to assess and predict violence and sexual violence risk, it is my view that Mr McKellar's unmodified risk of sexual offending could currently be regarded as above moderate. His risk of non sexual violence could also be above moderate, while his risk of general offending would be high. I take into account: his antisocial personality structure; his psychopathic traits; the extent of his general offending history; his vulnerability to alcohol and illicit drugs, which could act as disinhibiting agents; his poor adaptive coping and problem solving skills; his impulsivity; his previously demonstrated poor judgement and deception involved in his inability or lack or desire to properly manage the boundaries of his relationship with 'AB', which led to clear domestic violence on his part, and his underlying emotional and psychological vulnerabilities that allowed this to occur; the circumstances of his recent contravention behaviour, where he took crystal methamphetamine seemingly because of a negative affect state secondary to financial stress and the influence of substance using peers who he had chosen to socialise with; the circumstances of his previous contravention behaviour, where he took crystal methamphetamine due to the negative affect state secondary to losing his job (with the impact this had on his self-regard and confidence) and then tried to cover up his behaviour by not complying to urinalysis and even using other person's urine for a test; his ongoing vulnerability to maladaptive coping behaviour, in circumstances of psychosocial stress.

At the time of his recent contravention, he had become: less compliant with the directions of his supervising case manager; more

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26 Exhibit GM-8 of Affidavit of G Morgan sworn 16 April 2020.

> evasive in his movements; more entitled with respect to leave passes; more vulnerable to the influence of antisocial and substance using peers. The change in his attitude appears to have occurred relatively quickly and in the weeks prior to the contravention. Having been returned to prison, he has described remorse for his poor judgement, and has expressed his renewed motivation to succeed in the community, given that he is in a stable relationship and that his partner is now pregnant.
>
> It is in my view that, in the context of a supervision order, he could again be released to the community. He will require careful support, inclusive of: stable accommodation; ongoing psychologist attendance, to focus on adaptive coping and problem solving, and in particular his underlying core vulnerabilities (insecurity in relationships, including low self esteem, assertive communication, boundaries, prosocial friendships, respect for women, self respect, trust in relationships); monitoring of intimate relationships; abstinence from alcohol and substances. Special attention by his psychologist regarding motivational work associated with remaining abstinent from illicit drugs is indicated, and building up resilience to withstand setbacks. Special attention by his case manager is required regarding his association with criminogenic and substance using peers, and efforts must continue to be made to dissuade him from such associations, which clearly impact on his resolve to remain abstinent. It is hard to gauge whether he would be better contained and supported by residing, in the first instance, in the Precinct accommodation or in his private accommodation with his partner 'M', however, given the changed circumstances of her being pregnant and the current restrictions on general movement associated with the coronavirus pandemic, I would on balance support him returning to live with his partner in their private home.
>
> If released subject to a supervision order, I would consider his risk of sexual reoffending to be between moderate and low.
>
> Given his history of breaches while subject to this order, combined with his particular risk profile, it would seem appropriate that consideration be given to extending the order for a period of 2 or 3 years from the time of the hearing."

[31] Subsequently to the receipt of the two reports, Mr Daniel Bear, the acting manager of the High-Risk Offender Management Unit with Community Corrections, Queensland Corrective Services, provided an affidavit sworn on 24 April 2020 in relation to the application. Mr Bear deposes to a suitability assessment that was undertaken in relation to the proposed residential address (where the respondent had resided prior to the contravention). In his affidavit at [8], Mr Bear states that the accommodation suitability assessments are conducted:

> "… in accordance with appropriate risk management protocols. QCS recognises the need for a safe and successful transition for offenders, such as the respondent, into appropriate environments that avoid personally relevant high-risk situations, promote healthy relationships and manage potentially de-stabilising factors."

[32] In undertaking this assessment, Mr Bear states that the proposed property was assessed as not suitable.[27]

[33] At paragraph 10 of the affidavit, Mr Bear states:

> "QCS holds concerns regarding the high risk period after release for the respondent. The respondent and the co-resident of the assessed address have not cohabited nor been previously approved for overnight stays. The co-resident has disclosed to QCS that she is currently four months pregnant. There is a history of a turbulent relationship between the respondent and the co-resident."

[34] Further, in relation to the proposed accommodation for the respondent should he be released under a supervision order with any relevant amendments, Mr Bear, in his affidavit, states:

> "15. Further to the above noted concerns, QCS has been informed that there is a current Department of Child Safety notification under review. It would be remiss of QCS to support cohabitation or contact without restrictions, until this assessment is finalised and outcome provided.
>
> 16. In addition to the noted concerns with the co-resident, QCS has confirmed that a neighbour to the assessed property who the respondent notes in his interviews with the psychiatrists to have provided him the substance used in the contravention, is still listed by Queensland Police Services as residing there. QCS hold concerns to the respondent's ability to comply with the conditions of his supervision order in this environment at this time.
>
> 17. QCS will work with the respondent for a gradual transition to alternate accommodation once he has established a period of compliance post-release, demonstrates active engagement into intervention, develops pro-social activities and demonstrates engagement/compliance in his case management activities.
>
> 18. QCS will construct a graduated plan with the respondent regarding the possibility of cohabiting with the co-resident in

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[27] Affidavit of D Bear sworn 24 April 2020 at [9].

consultation with the treating psychologist and any other identified support. This will be reassessed on a regular basis.

19. Until the above noted concerns are addressed and compliance is demonstrated, the respondent will be housed at the QCS contingency accommodation at Wacol."

[35] The affidavit of Mr Bear also addresses ongoing psychological treatment. Mr Bear deposes that:

"26. The HROMU has made inquiries with Dr Michele Andrews to provide treatment and psychological intervention with the respondent, if he is release[d] back to his supervision order. She has advised that, if released, she will continue to provide treatment and psychological intervention with the respondent.

…

27. Treatment provided will be in consultation with QCS and in consideration of the psychiatric reports currently available to address the respondent's specific needs.

28. The frequency of treatment sessions will depend upon the respondent's needs and will be determined by the treating psychologist in consultation with QCS."

[36] In light of the proposed affidavit of Mr Bear, further views were sought from Dr Harden and Dr Aboud on the afternoon of Friday 24 April 2020.

[37] Dr Harden responded by email as follows:[28]

"This was very short notice as I had and have other things scheduled this afternoon but I have now quickly read the materials provided today and parts of my and Dr Aboud's reports. I am emailing now as I have other meetings after the teleconference.

I have not had time to review the case management meeting from 24 April 2019. I note that the accommodation suitability assessment completed yesterday was not attached to the new material that I could find. Details of the child safety notification were not provided.

I do not agree with the accommodation recommendations in the affidavit of Daniel Bear sworn today.

On balance, based on the material available, I would recommend he return to his previous community accommodation. That is not to

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28 EXH-3 tendered by the Applicant on 27 April 2020.

> say that he must co-habitate with his partner (although I understand that she currently resides there).
>
> He has managed to avoid amphetamine use on the previous 2 occasions for about 1 year. He has made very significant progress in the community and a return to the precinct accommodation in my opinion will be a significant slowing of potential progress.
>
> His ability to maintain himself drug and offence free must be tested in the real world if he is able to manage safely in the community without a supervision order in the future."

[38] Dr Aboud also responded by email as follows:[29]

> "I have been asked to further comment on the question of where Mr McKellar should initially reside, should he be released to a supervision order at the court hearing on Monday 27/04/20.
>
> As you are aware, it has been my 'on balance' view that he could return to live with his partner in their private home, as expressed on page 15 of my report (dated 17/04/20). However, I have been informed that this residence has been deemed unsuitable by QCS, in their assessment, and the reasons for this include: that he would be residing nearby to a man who had previously provided him with illicit drugs; there may be conditions associated with his in-person contact with his partner that might require further consideration by his case manager; that the Department of Child Safety has been notified, in respect of the need to potential safety assessment of his unborn child (to his current partner). Bearing these factors in mind, it is now my view that it would be more appropriate for Mr McKellar, if released, to initially reside at the contingency accommodation at the Wacol precinct, and to then undertake a timely process of identifying a suitable private residence, with the assistance and supervision of his case manager."

[39] Dr Harden was not required for cross examination at the hearing on Monday 27 April 2020.

[40] Dr Aboud was required for cross examination and gave evidence and was cross examined at the hearing on Monday 27 April 2020. At the hearing, Dr Aboud did not change from his view expressed in the email, taking into account the further evidence outlined in the affidavit of Mr Bear.

[41] The psychiatric evidence in these proceedings is clear and supports the contention that the respondent's risk of sexual recidivism can be managed by releasing him on a supervision order. Both Dr Harden and Dr Aboud make recommendations that the

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[29] EXH-4 tendered by the Applicant on 27 April 2020.

duration of the existing supervision order should be extended. Dr Harden recommends an extension for a period of two years, and Dr Aboud recommends an extension for a period of two to three years.

[42] A consideration needed to be given to a period of approximately 300 days which by application of ss 23 and 24 of the DPSO Act adds a further period to the end of the supervision order in operation until 24 November 2020. This in effect means that the supervision order would not expire until late 2021.

[43] Given this circumstance, the psychiatrists were asked to further clarify whether the recommendation for an extension would be calculated from November 2020 or from the end of the additional days (approximately 300) being October 2021.

[44] Dr Harden provided a further response by email dated 18 April 2020 as follows:[30]

> "I have reviewed my report.
>
> My opinion would be 2 years further on the supervision order from November 2020."

[45] Dr Aboud also provided a response by email dated 17 April 2020:[31]

> "My recommendation is that Mr McKellar's supervision order continue for 2 or 3 years from now, thus ending in 2022 or 2023. Thus, if his current order is to expire in November 2021, then extension of 1 year to November 2022 would suffice."

[46] The respondent's outline of submissions summarises the respondent's position as follows:

> "2. It is conceded by the respondent that it is open for the Court to find that a breach of clause 23 of the supervision order has been established. It is accepted that the onus is therefore on the respondent to demonstrate that the adequate protection of the community is able to be ensured by his release on a supervision order.
>
> 3. The respondent respectfully submits that the psychiatric evidence demonstrates that the risks of the community posed by the respondent's release are capable of being managed by his release on supervision. Neither psychiatrist supported any amendment of the existing supervision order, but both supported an extension of the order. The question of the appropriate length of that extension has been canvassed with both psychiatrists, who confirmed that in their opinion an extension of two years from the current expiry date of the

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30 Exhibit GM-10 of Affidavit of G Morgan sworn 16 April 2020.

31 Exhibit GM-9 of Affidavit of G Morgan sworn 16 April 2020.

order (incorporating the automatic extension of 318 days pursuant to sections 23 and 24 of the Act) would suffice.

4. The respondent respectfully submits that the psychiatric evidence supports a finding that he has discharged the onus under the Act. The respondent does not oppose an extension of the supervision order in the terms proposed by the applicant."

Issues for consideration

[47] If the court is satisfied that the evidence supports the finding that the respondent has contravened the requirements of the supervision order, in considering the appropriate order to be made the court is then to consider whether the respondent has demonstrated that the adequate protection of the community is able to be ensured by his release on the existing supervision order or suitable amendments. If he is unable to do this, the supervision order ought to be rescinded and a continuing detention order is to be made.

[48] In considering the question as to whether the respondent has demonstrated the community could be adequately protected by his release on supervision, two issues arose for consideration:

(a) Whether the supervision order should be extended for a period of two to three years; and

(b) Where the respondent is to live if released back on the supervision order.

[49] In relation to the proposed residential address, the respondent relied on an affidavit of Kerry Belinda Bichel affirmed on 27 April 2020.

[50] The real issue to be determined in respect of the proposed residential address is, if the respondent is to be released on a supervision order:

(a) Whether it is appropriate to leave the management of the respondent under any supervision order to Queensland Corrective Services as is envisaged under the legislative scheme; or alternatively

(b) Whether it is appropriate in the current circumstances that the existing supervision order be amended to provide that he is to reside at a specific residential address.

[51] In its supplementary outline of submissions, the applicant did not contend that the respondent should be subject to a continuing detention order. At paragraph 11 of those supplementary submissions, the applicant concludes:

"In this case, it is acknowledged that the evidence supports the finding that the respondent has contravened the requirements of a supervision order. The applicant also acknowledges that the evidence of the two psychiatrists supports the release of the respondent on the terms of the existing supervision order. That

evidence also recommends that the duration of the supervision order be extended by a period of two to three years."

[52] A draft supervision order was provided to the court stating as follows:

> "THE COURT being satisfied to the requisite standard that the respondent, Adam Cliffe McKellar, has contravened requirements of the supervision order made by Justice Mullins on 24 November 2014, and amended by Justice Brown on 12 June 2017 and Justice Davis on 18 December 2018, ORDERS THAT:
>
> 1. The respondent be released from custody and continue to be subject to the supervision order made by Justice Mullins on 24 November 2014 and amended by Justice Brown on 12 June 2017 and by Justice Davis on 18 December 2018, and extended by 318 days by virtue of sections 23 and 24 of the *Dangerous Prisoner (Sexual Offender) Act* 2003 with the following amendments:
>
> (a) amend order (1) by omitting the words '24 November 2020' currently in the order and inserting the following underlined words to read:
>
> (1) The respondent be subject to the following conditions until 24 November 2022."

[53] An alternative order was also provided at the hearing with an additional subparagraph (b) which reads as follows:

> "'amend order 9 by inserting the words 'reside at the address known to the court and otherwise' at the commencement of order 9."

[54] It was proposed that this additional wording would allow the respondent to reside at his former residential address if the court concluded that was appropriate.

Determination

[55] It is necessary for me to determine the following issues:

(a) Whether the Attorney-General has satisfied the court on the balance of probabilities that the respondent has contravened the supervision order.

(b) Whether the respondent has satisfied the court on the balance of probabilities that the adequate protection of the community can, despite the contravention, be ensured by the supervision order in its current form or as amended.

(c) If the answer to (a) and (b) above are in the affirmative, then consideration needs to be given as to whether the current supervision order should be amended to extend the period of the supervision order and further, whether it is appropriate to make provision for a particular place of residence.

[56] On the evidence before the court, I am satisfied that on the balance of probabilities the respondent has contravened the supervision order.

[57] Further, on the evidence before the court, and upon a consideration of the psychiatric evidence presented to the court, I am satisfied on the balance of probabilities that the adequate protection of the community can, despite the contravention, be ensured by a supervision order.

[58] As part of that consideration of the appropriate terms of the supervision order under s 13A, I am to give consideration to the length of the supervision order. Davis J in *Attorney-General for the State of Queensland v KAH* [2019] QSC 36 considered s 13A of the DPSO Act and the relevant considerations when faced by various opinions by psychiatrists in respect of the length of the supervision order. At [56], his Honour stated:

> "The correct legal consideration is 'when will the respondent reach a point at which he/she is an acceptable risk without a supervision order?' Assessment of the risk as 'acceptable' or otherwise is a matter for the Court not the psychiatrists, but the psychiatrists can, and do, express risk in terms of degree; high, moderate or low. The psychiatrists should be requested to report (if they can) on their predictions as to when the risk will reduce to low, for instance. That evidence will then be directly relevant to the determination under s 13A."

[59] It appears that the psychiatric evidence in the current matter in relation to the period involves the consideration of reinstating a "period of prolonged stability prior to the removal of this supportive and risk decreasing structure".[32] I infer from these statements that the detention of the respondent and the period of time he has spent in custody has disrupted the respondent's progress and the disruption that could (at least in part) destabilise his rehabilitation. I also note the view that when considering previous contraventions, there is a pattern where the respondent remains compliant with the terms of the supervision order for a period of time and then a contravention occurs.

[60] On balance, I am satisfied that it would be appropriate to extend the term of the supervision order so that the requirements of s 13A of the DPSO Act are met.

[61] In doing so, it is necessary to consider the impact of the additional 318 days that the respondent has served. The affidavit of Patricia Dennis sworn on 23 April 2020 addresses the calculation of the 318 days. For the purposes of the operation of s 23 and s 24 of the DPSO Act, the Risk Offender Management Unit within Community Corrections, Queensland Corrective Services, has undertaken a calculation of the relevant extension as a result of the respondent spending time in custody for offences not of a sexual nature. At paragraph 8 of her affidavit, Ms Dennis identifies that the respondent has served a total period of 318 days. The affidavit of

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[32] Report of Dr Scott Harden dated 31 March 2020 (Exhibit GM-5 of Affidavit of G Morgan sworn 16 April 2020).

Ms Dennis exhibits a table outlining a calculation at PD-1, being a table which contains the calculation of the additional 318 days. The supervision order as amended by Davis J on 18 December 2018 which expired on 24 November 2020, would be extended to expire on 8 October 2021 by taking into account the additional 318 days.

[62] The decision of Davis J in relation to this respondent on 9 April 2019 considers the additional approximately 300 days spent in custody during the period of the supervision order and the operation of s 23 and s 24 of the DPSO Act. His Honour in that case did not make any declaration in relation to those days served but took that into account in fashioning the extension of the supervision order until 24 November 2020.[33]

[63] Subsequent to that decision, in *Attorney-General for the State of Queensland v Ruhland* [2020] QSC 33, Davis J stated at [19]:

> "Given the powers vested in corrective services officers to control and manage the respondent under the supervision order, and given the consequences for the respondent of a breach of the supervision order, it is in my view in the interests of both parties that the effect of the operation of s 23 and s 24 of DPSOA upon the supervision order be the subject of declaration."

[64] In that matter, his Honour proceeded to declare the additional period by operation of s 23 and s 24 upon the supervision order and the date that the supervision order had been extended to.

[65] In the current matter, I consider it is preferable to specifically declare the 318 days under s 24(2) of the DPSO Act to avoid any potential uncertainty in the future. Further, it is also desirable to identify the date that the supervision order is extended to, taking into account the declared period and any additional operational period for the supervision order to ensure that the objectives of s 13A are met.

[66] In these circumstances, I proposed to the parties on the afternoon of 27 April 2020 an alternative form of order based on this approach. No further submissions were made by the parties.

[67] In respect of the issue concerning the appropriate residential address for the respondent, it is appropriate to leave that to Queensland Corrective Services to determine in accordance with their overall responsibility to manage the respondent under the supervision order. This is consistent with the legislative scheme.

[68] Accordingly, I make the following orders:

THE COURT being satisfied to the requisite standard that the respondent, Adam Cliffe McKellar, has contravened requirements of the supervision order made by

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[33] See *Attorney-General v McKellar* [2019] QSC 92 at [62].

Justice Mullins on 24 November 2014, and amended by Justice Brown on 12 June 2017 and Justice Davis on 18 December 2018–

DECLARES THAT:

1. The period of the respondent's supervision order made on 24 November 2014 and amended by Justice Brown on 12 June 2017 and by Justice Davis on 18 December 2018, by operation of s 24(2) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, is extended by 318 days to expire on 8 October 2021.

ORDERS THAT:

2. The supervision order is amended by omitting in order (i) the words "24 November 2020" and inserting the following underlined words to read:

   "(i) The respondent be subject to the following conditions until <u>24 November 2022</u>".

3. The respondent be released from custody and continue to be subject to the supervision order made by Justice Mullins on 24 November 2014 and amended by Justice Brown on 12 June 2017, by Justice Davis on 18 December 2018 and this order.