SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Kynuna* [2020] QSC 205
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **DIRK GREGORY KYNUNA** (respondent)
FILE NO:	BS No 3832 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	Orders made on 15 June 2020 and 15 July 2020, reasons delivered on 15 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2020
JUDGE:	Davis J
ORDERS:	**Orders made on 15 June 2020:** **1. The application filed 24 April 2020 is dismissed.** **2. Pursuant to s 19D(2) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the respondent is released from custody subject to the requirements of the supervision order made by PD McMurdo J on 6 April 2011 and subsequently amended.** **Orders made on 15 July 2020:** **1. The respondent be subject to a further supervision order until 19 June 2022 on the requirements of the supervision order made by PD McMurdo J on 6 April 2011 and subsequently amended.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent has been subject to a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA) since 6 April 2011 – where the supervision order was due to expire on 19 June 2020 – where the

applicant seeks orders under s 22 and Division 4 of the DPSOA to extend the period of the supervision order for a further five years – where the respondent has contravened the supervision order on various occasions, primarily by consuming illicit substances – where the respondent admits the most recent breaches of the supervision order but submits that the supervision order ought not be extended – where the opinions of the psychiatrists is that the respondent's risk of committing a sexual offence if not subject to a supervision order is moderate – where the psychiatrists' evidence is that the risk may reduce if the respondent demonstrates a period of abstinence from alcohol and illicit substances – whether the period of the supervision order ought to be extended

Dangerous Prisoners (Sexual Offenders) Act 2003, s 5, s 13, s 13A, s 16, s 19B, s 19C, s 19D, s 19E, s 19F, s 20, s 21, s 22, Schedule 1

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27, applied
Attorney-General v DBJ [2017] QSC 302, followed
Attorney-General for the State of Queensland v DGK [2011] QSC 73, cited
Attorney-General for the State of Queensland v DXP [2019] QSC 77, cited
Attorney-General for the State of Queensland v Fardon [2019] QSC 2, followed
Attorney-General (Qld) v Foy [2014] QSC 304, cited
Attorney-General for the State of Queensland v KAH [2019] 3 Qd R 329, followed
Attorney-General for the State of Queensland v Kynuna [2013] QSC 119, cited
Attorney-General for the State of Queensland v Kynuna [2018] QSC 90
Attorney-General for the State of Queensland v Kynuna [2020] QSC 68
Attorney-General for the State of Queensland v Loudon [2019] QSC 74, cited
Attorney-General for the State of Queensland v McKellar [2020] QSC 98, cited
Attorney-General v Phineasa [2013] 1 Qd R 305, cited
Attorney-General (Qld) v Sands [2016] QSC 225, cited
Attorney-General v Van Dessel [2007] 2 Qd R 1, cited
Attorney-General v Van Dessel [2006] QSC 16, cited
Bickle v Attorney-General [2016] 2 Qd R 523, cited
Briginshaw v Briginshaw (1938) 60 CLR 336, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575, cited
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503, applied
Neat Holdings v Karajan Holdings (1992) 110 ALR 449, cited

SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, applied

COUNSEL: J Rolls for the applicant
J Crawford for the respondent

SOLICITORS: GR Cooper, Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

[1] Since 2011, the respondent has been the subject of a supervision order made under provisions of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the DPSOA). The supervision order was made by P D McMurdo J (as his Honour then was) on 6 April 2011.[1] The supervision order was later extended due to contraventions and was due to expire on 19 June 2020.

[2] Two applications were made against the respondent: one for orders under s 22 of the DPSOA consequent upon a breach of the supervision order, and one under Division 4A of Part 2 of the DPSOA for a further supervision order.

[3] On 15 June 2020, I made the following orders:

> "1. The application filed 24 April 2020 is dismissed.
>
> 2. Pursuant to section 19D(2) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the respondent is released from custody subject to the requirements of the supervision order made by PD McMurdo J on 6 April 2011 and subsequently amended."

[4] The application filed 24 April 2020 is the application seeking orders under s 22 of the DPSOA pursuant to the contravention. I now make orders for a further supervision order under Division 4A of Part 2 in terms which I explain below. These are my reasons for dismissing the application filed on 24 April 2020 and for making the further supervision order under Division 4A.

History

[5] The respondent is an Indigenous man born on 15 November 1981. He is presently 38 years of age.

[6] The respondent has an extensive criminal history[2] including convictions in March 2000 and October 2002 for offences of indecent assault and rape. In an earlier judgment,[3] I described the sexual offending in these terms:

> "[4] In March 2000, the respondent was convicted of two counts of indecent assault. There were two separate victims and two separate incidents, but each involved the respondent breaking into the victim's bedroom and attempting to remove her clothing. The respondent was placed on an intensive

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1 *Attorney-General for the State of Queensland v DGK* [2011] QSC 73.
2 Analysed in *Attorney-General for the State of Queensland v DGK* [2011] QSC 73 at [3]-[12].
3 *Attorney-General for the State of Queensland v Kynuna* [2020] QSC 68.

corrections order with which he did not comply. This resulted in a sentence of nine months' imprisonment in addition to three months of pre-sentence custody.

[5] In October 2002, a sentence of eight years' imprisonment was imposed on the respondent on a count of rape. That involved a violent attack upon a woman walking home in the early hours. Concurrent sentences were also imposed for sexual offences committed by the respondent against two other complainants."

[7] The offence of rape was a "serious sexual offence".[4] The supervision order made on 6 April 2011 was for a duration of five years. However, the respondent contravened the supervision order and was returned to custody on various occasions.[5]

[8] Upon some of the contraventions, orders were made under s 22(7) of the DPSOA extending the supervision order. As already observed, the order was to expire on 19 June 2020.

[9] The application for a further supervision order under Division 4A of Part 2 of the DPSOA was filed on 10 March 2020. The preliminary hearing was heard by me on 25 March 2020 and determined on 9 April 2020 when the application was set for final hearing on 15 June 2020.[6]

[10] The respondent was arrested upon suspicion of contravention of the supervision order[7] and appeared before this court on 24 April 2020. He was ordered to be detained until final determination of the contravention.[8]

[11] The jurisdiction of the court to make orders consequent upon a contravention is enlivened once the respondent is brought before the court pursuant to a warrant issued for his arrest.[9] However, it is the practice of the applicant to file an application seeking orders under s 22 of the DPSOA. That procedure was approved by Burns J in *Attorney-General (Qld) v Sands*.[10]

[12] Here, an application was filed on 24 April 2020. The contraventions alleged in the application are:

"SUPERVISION ORDER REQUIREMENTS

ALLEGED TO HAVE BEEN CONTRAVENED

xviii abstain from the consumption of illicit drugs

FACTUAL BASIS OF CONTRAVENTION

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4 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 5; definition in the Dictionary (Schedule 1); and *Attorney-General v Phineasa* [2013] 1 Qd R 305 at 314, [38].

5 See the summary of the contraventions by Lyons SJA in *Attorney-General for the State of Queensland v Kynuna* [2018] QSC 90. There was a further contravention in 2019.

6 *Attorney-General for the State of Queensland v Kynuna* [2020] QSC 68.

7 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 20.

8 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 21(2).

9 *Dangerous Prisoners (Sexual Offenders) Act* 2003, ss 20 and 22.

10 [2016] QSC 225 at [4].

> On 6 April 2011, the respondent was released from custody subject to a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 made by P McMurdo J. This order was amended by North J on 10 December 2015 and Lyons SJA on 1 May 2018.
>
> On 16 March 2020 and 8 April 2020, the respondent provided samples of urine for analysis as directed by a Corrective Services officer. The respondent's urine samples showed a positive result for drugs, and were sent for confirmatory testing. The respondent stated that he had smoked cannabis on 15 March 2020 and 7 April 2020. Confirmatory testing of the respondent's urine samples collected on 16 March 2020 and 8 April 2020 detected the presence of cannabis, (56ug/L) and (29ug/L) respectively. These levels are above the cut off (15ug/L) for cannabis.
>
> The respondent was encouraged to continue to engage with his drug and alcohol treatment providers to address and cease his illicit drug use.
>
> Since his release from custody in May 2019, the respondent has shown a pattern of increasing resistance to drug treatment or intervention and repeated non-compliance with requirements of supervision.
>
> The respondent has been afforded multiple opportunities to comply with supervision and gain benefits to address his substance abuse concerns and general offending behaviour. The respondent is unable to be safely managed in the community while an escalation in drug use and non-compliance is evident."

[13] The contraventions are admitted by the respondent.

[14] As already observed, since the supervision order was made in 2011, the respondent has contravened the order on various occasions. One of the contraventions consisted of the respondent losing his temper and wilfully damaging property of Queensland Corrective Services.[11] All other contraventions, like the current contravention, have been constituted by the consumption of illicit substances. No sexual offence, let alone a serious sexual offence,[12] has been committed by the respondent while on supervision.

Statutory context

[15] Section 5 of the DPSOA authorises the applicant to apply for orders against a prisoner who is serving a period of imprisonment "for a serious sexual offence". That term is defined, relevantly here, as "an offence of a sexual nature … (a) involving violence".

[16] Under s 8 there must be a preliminary hearing to determine whether there are reasonable grounds for believing a prisoner is a serious danger to the community in the absence of an order under the DPSOA. If such a determination is made the

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11 *Attorney-General for the State of Queensland v Kynuna* [2013] QSC 119.

12 As defined in the *Dangerous Prisoners (Sexual Offenders) Act* 2003, relevantly here "an offence of a sexual nature … involving violence".

court is empowered to order that a prisoner undergo psychiatric examination by two psychiatrists.

[17] Although the term "serious danger to the community" appears in s 8, it is s 13(2) which defines that term. Section 13 is a pivotal section in the Act and is 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)."

[18] Under s 13, once there is a finding that the respondent "is a serious danger to the community in the absence of [an order under the Act]", then the effect of s 13(5) is that a continuing detention order will be made unless the adequate protection of the community can be ensured by a supervision order, although there is a residual discretion to make no order.[13]

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13 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 596-598, [34].

[19] If the court makes a supervision order, s 16 comes into play. Section 16 provides:

> "**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—
>
> 1A proposed direction to the prisoner would be directly inconsistent if it requires the released prisoner to live at least 2km from any school.
>
> 2A 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.
>
> 3A 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."

[20] It is necessary to fix the duration of the supervision order under s 13A which provides:

"**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 can not end before 5 years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later."

[21] Division 4A is headed "Extending supervised release". The division provides, not for the extension of an existing supervision order, but for the making of a new supervision order. Division 3 provisions are effectively re-enlivened so that any further supervision order is made consistently with the principles applicable to Division 3.

[22] Sections 19B to 19F are as follows:

"**19B Attorney-General may apply for further supervision order**

(1) This section applies to a released prisoner subject to a supervision order (the ***current order***).

(2) The Attorney-General may apply for a further supervision order for the released prisoner.

(3) The application may be made only within the last 6 months of effect of the current order.

(4) Despite subsection (2), the Attorney-General can not make the application if a further supervision order has been made for the released prisoner.

(5) However, subsection (4) does not prevent the making of the application if—

(a) under section 13(5)(b) or 30(3)(b), a new supervision order is made for the released prisoner; and

(b) no further supervision order has already been made for the new supervision order.

19C Requirements for application

The application must—

(a) state the period of supervised release sought; and

(b) be accompanied by any affidavits to be relied on in support of the application.

19D Application of provisions for division 3 orders

(1) Division 1 (other than section 5(1) and (2)), division 2, section 13, section 15 and divisions 3B and 3C apply for the application and the operation of any further supervision order for the released prisoner—

(a) as if a reference in the provisions to a division 3 order were a reference to a further supervision order; and

(b) as if a reference in the provisions to an application for a division 3 order were a reference to an application under this division; and

(c) as if a reference in the provisions to the prisoner were a reference to the released prisoner; and

(d) as if a reference in the provisions to a prisoner's release day were a reference to the day that the current order expires; and

(e) as if the reference in section 5(5) to 2 business days were a reference to 7 business days; and

(f) as if the psychiatrist's assessment under section 11(2)(a) were an assessment of the level of risk that the released prisoner will, after the expiry of the current order, commit another serious sexual

offence if a further supervision order is not made; and

(g) as if the references in section 13(5) to the making of an order were only a reference to the making of a further supervision order for the released prisoner; and

(h) as if the reference in section 16 to the ordering of release from custody were a reference to the making of a further supervision order; and

(i) with other necessary changes.

(2) If the court is satisfied the application may not be finally decided until after the current order expires, it may make an interim supervision order for the released prisoner.

(3) The power under subsection (2) applies for the application instead of the power to make the orders mentioned in section 8(2)(b) or 9A(2) as applied under subsection (1).

19E Fixing of period of further supervision order

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

19F Effect of further supervision order

If a further supervision order is made for the released prisoner, it has effect in accordance with its terms for the period stated in the order."

[23] Division 4A picks up sections 5 and 8 from Division 3, so a preliminary hearing must be conducted to determine whether there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order made under Division 4A. I so determined on 9 April 2020.[14]

[24] The relevant principles applicable on the final hearing of a Division 4 application were considered by Bowskill J in two cases: *Attorney-General v DBJ*[15] and *Attorney-General for the State of Queensland v Fardon*.[16] The principles are not controversial and it is unnecessary to engage in an examination of those two decisions.

[25] Where a contravention or likely contravention of a supervision order is alleged, a respondent may be arrested under warrant pursuant to s 20 of the DPSOA. That provides, relevantly:

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

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14 *Attorney-General for the State of Queensland v Kynuna* [2020] QSC 68.
15 [2017] QSC 302 at [6]-[16].
16 [2019] QSC 2.

(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. …"

[26] Section 21 of the DPSOA concerns the custody of a respondent pending determination of the contravention proceedings under s 22. Section 22 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)."

The position of the respective parties

[27] The applicant does not seek, under s 22, the rescission of the supervision order and the imposition of a continuing detention order. The applicant seeks an extension of the supervision order for a period of five years so that the respondent remains under supervision until 19 June 2025.

[28] Two bases were identified for the extension of the order. Firstly, s 22(7) provides that the court may, upon proof of contravention, release a respondent back on the supervision order with necessary amendments. It is settled that the court may, under s 22(7), amend the order by extending its term.[17]

[29] Alternatively, the applicant seeks a further supervision order under Division 4A operative for five years until 19 June 2025.

[30] Questions arise as to the relationship between the discretion arising under s 22(7) and the discretion under Division 4A and I consider that later.

[31] The respondent submits that no order should be made.

[32] Ms Crawford of counsel, who appeared for the respondent, rightly submits that the question is whether the respondent's further supervision is required to "ensure adequate protection of the community". She also rightly submits that the relevant risk, against which "adequate protection" must be considered, is not risk of general, or even sexual offending, but risk of the commission of a "serious sexual offence", namely an offence of a sexual nature involving violence.

[33] Ms Crawford submits, again correctly with respect, that no serious sexual offence has been committed by the respondent since the rape in 2000 for which he was convicted and sentenced in 2002. She submits that against a background of no sexual offending for 20 years, the evidence is such that no supervision order is required to protect the public from the relevant risk.

The relationship between s 22 and Division 4A

[34] Both the scope of the discretionary powers under the DPSOA and the considerations relevant to the exercise of the powers are determined upon the construction of the DPSOA by reference to grammar, context and purpose.[18]

[35] A central purpose of the DPSOA is the adequate protection of the public against the statutorily identified risk; of commission by a respondent of a "serious sexual offence", relevantly here an offence of a sexual nature involving violence. Protection of the public is achieved by the imposition of orders under the DPSOA being a continuing detention order or a supervision order. Where a supervision

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17 *Attorney-General v Van Dessel* [2007] 2 Qd R 1 at 9, [31]; *Attorney-General (Qld) v Foy* [2014] QSC 304 at [14]; *Bickle v Attorney-General* [2016] 2 Qd R 523 at 538-539, [21]-[24] and *Attorney-General for the State of Queensland v KAH* [2019] 3 Qd R 329 at 347, [61].

18 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-47, [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368, [14], 374-375, [35]-[40].

order is imposed, the period of supervision must equate to the period of risk. In *Attorney-General for the State of Queensland v KAH*,[19] I said this:

> "[68] It follows then that setting a period of supervision under s 13A must involve an assessment now of the prisoner's current state but predicting when he will be an acceptable risk in the community without a supervision order."[20]

[36] As already observed, Division 4A picks up and applies the provisions of Division 3. However, it does not pick up s 13A. The power to fix the duration of the further supervision order is found in s 19F. Importantly, s 19F, unlike s 13A, does not mandate a minimum period of supervision of five years. However, whether the court is fixing the term of the Division 3 supervision order pursuant to s 13A, or fixing the term of a Division 4A supervision order under s 19F, the considerations are the same, namely the assessment of when the risk of the respondent being in the community without a supervision order becomes acceptable.

[37] As explained by Bowskill J in *Attorney-General v DBJ*[21] and *Attorney-General for the State of Queensland v Fardon*,[22] the onus is upon the applicant under Division 4A to prove that the respondent is a serious danger to the community in the absence of a further supervision order, and that finding must be made on "acceptable cogent evidence" and "to a high degree of probability".[23]

[38] Upon proof by the applicant of a breach of a supervision order, the onus falls upon the respondent to demonstrate that the "adequate protection of the community can … be ensured by a supervision order", which should be on the same or amended terms.

[39] The power to amend the supervision order is an important one, as is the power to extend its duration. A respondent may be unable to discharge the onus of proving that adequate protection of the community can be ensured by release on the supervision order in its current terms. However, he may be able to establish that the adequate protection of the community is ensured by him being released on terms different to that in the supervision order. It may be that the breach shows that a respondent will still be an unacceptable risk at the expiry of the term of the supervision order but evidence may show that he will not pose such a risk if the order is extended.

[40] Here, the question arises as to who bears the onus. Must the applicant prove that the respondent is a serious danger to the community in the absence of a further supervision order to achieve an extension under Division 4A, or must the respondent discharge the onus under s 22(7)?

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19 [2019] 3 Qd R 329.

20 Followed in *Attorney-General for the State of Queensland v DXP* [2019] QSC 77 at [4], *Attorney-General for the State of Queensland v Loudon* [2019] QSC 74 at [65] and *Attorney-General for the State of Queensland v McKellar* [2020] QSC 98 at [9].

21 [2017] QSC 309.

22 [2019] QSC 2.

23 Which is a statutory version of the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336; see also *Neat Holdings v Karajan Holdings* (1992) 110 ALR 449 and *Attorney-General v Van Dessel* [2006] QSC 16 at [17].

[41] Section 22(7) assumes that the supervision order is in force at the time of the release back into the community. What is envisaged is release onto "the existing order" or the existing order as amended.

[42] While the respondent has breached the order, the only relief sought by the applicant is an extension of the term of the supervision order. The central question then, under both s 22(7) and Division 4A, is whether the respondent should remain under supervision beyond the term of the order. It is not suggested by the respondent that the breach of the supervision order cannot be taken into account in assessment of the application under Division 4A.

[43] The language of s 22 is mandatory. Once a breach of the supervision order is found, "the court must"[24] rescind the supervision order and make a continuing detention order unless the respondent satisfies the onus under s 22(7). If the onus is satisfied, then the only avenue available is the release of the respondent back onto the supervision order, whether amended or otherwise.

[44] Therefore, to avoid a continuing detention order, a respondent must discharge the onus under s 22(7).

[45] Here, the position becomes somewhat artificial. The supervision order had taken its course. No serious sexual offences have been committed and it was to expire four days after the hearing before me. As previously observed, the critical issue was whether the supervision order ought to be extended and Division 4A contains specific provisions governing the making of a further supervision order.

[46] In the course of argument, I indicated to Mr Rolls of Counsel, who appeared for the applicant, that I thought that the application which should be pressed by the applicant was the one made under Division 4A, not the application under s 22. He accepted that as a reasonable course and I dismissed the application under s 22(7).

Psychiatric evidence

[47] For the purpose of the preliminary hearing, psychiatrist Dr Harden prepared a report. He had previously examined and prepared reports on the respondent for the purposes of proceedings under the DPSOA. On 9 April 2020, I ordered that the respondent be examined by psychiatrists, Dr Beech and Dr McVie.[25] Both prepared reports. All three doctors gave evidence before me.

[48] Doctor Harden diagnosed the respondent as suffering from an anti-social personality disorder with alcohol abuse and probable dependence, currently in remission. He also noted the respondent's history of polysubstance abuse. Dr Harden opined:

> "At the time of this report Dirk KYNUNA was a 37 year old man who had previously sexually offended against five different women on separate occasions. Two of the offences consisted of his breaking into the house of the young woman or adolescent and then sexually assaulting them while they slept. Two other offences were committed against young adolescent females [redacted] to whom he had access while they were sleeping. These four offences resulted in

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24 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 22(2).

25 *Attorney-General for the State of Queensland v Kynuna* [2020] QSC 68.

him leaving when he was challenged. Three of the offences were against young adolescent (but postpubertal) girls and the fourth against a 19-year-old woman,

The circumstances of his juvenile charge of aggravated assault against a female were unknown and he was unable to throw further light on these but one would suggest that it is quite likely that there was a sexual element to these charges.

His other sexual offence conviction was quite different and was only discovered because of DNA matching. This offence involved abducting a female stranger off the street in the centre of a city and using physical force to restrain her and rape her. This offence occurred in between the other two sets of offences.

He has ascribed his inability to describe the sexual content of his offences to alcohol induced blackouts. It is of interest that he has described to other informants recollection of the rape committed against the stranger and had alleged to those informants that the sexual activity was consensual. The sexual offences against the young adolescents do not constitute paedophilia because the victims are post-pubertal, however there was some suggestion that they might well represent some kind of sexual preference for the 13 to 14-year-old female age range and at the time of the offending he was close enough in age to the younger victims for this not to necessarily represent paraphilic behaviour. The passage of time has not provided any further evidence to suggest that he has a preoccupation with prepubertal females.

He had a significant history of other criminal offences across a range of modalities including recurrent serious assaults, numerous break and enters, recurrent destruction of property and numerous breaches of community-based orders. His early environment was characterised by a high level of physical abuse followed by later sexual abuse at the hands of family members. His history was also marked by severe personal, educational, and employment instability.

He has some social supports predominantly in the form of his family members on his mother's side. He identifies strongly with the indigenous culture and also professes and seems to practice a significant Christian faith although he does not seek out support from a church in the community. He improved his education and training· while incarcerated and has demonstrated some early degree of maturation of some of his antisocial characteristics.

He has successfully completed the preparatory and indigenous sexual offending programs previously albeit with some ongoing areas requiring therapeutic attention. Since being in the community he has engaged reasonably with psychologists for individual therapy although it has taken some time to build rapport. He has successfully completed the maintenance program in the community.

> He successfully completed a high intensity substance abuse program.
>
> There have been ongoing difficulties with his supervision in the community and these have almost always related to his difficulty in managing negative emotions so that when he becomes frustrated or angry he has poor problem-solving and acts in ways that are contrary to his best interests. At this time he also often becomes angry or agitated with his supervising staff and utilises illicit substances.
>
> On a couple of occasions now he has progressed to living independently in the community and on the report of his treating psychologist at the time and himself appeared to have coped better with a range of negative life events compared to his previous reactions. This represented a degree of significant and measurable progress. With regard to these more recent problems on supervision the death of his father in 2018 does seem to be a very significant element. This has resulted, in my opinion, in him returning to a pattern of misusing substances in order to cope with negative emotions.
>
> His sexual offending in the past has been strongly associated with alcohol intoxication. He has largely been able to remain abstinent from alcohol in the community on supervision apart from one significant contravention. In 2014 he consumed a significant amount of alcohol in the alleged contravention. This significant alcohol intoxication was then associated with irritable and inappropriate behaviour towards supervising staff. This was the most concerning of his many infractions of the supervision order given his previous sexual and nonsexual offending behaviour has strongly been linked to alcohol intoxication.
>
> He has undertaken ongoing treatment of various kinds for substance use as well as ongoing individual psychological therapy. While he has made some gains from this when he is highly emotionally distressed he does not appear to be able to apply these principles consistently and continues to breach his order by using substances and being detected."

[49] As to risk, Dr Harden said:

> "Overall taking all factors into account his future risk of sexual reoffence (in the absence of a supervision order) is now overall still most likely in the moderate (about average) range given some reduction in risk for his period of time in the community.
>
> The supervision order further reduces his risk to low to moderate in my opinion.
>
> If he were not on the supervision order the risk of sexual offence would be in the moderate range. This will also be the case at the expiry of the current supervision order on 19 June 2020."

[50] As to recommendations, Dr Harden reported:

> "He is making progress albeit extremely slowly. In my opinion a further supervision order should be imposed for a period of five years in the same terms.
>
> Attempts to reduce risk further should focus on abstinence from substance use, community integration, training and employment.
>
> I would recommend that he continue to be required to be abstinent from alcohol and drug use.
>
> I recommend he continue to have individual therapy with his treating psychologist Mr Smith." (emphasis added)

[51] After preparing his report, Dr Harden received further materials and prepared a further report. His conclusions reached in that report were:

> "Overall the new material does not alter my opinions from my report of 2019. Please refer to that report for a detailed formulation. My view on risk is unchanged from that report.
>
> Overall his future risk of sexual reoffence (in the absence of a supervision order) is most likely in the moderate (about average) range given some reduction risk for his period of time in the community. The supervision order further reduces his risk to low to moderate.
>
> If he were to commit a future sexual offence it is most likely to be an opportunistic sexual offence against an adult or late adolescence female and to be associated with alcohol intoxication.
>
> The use of threats or violence to accomplish the offence is possible. Physical harm to the victim is possible, psychological harm is likely.
>
> If he were not on the supervision order the risk of sexual offence would be in the moderate range. This will continue to be the case at the expiry of the current supervision order on 19 June 2020.
>
> I continue to recommend a further 5 year supervision order given his high level of non-compliant and antisocial behaviour.
>
> I am concerned that in the absence of a supervision order he is more likely to resume chronic high level substance misuse and increase the risk of sexual recidivism.
>
> My recommendations remain unchanged from my most recent comprehensive report." (emphasis added)

[52] Doctor Beech, in his report, expressed his opinion as follows:

> "Dirk Kynuna is a 38 year old single indigenous man who was released in 2011 on a DPSOA supervision order. He has been returned to custody for his eighth contravention; as with most of the others, it has involved the use of cannabis.

Essentially, since 2002, he has remained in custody or on supervised release, and for nearly every year in the community since 2011, he has been returned to custody.

He was 14 years old when he punched a six year old girl and dragged her into an abandoned house. At the age of 17 years, in the course of multiple break and enter offences, in two separate incidents, he entered the bedrooms of female strangers and began to remove their clothing. He left when they awoke. One victim was 14 years old and the other 19 years old. At the age of 18, he attacked a woman in the early hours of the morning who was returning from work. He dragged her off and raped her. At the age of 20 years, on two separate occasions, he indecently touched two young female relatives, again desisting when they protested. This offending occurred in his youth, at a time when he was heavily using substances particularly alcohol, and probably while he was intoxicated. At the time, there were indications of turmoil related to his childhood and upbringing. By then, he had accrued a significant criminal history with several convictions for assault.

During an intensive sexual offending program, several issues were noted, including his ambivalent motivation and entitlement. Risk factors for further offending were deemed to include victim access, sexual preoccupation, substance use, emotional collapse or loss of supports, and the rejection of supervision. He had expressed negative attitudes towards women and his insight was limited. Facilitators noted problems with emotional regulation and recommended treatment to address issues around self-worth and self-efficacy.

In the community, under supervision, he has presented a challenge to those who have to supervise him. I think significant themes come through. Firstly, Mr Kynuna has continued to lapse into substance use or the mis-use of prescribed medications to deal with emotional problems. He particularly cites multiple losses of family members, problems dealing with the restrictions of supervision, his distance from family members, and idleness and boredom. While he blames the supervision order for his limited pursuit of activities, I think the reality is he has very limited ability himself to undertake pro-social activities and he does struggle with boredom. The second thing is the difficulty generally he has managing himself in the community - problems with finances and budgeting, gambling, forgetting his medication, and the need to rely upon support agencies. Another theme is recurring complaints from others about his emotional regulation, threatening and intimidatory behaviour, and the coercion of others for things such as money and food. I think he is a difficult person to engage with and to live with. Finally, there is simply the difficulty of managing him with supervision when he arcs up at the restrictions, continues to breach conditions, and has multiple infractions for things such as curfew and movement monitoring.

However, themes that do not come through have been the use of sex to deal with emotional problems and stress, sexual preoccupation, seeking out female sexual partners, or evidence of attitudes that condone violence specifically towards women. There are no continuing indications that he has heightened sexual urges let alone paraphilic ones. Of all the breaches during his time on release, only one appears to relate specifically to alcohol. I think there are times where he has been near to emotional collapse and there are certainly elements of supervision rejection, but as he would point out, he has not absconded and, the charge of assault aside, he has not committed any dangerous acts, and he has not re-offended sexually. He believes that he is a changed man, and I think the reports from Nick Smith support this to some extent. It is difficult to get an indication from Mr Kynuna about his views on the circumstances of the offending, but what he does articulate is shame and a decision to put it in the past, with nothing that points to attitudes that condone what he has done.

In general, the factors that point to continued elevated risk are age, anti-social or psychopathic traits, sexual preoccupation, and the presence of deviant sexual urges.

Mr Kynuna is now 38 years old, approaching the flattening of the curve of re-offending risk but not quite there yet. There are continued signs of psychopathic anti-social traits - intimidatory behaviour, the exploitation of others, contraventions of supervision, idleness and boredom, and substance use. What is absent though are recurring indications of assault (although that may be hidden at the Precinct and he has a recent charge), evidence of general criminality, and outright rejection of supervision (although clearly he has not accepted it well either). I do not think there is evidence of sexual preoccupation. Some of his victims have been minors, mostly teenage girls, but I think they represented opportunistic offending rather than a paraphilia such as hebephilia. This though has not ever been fully clarified.

On the Static-99R, he has a score of 7. The static factor instrument still places him in the group of offenders who are at much above average risk of re-offending in the next five years. On the Hare Psychopathy Checklist, he has elevated traits but not in the range of psychopathy now. As noted in my earlier report, it is likely to have been higher in the younger years but he has matured and settled to some extent since then. The complaints from the Precinct point to continued use of coercion to meet his demands. On the Risk for Sexual Violence Protocol there are continuing dynamic risk factors. Much still relate to earlier traits. These days, I think those that are notable are:

- Problems with stress
- Personality disorder
- Problems with substance use

- Problems with intimate relationships
- Problems with non-intimate relationships
- Problems with planning
- Problems with supervision

On the STABLE, another dynamic risk factor instrument, he still scores in the domains around problems with relationships, social integration, negative emotionality and poor problem skills, and cooperation with supervision. His social influences are mixed, but at interview I think he refers to positive attachments to women in his life. Again, sex drive, sexual preoccupation, the use of sex to cope, and deviant sexual preferences are absent or in remission.

On an actuarial basis, he still remains in the group of offenders who are at much above average (essentially, 'high') risk of re-offending. In my opinion, observations throughout periods of supervision indicate that this risk has reduced to moderate. It is still above the risk of the 'average' sexual offender, but no longer much above average.

Supervision would reduce the risk further. Clearly, supervision is likely to continue to provoke Mr Kynuna's sense of injustice. It will continue to remove him from close contact with his family. It will restrict his activities and opportunities, but it is difficult to know really whether in the absence of supervision he would be able to find the stable accommodation and employment that he asserts is available to him. It is likely, I believe, that he will continue to contravene supervision orders around substance use. Continued supervision will get him past the 40 year old post, into the age range where the risk of re-offending for rapists is substantially reduced although clearly this is not an abrupt cut off but rather a curve of lessening risk.

Without supervision, it is likely that Mr Kynuna will return to North Queensland. It is unclear but I think he would return to the Yarrabah community. He points to the support of family members, the offer of employment, and available accommodation. With these positive influences, he might find work and settle down there. His criminal offending arc has reduced, and it is less likely he will return to break and enter offences, which were probably one of the conduits to earlier sexual offending. I think it is likely that he will continue to use cannabis, but he may continue to eschew alcohol, which I think is the most problematic substance for him. The risk would be that delinquent associates will encourage him to return to alcohol use. It may further progress to methamphetamine use, which is likely to be more available to him these days than in his youth. In an intoxicated state, from alcohol or methamphetamine, he would become more belligerent and entitled. He may attempt to intimidate others. From there, the risk of sexual offending would increase because there would be limited restraints on him when he sought simply to gratify himself. Against this most worrying scenario is simply that in

> intoxicated states over recent years, I can see little evidence that Mr Kynuna has become sexually preoccupied or sought to exploit others sexually, or to return to criminal activities. However, the supervision order probably acted to stymie this.
>
> It is unlikely that he would continue with any forms of therapy but he may be encouraged to continue to associate with men's groups. That is, the limited support that he finds from Mr Smith and AODS would be removed. Psychologically and emotionally though he may find more support from family members."

[53] Doctor Beech clearly opined that continuing supervision was necessary to manage risk. He did not express a view as to when risk would fall to a level where the supervision order was not necessary. In his evidence before me, Dr Beech opined that the respondent dealt with stressors by resorting to substance abuse. While Dr Beech accepted that it had been some 20 years since the respondent offended sexually, he opined that the respondent's personality type was such that resort to substance abuse, in particular alcohol, could lead to decompensation and sexual offending.[26]

[54] During Dr Beech's examination in chief, this exchange occurred:

> "HIS HONOUR: Is the use of substances an indicator of not coping?---Yes, your Honour.
>
> And that's how I understand your evidence: that he's not coping - he has cannabis or whatever. He resorts to substances. The supervision order picks him up and prevents degeneration to something worse?---Yes, your Honour.
>
> Now, presumably it works back the other way. So if he was substance-free for a period of time, that would indicate to you that he is coping?---Yes, your Honour.
>
> What period are we looking at or is that a very difficult question?---No. I think, your Honour, you know, if you could show an - - -
>
> I recently was involved in a case where psychiatrists were taking the view that a 12-month period was one that tended to be recognised as a period over which a change in behaviour might be regarded as being solidified?---Yes. I think that's fair, your Honour. I would think it'd be at least 12 months. It - it'd be one to two years of abstinence. What - what you see is he - he comes back on the contraventions, but, as in this case, that contravention is not the first time he uses substances, is the second or third or - or unless it's something like alcohol or methamphetamine. Then that obviously triggers it very more quickly. But he seems to go back into substance use very quickly and then continues despite the reprimand, despite the referral to alcohol and drug services, despite psychological interventions."[27] (emphasis added)

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26 T 1-10, lines 10-45; T 1-11, line 35 to T 1-12, line 40.

27 T 1-16.

[55] Doctor McVie, in her report, expressed her opinion in this way:

> "Mr Dirk Kynuna is a 38 year old single indigenous man who was released from prison in April 2011 on a supervision order under the DPSOA. He has been convicted of five sexual offences, committed in 1999, 2000 and 2002 including indecent treatment and rape of a 23 year old stranger. Three of his victims were females under the age of 16 years. He was also convicted of three offences (not named as sexual offences) committed when he was aged 14 or 15 years, which may also have been sexual offences against female children. His sexual offending has generally occurred while he was under the influence of alcohol.
>
> His background includes general criminal offending, having been in custody from age 15 years, and for much of his adult life.
>
> He has breached his supervision order on at least nine occasions, most recently in April 2020, resulting in his being returned to custody after my assessment. Breaches were frequently for use of cannabis. He had used alcohol once in 2014, pregabalin (a drug he is now prescribed) in 2018 and methamphetamine (a drug he had never previously reported as having used) in 2019.
>
> His urine also tested positive for Suboxone in 2018 though he has now been prescribed this medication for over 6 months.
>
> His current breach is for continued use of cannabis, difficulties in management as evidenced by his alleged assault on another resident of the precinct in December 2019 and his failure to respond to treatment. A subsequent urine test on 21 April showed a level of pregabalin indicative of abuse of this substance.
>
> While previously he has minimized aspects of his sexual offending, he currently minimizes the allegations of assault in December 2019.
>
> In spite of his recurrent lapses into substance use, there has been no evidence that he has reoffended sexually.
>
> Mr Kynuna has worked with his treating psychologist on a regular basis and the most recent report suggests gradual improvement in several areas. He still presents with difficulties in emotional regulation and impaired problem solving skills.
>
> His recent deterioration may be related to the ill health and then recent death of his uncle who had also been under the DPSOA and residing nearby.
>
> At interview he presented as frustrated and angry at the possibility his supervision order would be extended and he was impossible to engage in any meaningful discussion regarding his current attitudes towards his offending and his current sexual functioning. His recent history suggests use of drugs and use of intimidating and violent behaviour as coping mechanisms rather than use of sex as coping.

> Mr Kynuna meets criteria for a diagnosis of antisocial personality disorder. He has previously met criteria for alcohol dependence and has an ongoing substance use disorder.
>
> He does not meet criteria for any paraphilia or paedophilia.
>
> Risk assessment looking at his historic risk factors indicates he is at high risk of sexual violence recidivism. This risk rating must, to some extent, be moderated by the fact he has spent considerable time in the community over the last nine years without any evidence of potential sexual offending behaviours.
>
> His historic risk factors for physical violence and his recent behaviours indicate an ongoing high risk of future physical violence.
>
> **Recommendations:**
>
> …
>
> Mr Kynuna will probably continue to present at least a moderate risk of sexual recidivism at the end of the current supervision order on 19 June 2020. His antisocial attitudes, ongoing substance abuse and lack of cooperation with assessment contribute to this risk.
>
> If he became intoxicated, and committed further sexual offending, it would most likely be an opportunistic assault of an adult female.
>
> The risk of sexual recidivism has been managed on his current supervision order. His risk of sexual reoffending on the order is low. Continuation of the order would ensure the risk remains low. Any future order should be in place for a maximum of five years.
>
> It would be beneficial to him if he were to be able to continue therapy with his current treating psychologist while he remains detained in custody.
>
> I was concerned that he was unable to complete his forklift ticket. Though his verbal skills seem reasonable, I wondered if he may have some learning disability which is impeding his progress in therapy and in gaining his qualifications, in addition to his antisocial personality structure. I would thus recommend consideration for neuropsychological testing." (emphasis added)

[56] It can be seen that Dr McVie opined that a further supervision order should be in place for a maximum period of five years.

[57] It is also clear that Dr McVie regarded substance abuse as a risk factor. During her examination in chief, this exchange occurred:

> "HIS HONOUR: The question of abstinence from substances seemed to be the focus of - well, what I understood to be the focus of Dr Beech's report - - -?---Yes.
>
> - - - Dr Beech's opinion, in the sense that this man might be difficult, this man might have difficult relationships, he might have

a difficult personality, but it seems that the evidence is drifting towards the risk of sexual reoffending is directly linked with the substance abuse? So if that's the case, he has to get off the substances and has to demonstrate that that's a real change rather than just he's got off it for a while. Would you agree with that?---I would agree with that, your Honour.

So the question then is what period is necessary of abstinence for you to then be satisfied - or for you then to form an opinion that that shows a proper, sustainable change rather than just a temporary change in behaviour? Does that make sense?---It does make sense. It's - it's also difficult on orders because there are external factors impinging on the person's behaviour, but if this fellow could demonstrate no use of substances for two years, that would be a major change for him. So I would look at an order for a minimum of three years.

Now just going back to the substances. If he - if he's in the community, one way or another, under supervision, he's obviously going to be subject to the stressors that all of us are under and special stressors that he personally is under, and if he resisted the temptation to resort to alcohol or cannabis over that period, that surely would have to be regarded as a permanent - or likely to be a permanent improvement?---It's more likely to be a long-lasting improvement.

That's probably a better term for it. Now, if you were sitting here now and you could see that he had two years alcohol and cannabis-free as at this point, what would you say at this point about his risk factor - his risk?---If I'd had - if that were his history, I would find it difficult to justify continuing his supervision order. He does have other factors. He's got the antisocial attitudes. He's got the antisocial behaviours. There's a lot of information in the Corrective Services notes of - of verbally threatening. There's the assault charge from December. So there are other factors that also impinge on his ability to manage in the community.

But we're talking about risk of sexual reoffending?---So the risk is - - -

And unless I'm misinterpreting the evidence, central to that issue seems to be the substance abuse because the fact is he hasn't committed an offence for 20-odd years?---That's true. Yes.

So am I on the right track or not?---Well, the substance abuse is the main risk factor. Certainly the alcohol abuse at the time of the offending makes alcohol seem to be the major risk factor, but as Dr Beech mentioned, there are other substances that are readily available - - -

Yes. Yes?--- - - - now that could potentially be used, and he has used those substances while in the community and those substances

would increase the risk of his sexual reoffending as well."[28] (emphasis added)

[58] Doctor Harden, in his evidence, also identified substance abuse as a risk factor. In his evidence in chief, this exchange occurred:

> "What causes the reduction in risk?---The interruption of the substance abuse pathway.
>
> But how is that relevant to his sexual offending?---His Honour put it quite clearly before I think that might be [indistinct] that, as far as we understand of Mr Kynuna, he has poor emotional coping. He uses dysfunctional coping strategies to deal with emotional upset. One of those is substance misuse. If he misuses substances consistently. He runs the risk of resuming alcohol abuse, which was his initial substance of preference and probably also of dependence at some point. If he uses alcohol consistently, there needs to be a clear association in his history between alcohol misuse and sexual offending.
>
> What about - Dr Beech identified methamphetamine and there's also a contravention to that effect. Is that relevant in your view?---It's relevant. We don't have the history to know if Mr Kynuna exact - what it might cause. But we - I suppose we're always particularly concerned about methamphetamine because it increases activity, aggression and sexual behaviour.
>
> So you say the benefit of the supervision order, as has been stated by Dr McVie and Dr Beech that it's - and as his Honour observed, just provides a mechanism by which escalating use of substances gives rise to contravention proceedings which prevents that substance abuse continuing?---Correct."[29]

And later:

> "The risk factor that has been identified now by three psychiatrists, including you, is resort to substances to cope with emotional frailty, if I can put it that way. Now, over what period of abstinence from drugs - that's resort to drugs - would you consider you would have to see before you would opine that the behaviour, namely not resorting to drugs in emotional - times of emotional stress was in a proper foundation and set?---I think I'd agree with the previous evidence, your Honour, somewhere between one and two years."[30]

Determination and orders

[59] By force of the provisions of Division 3 as adopted into Division 4A, the relevant questions are:

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28 T 1-28 to T 1-29.
29 T 1-37.
30 T 1-38.

1. Is there an unacceptable risk that the respondent will commit a serious sexual offence in the absence of a further supervision order?[31]

2. If so, at what point in the future will the respondent cease to be an unacceptable risk without supervision?[32]

[60] There is a solid body of expert evidence provided by the psychiatrists which supports the conclusion that in the absence of a further supervision order the respondent is an unacceptable risk of committing a serious sexual offence. The respondent's personality type is such that if placed under stress he is likely to resort to substances, including alcohol, and in a stressed and intoxicated state, his risk of committing a serious sexual offence is unacceptable. The psychiatrists are all experienced in the particular field of psychiatry which deals with the prediction of risk of criminal offending. I accept that evidence, find it cogent, and I am satisfied to a high degree of probability that the respondent is a serious danger to the community in the absence of a further supervision order.

[61] I have set out the psychiatric evidence in some detail. The doctors recommended a further supervision order of a duration of five years. The doctors do their best to make recommendations for the assistance of the Court. Those recommendations are made upon medical considerations. However, it is the function of the Court, not the doctors, to apply the relevant legal tests to the evidence which the doctors give. It is unfair to expect the doctors to express an opinion in terms of the final legal questions which have to be determined.

[62] All three doctors opined that a major risk factor was the consumption of illicit substances, including alcohol. The reoffence scenario which they suggested was alcohol fuelled. All three doctors expressed the view that a permanent change of behaviour must be demonstrated over a period of time. They opined that if the respondent abstained from illicit substances and alcohol for a period of two years, then abstinence could be taken to be an established and reliable behaviour. I accept that evidence.

[63] I find, based on the current evidence of the psychiatrists, that supervision of the respondent is required until his abstinence from alcohol can be accepted as an established behaviour. I accept the evidence that the abuse of illicit substances and alcohol is a significant risk factor and I conclude that he is an unacceptable risk until abstinence is an established behaviour. I conclude that the imposition of a further supervision order is necessary for the period of two years.

[64] There is no need to amend the supervision order further. I order that the respondent be subject to a further supervision order until 19 June 2022 on the requirements in the supervision order made by PD McMurdo J on 6 April 2011 and as subsequently amended.

[65] As already observed, on 15 June 2020, I ordered the respondent's release pending the finalisation of the applications. That order was made under s 19D. There was no basis (nor any submission) to make a continuing detention order. The s 22 application was dismissed and the Division 4A application would result in a further

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31 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13(1) and (2) and s 19D.

32 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13(5) and (6), s 19D(i) and 19E.

supervision order or no order. As a result, I found that the continued detention of the respondent was not justified.