

# SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Qld v Toms* [2008] QSC 131

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**  
(applicant)  
v  
**TREVOR LEWIS TOMS**  
(respondent)

FILE NO/S: BS 4470/06

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 June 2008

DELIVERED AT: Brisbane

HEARING DATE: 2 May 2008

JUDGE: Martin J

ORDER: **APPLICATION FOR DETENTION DISMISSED. RESPONDENT TO BE RELEASED SUBJECT TO A SUPERVISION ORDER.**

CATCHWORDS: CRIMINAL LAW - OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT - OTHER MATTERS – where the respondent had been released subject to a supervision order under the Dangerous Prisoners (Sexual Offenders) Act 2003 – where the respondent breached that order for the third time by the consumption of alcohol and a breach of his curfew – where the respondent did not pose a significant risk of sexual re-offending – whether the respondent’s supervision order should be amended – whether the adequate protection of the community could be ensured by the existing order.

*Dangerous Prisoners (Sexual Offences) Act 2003, s 3, s 13(5), s 22, s 43B*

*Attorney-General for Queensland v Francis* [2006] QCA 324  
*Attorney-General for the State of Queensland v Toms* [2006] QSC 298

*Attorney-General for the State of Queensland v Toms* [2007]  
QSC 290  
*Fardon v Attorney-General for Queensland* (2004) 223 CLR  
575

COUNSEL: B Mumford for the Applicant  
D Kent for the respondent

SOLICITORS: C W Lohe Crown Solicitor for the applicant  
Legal Aid Queensland for the respondent

- [1] This is an application by the Attorney-General for an order that Trevor Lewis Toms (“Toms”) be detained in custody for an indefinite term for care, control or treatment pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offences) Act* 2003 (“the Act”). Should that application not be granted the Attorney-General seeks, in the alternative, an order that Toms be released subject to such conditions as this court thinks appropriate (s 13(5)(b) of the Act).

### **History**

- [2] The circumstances which led to Toms’ conviction and imprisonment were summarised by Chesterman J in *Attorney-General for the State of Queensland v Toms* [2006] QSC 298 at [1] and [2]:

“[1] On 16 April 1986, in the Supreme Court in Townsville, the respondent pleaded guilty to three counts of rape and numerous counts of breaking and entering a dwelling house and stealing. The first rape was committed on 26 September 1985 in Tully; the second on 20 October 1985 in Mt Isa; and the third ten days later, on 30 October 1985, also in Mt Isa. There was a pattern to the offences. On each occasion the respondent followed a woman home, watched her undress and retire to bed, broke into the home, armed himself with a knife taken from the kitchen and raped the woman at knife point. He stole some items of property as he left.

[2] Mr Justice Ambrose who sentenced the respondent said this about the offences:

‘The first ... rape occurred at Tully ... [I]t was a rape accompanied by indecent assault ... of a demeaning, humiliating and revolting kind ... The rape ... was done with a series of acts which must have terrorised the girl ... [who] has been left mentally and emotionally disturbed by her ordeal ... You also took money which you found in the flat.

The second rape occurred at Mount Isa a little over three weeks [later] ... You again followed your victim home ... You waited outside ... until you thought she was asleep. You mistakenly believed that she was alone ... As it happened, her husband ... was asleep in the flat ... you gained entrance ... by climbing ... onto the balcony ... You again searched the kitchen for a

knife to ... overcome any resistance ... by the woman ... and you went into her bedroom ... She [got] up ... you followed her out of the bedroom and ... overpowered her in the kitchen ... and you forced her downstairs ... where you raped her ... This rape has had ... a terrible effect on the woman. It has placed severe strains on her marriage ...

The third rape was committed in Mount Isa ... and again you ... followed the same system ... except that you did not follow the woman home but you went back to the same block of flats where you had perpetrated the second rape to observe the movement of the woman ... you had raped ... before ... when you got back to that block of flats you saw ... the third victim ... moving ... in the flat ... below ... and you watched her for a time and waited until the lights were out ... You ... broke into the flat, selected a knife from the kitchen and ... went into her bedroom where you found her asleep.

You ... discovered ... that she had a child sleeping in the bedroom near her and you ... subjected her to ... a terrorising ordeal ... You placed a pillow over her face and cut her ... panties and ... top ... threatening her all the time with the knife and threatening ... that if with her child might do something ...

Using these inducements you had sexual intercourse with that woman.

On all three occasions ... you ... [stole] money from the flat occupied by each woman that you raped.””

- [3] Toms was sentenced to an effective term of imprisonment of 22 years. He was due for release in November 2006 when the Attorney-General brought the first of this type of application. After a detailed examination of the facts, Chesterman J ordered that he be released subject to the conditions contained in Schedule 1 to these reasons.
- [4] On 24 April 2007 Toms was brought before Atkinson J as a result of a number of contraventions of the conditions imposed in 2006. They consisted of six occasions when he returned a positive breath test for alcohol. Two of those readings were very low but one (in January 2007) was a reading of .097 per cent.
- [5] As a result of those contraventions, her Honour varied the conditions attaching to Toms' release by adding the conditions set out in Schedule 2 to these reasons.
- [6] Notwithstanding the increase in severity of the conditions, Toms again breached the terms of his release by, in July 2007, taking cannabis (demonstrated by a urine analysis), breaching his curfew and consuming alcohol.

- [7] Following those contraventions, the Attorney-General applied for his conditions to be revised. Chesterman J allowed the application ([2007] QSC 290) and varied the conditions in the form contained in Schedule 3 to these reasons. I think it helpful to refer, at some length, to part of the reasons of Chesterman J in arriving at that conclusion:

“[14] Dr Lawrence considered that ‘the risks are not such that [she] would recommend indefinite detention and that the low to moderate risk of re-offending could be contained by a supervision order with appropriate conditions.’

- [15] Dr Grant discussed with the respondent his attitude to re-offending and reported:

‘He looks back at his offending behaviour and sees it as quite foreign to him. He never expected that he would find himself in a situation of offending against women. ... After a few years in jail he began to think seriously about his sexual offending ... and he found it increasingly distressing. It was at that point that he sought treatment in the SOTP and his insight developed thereafter.

[The respondent] said that at the time of the offences he had ... no feelings for women and ... no feelings for anybody. He believes that his background “desensitized” him to sexually aberrant behaviour. His behaviour was ... shaped by his brother ... After a few years in prison he saw a program about rape victims which reduced him to tears and he then participated in the SOTP, looking for answers to his behaviour. Later he saw his relationship [with a woman who subsequently died] as an important part of his own rehabilitation, and her death shattered him. It gave him a greater appreciation of the preciousness of life and the need to work hard on rehabilitating himself.

...

[The respondent] readily admitted that he had difficulties with his behaviour when on previous leave of absence and work release programs. He recognises that he took far too much for granted and that he didn’t cope well with the freedom which he suddenly experienced. He did not conform to the requirements of his release at that time and responded inappropriately to financial and other stressors. He recognises now that he didn’t pay appropriate attention to the seriousness of his situation and that he was ... irresponsible ... He feels that that has changed and he is now much more prepared for his release. For

example, he has saved almost \$2,000 to assist him in adjusting to life outside prison and is much more aware of his needs and responsibilities when ... released.'

- [16] Dr Grant expressed his assessment of the respondent in these terms:

'... using overall clinical judgment [the respondent] would be seen as of moderate risk of violent sexual re-offending and moderate to high risk of some other less serious non-sexual re-offending. He will clearly be vulnerable to stressful situations when he leaves prison and will require a lot of social and personal support to overcome the effects of prolonged institutionalization. Any recurrence of alcohol or drug abuse would increase the risk of some kind of re-offending behaviour ...

The degree of risk would indicate that [the respondent] should be subject to a supervision order if ... released ...'

- [17] In oral evidence Dr Lawrence, in answer to the question whether the respondent currently suffers from an anti-social personality disorder said:

'... at the time he entered prison there would be ... no doubt that that would have been a diagnosis applied to him ... At that point I probably would have graded him at a level which qualified him as a psychopath ... but the subsequent development, his maturity, the passage of time, his experiences since and the way he presents at the present time ... raises some doubt as to whether that is an accurate description ...'.

- [18] Dr Grant was asked about the effects on the respondent of his participation in the Sexual Offenders Treatment Program. His answer was that the respondent:

'... was seen to have made significant gains as a result of that course ... There was a degree of empathy and understanding of his behaviour. He disclosed his behaviour well and came to some understanding as to its origins and I think that overall it was a reasonably positive exit report ...'

Dr Grant's own assessment was that the respondent had benefited from the program.

- [19] Importantly Dr Grant said that he thought that the respondent was open and honest in his responses to questions. He also thought that the respondent's older

brother would have been 'a very significant influence' in inculcating in the respondent 'very negative ... very aggressive sexual attitudes towards women' but that malignant fraternal influence is now insignificant and has been overcome by the respondent's own improved attitudes. Dr Grant said:

'He realised that his attitudes were abnormal, that he needed some assistance, and he sought out the Sexual Offenders Treatment Program. I think that was the beginning of his attitudinal changes, and he made further changes of maturation through his relationships with women ... particularly his last relationship with Michelle, who he had a great deal of affection and respect for and her death was a very traumatic thing for him. I think that ... underlined for him the values of relationships ...'.

[20] Dr Grant said later:

'... he seems to be being open and honest about his sexuality now. He is not experiencing those impulses [sadism and voyeurism]. He sees it as very much something that happened in the past that he is ashamed of. When he has had work release in the past there has been no evidence that he has been offending in a sexual way ... So the evidence is that that is now a diagnosis which is more in the past than a way for the present ...'

[21] Counsel for both applicant and respondent had collaborated in preparing a draft supervision order setting out conditions which might be thought appropriate for the respondent. They were shown to Dr Grant who was asked whether they would address the risk of the respondent re-offending. He said:

'I think it would go a long way to addressing the risk ... I don't think you can ever entirely eradicate the risk, in that if [the respondent] wasn't being totally honest and he was nurturing some violent sexual impulses, then a supervision order would not necessarily prevent him acting on those, but I think it would go quite a long way to assisting.'

[22] Dr Grant was asked about the appropriateness of the condition if, as he thought, the respondent had spoken frankly to him. Dr Grant said:

'If he has been frank with us then I think the supervision order will be very helpful and will probably prevent any violent sexual reoffending

at all, and would be very helpful in his adjustment to life outside prison and therefore would reduce the risk of other more minor anti-social behaviour, like stealing.'

- [23] It should perhaps be pointed out that both psychiatrists regarded as quite unnecessary that any condition of the respondent's release should prevent his coming into contact with children. He is not a paedophile and there is not the slightest evidence that he has ever or will ever constitute a danger to children. On the contrary there is evidence that he has exhibited paternalistic and protective attitudes towards children when his relationships with women brought him into contact with their offspring.
- [24] Something should be said about the respondent's behaviour in prison. It was referred to by Dr Lawrence and Dr Grant and assumed some importance in a report by Ms McEvoy which is yet to be discussed.
- [25] Beginning in late 1994 the respondent was given weekend leave of absence, part of a program to equip him for release on parole. Occasionally he returned late to prison. His leave was subject to strict conditions as to where he went, what he did and where he stayed. On 24 March 1995 the respondent strayed from the conditions and was not at his designated residence. Accordingly his leaves of absence were revoked and he was returned to custody in the Arthur Gorrie Correctional Centre on 28 March 1995. He had been detained in the less secure Numinbah Correctional Centre.
- [26] On 19 June 1996 he was again allowed out of prison on a release to work program. He obtained employment at two places and worked industriously. However on 5 May 1997 he was again returned to secure custody following an incident on 3 May out of which he was charged with assault. The respondent had gone to a party to collect one of his partner's children. Those at the party were drunk and abusive and an altercation developed. The respondent was not involved and offered no violence but police were called, he was suspected of assault and arrested. The charge was subsequently withdrawn. However at about this time it emerged that earlier, in December 1996 while on leave of absence, the respondent had stolen some toiletries worth \$7.34 from Franklins at Caboolture."

### **This application**

- [8] This application is based on the following, undisputed, contraventions:
- (a) Failing to comply with every reasonable direction of a Corrective Services officer (breach of condition (x)).

*Particulars:*

On 12 October 2007 Toms was given written directions to abstain from the consumption of alcohol for the duration of the supervision order and not to visit to licensed premises without the prior written permission of the supervising Corrective Services officer. He breached those directions by:

- (i) On 14 December 2007, returning a positive breath test for alcohol of .021 per cent, and
- (ii) On 27 February 2008, attending at a hotel in Annerley and drinking alcoholic drinks.

The respondent answered the allegation of consuming alcohol on 14 December 2007 by saying that he had recently used mouthwash and that that was the cause of the reading.

- (b) Consuming alcohol, in breach of condition (xiii) of the supervision order.

*Particulars:*

This breach refers to the reading obtained on 14 December 2007.

- (c) Visiting licensed premises without permission, in breach of condition of (xxvi) of the supervision order.

*Particulars:*

This breach is constituted by the visit to the hotel referred to above.

- (d) Returning to his residence late, in breach of curfew condition (xxviii).

*Particulars:*

On 20 December 2007, the respondent was directed to remain at his residence between 7 pm and 7 am. He breached that on two occasions.

- (i) On 2 February 2008, by being late by two minutes;
- (ii) On 14 February 2008, when he was late by 14 minutes.

As for the first occasion, Toms said that it was caused because an acquaintance who was driving him home had been late in picking him up and, as to the second occasion, it had been caused by his missing the train home as the timetable had been changed.

- [9] Breach (a) arises out of the same set of facts as those which form the basis of breaches (b) and (c).

**The Act**

- [10] The objects of the Act are contained in s 3. It provides:

“The objects of this Act are –

- (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
- (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.”

- [11] Where a released prisoner is suspected of having contravened a requirement of the relevant supervision order then a warrant may issue for the arrest of the released prisoner so that he or she can be brought before the Supreme Court (see s 20(1)).
- [12] The Act makes provisions for interim orders concerning the custody of the released prisoner and for submissions from any victims of the crimes earlier committed by the released prisoner.
- [13] Of relevance to this application is s 22 of the Act. It 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 an order in the nature of a risk assessment order.
- (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 the requirements mentioned in section 16(1)(da) and (db), if the existing order does not already include the 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).”

[14] In the circumstances of this application it is worth noting that a person who breaches a supervision order is liable to the process under s 43B of the Act which provides:

- “(1) A person subject to a supervision order or interim supervision order who, without reasonable excuse, contravenes a requirement of the order commits an offence. Maximum penalty – 2 years imprisonment.
- (2) A proceeding for an offence against subsection (1) is to be taken in a summary way under the *Justices Act 1886*.”

### **Consideration**

[15] As there has been no dispute about the matters I am satisfied to the extent required by s 22(1) of the Act that the applicant has contravened a requirement of the supervision order.

[16] In those circumstances the onus is on the released prisoner to satisfy 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. If Toms does not discharge that onus then the court is required, in these circumstances, to rescind the supervision order and make a continuing detention order.

[17] The applicant Attorney-General points to the repeated breaches of the supervision order and the fact that this is the third time that Toms has faced proceedings for contravening that supervision order. Notwithstanding that he had spent three months

in custody from July 2007 to October 2007 as a result of an earlier breach, Toms breached the order in the manner which has been set out above. The Attorney-General submitted that the persistent flouting of the conditions of the supervision order, particularly those relating to the consumption of alcohol and drugs, are such that the court could not be satisfied on the balance of probabilities that the adequate protection of the community could be ensured by a supervision order.

- [18] On behalf of Toms it was submitted that, in the light of the psychiatric evidence, the risk that the respondent would commit sexual offences is no greater than when he was first released, notwithstanding the breaches of the conditions of his supervision order.
- [19] The issue I must consider is not whether Toms will breach his supervision order again but whether, on all the evidence, the adequate protection of the community can be ensured by the existing order. There are two important matters which the legislation requires to be borne in mind.
- [20] First, that the consideration I have to give to the application does not involve any aspect of punishment for the breach. As noted above, any breach of a supervision order is subject to summary prosecution under s 43B of the Act. While a person may be punished for such a breach, one must bear in mind that the general objects<sup>1</sup> of the Act are: the adequate protection of the community, and the rehabilitation of prisoners subject to the Act.
- [21] Secondly, the legislation only requires<sup>2</sup> that a released prisoner:
- (a) satisfy the court,
  - (b) on the balance of probabilities,
  - (c) that the adequate protection of the community can,
  - (d) despite the contravention,
  - (e) be ensured by the existing order.

If those requirements are fulfilled, that prevents the rescission of the supervision order and the consequent return of the prisoner to detention.

- [22] If a court considered that further detention, or a return to detention, would be truly punitive then such a step would be contrary to the objects of the Act and would remove the basis for the court to make such an order.<sup>3</sup>
- [23] The evidence before me, apart from the facts relating to the current contraventions, is the same as that which was before Chesterman J when he made his decision.<sup>4</sup>
- [24] The breaches of curfew (by 2 minutes and 14 minutes respectively) were both minor and, in my opinion, satisfactorily explained. Although all breaches should be considered when dealing with an application of this type, I think that these, unrelated as they are to the breaches concerning alcohol, are so slight as to have little or no weight in an overall consideration of the matter.

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<sup>1</sup> Section 3.

<sup>2</sup> Section 22(2).

<sup>3</sup> *Fardon v Attorney-General for Queensland* (2004) 223 CLR 575 at [2], [19], [33]-[34], [72]-[81], [107]-[113], [196], [214]-[233]; *Attorney-General for Queensland v Francis* [2006] QCA 324 at [31].

<sup>4</sup> *Attorney-General for the State of Queensland v Toms* [2007] QSC 290.

- [25] It is appropriate, when considering the consequences of the breaches, to consider Toms' behaviour overall. There is no suggestion of any re-offending (in the sense of his original offences) and no suggestion of any increased risk of re-offending. No evidence was tendered to demonstrate that these contraventions, either alone or when considered with the earlier breaches, had any effect on the risk level which had been assessed for earlier proceedings.
- [26] There are voluminous notes of contact between Toms and departmental officers which, apart from the recorded breaches and a few minor matters, demonstrate that he has been, on the whole, cooperative and stable. Those departmental notes demonstrate that between November 2006 and April 2008 Toms has been the subject of 195 office visits, 84 urine tests, 173 breath tests and 125 home visits.<sup>5</sup> Clearly, the relevant departmental officers are fulfilling their obligations and, in doing so, their surveillance has demonstrated that Toms has breached his conditions on only a very limited number of occasions.
- [27] I now turn to the medical evidence. The applicant did not seek to have Toms undergo any further psychiatric or similar examinations. On the hearing, the applicant was content to rely on the previous reports which had been obtained. I have considered those and I cannot better the summary outlined by Chesterman J<sup>6</sup> in the following way:

“[18] Dr James reported:

‘There do appear to remain some residua ... of Mr Toms’ previous anti-social personality disorder in the form of ... some degree of rebelliousness and disregard for authority, as well as some degree of entitlement. This remaining sense of entitlement now appears to be channelled into a wish for a normal life as he sees it after having served the 22 years imprisonment to which he was originally sentenced and should be seen as only a vestigial remnant of the more pervasive sense of entitlement which appears to have existed 22 years ago and which ... contributed to his offending.’

[19] Dr James went on:

‘... Some degree of frustration in response to the imposition of restrictions is in my opinion understandable, bearing in mind the fact that Mr Toms who is now ... 43 has been in prison ... continuously since the age of 21. ... It is not surprising that he had experienced a wish to enter, as fully as possible, normal and mainstream social life, which as noted often entails some consumption of alcohol. Furthermore, the conditions in which he has

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<sup>5</sup> Exhibit 1.

<sup>6</sup> [2007] QSC 290.

had to live since his discharge from prison in October 2006 have been far from ideal and again it is not surprising that he may wish to seek some alleviation of the relative monotony and boredom. ... The efficiency of the corrective services in detecting transgressions of the supervision order have been demonstrated in relation to his alcohol consumption in December 2006, January 2007 and his subsequent reappearance in court in April 2007. ... Having been returned to jail since 12 July 2007 has served to underline yet again for Mr Toms the seriousness of the supervision order.'

- [20] Dr James considered specifically whether the respondent's disregard of the supervision order with respect to the consumption of alcohol might indicate an increased risk of sexual offending. He thought that there was no such risk. He noted:

'(The respondent's) description of his attitude to his former sexual offences, and his changed attitude towards women, appeared ... not only genuine, but established over time, and well assimilated. He appears to have been able to form a relationship of a romantic and sexual kind without any evidence of untoward sexual conduct, and he also appears to have formed respectful relationships with women from the Prisoners' Christian Fellowship. ... There is significant difference between ... deciding to have a drink of alcohol and on the other hand of committing a major sexual offence.'

- [21] Dr James thought that the continued abstinence from alcohol and other intoxicants would be 'a further safety factor guarding against any likelihood of repetition of sexual offending'. I accept this as true. The conditions that have been imposed and will now be imposed will ensure that abstinence as far as is humanly possible. The effectiveness with which breach of the conditions can be detected has already been demonstrated.

- [22] Dr James thought that the continued abstinence from alcohol and other intoxicants would be 'a further safety factor guarding against any likelihood of repetition of sexual offending'. I accept this as true. The conditions that have been imposed and will now be imposed will ensure that abstinence as far as is humanly possible. The effectiveness

with which breach of the conditions can be detected has already been demonstrated.

- [23] The only accommodation presently available is that which the Department of Corrective Services made available earlier, at Wacol. The criminal whom I mentioned earlier is no longer there and will not be a neighbour. Nevertheless the accommodation is not ideal and better accommodation, which meets Dr James' description, should be found as a matter of urgency.
- [24] Dr Beech reached the same conclusion as Dr James. He supports his release subject to suitable supervision. Dr Beech reported:
- 'There is evidence that over his long incarceration he has matured and what was likely to have been a very callous and impulsive personality has mellowed with time and a number of exposures to more socialising experiences. He is able to consistently recount these as including an earlier sexual offender program, the experiences with female wardens, and accounts from rape victims. Significantly he has developed the capacity for relatedness and attachment as well as empathy and he appears genuinely been able to have formed friendships as well as the relationship with Michelle.'
- [25] He concluded:
- 'I believe he is ... a moderate risk of violent re-offending. His background and offences and continued ... low level breaches point to this. Factors mitigating against this are his age, his recent history of no violence, and evidence of a development of emotional sensitivity. Factors that would protect him would be his placement in suitable accommodation and association with a pro-social supportive stable friends together with meaningful work and recreation. ... I do not think that his recent breach has placed him in any higher risk category than he was in April 2006. The breach does seem to have been offset by his return to detention and its consequences. ... He does seem to have adjusted to an understanding of the seriousness of the conditions of the order.'
- [26] To summarise, the risk that the applicant will commit sexual offences is no greater now than it was a year ago when he was released pursuant to a supervision order. His breaches

of some of the conditions are no indication of a propensity or likelihood of committing further offences. The breaches have not involved any contravention of the criminal law. They amount to consuming alcohol on about six occasions in the course of the year; leaving his home in breach of curfew to visit friends and being less than completely frank about that occasion when questioned by his supervising officer. The respondent served 21 years in jail during which he demonstrated a commitment to rehabilitation and demonstrated industriousness and many years of good behaviour. He was initially sent to live with decent, God-fearing people who offered him support and employment. He was taken abruptly from that environment and put in one quite unsuitable for a man endeavouring to become part of mainstream society after having spent his entire adult life in jail. He has never offended against children and poses no threat to them. There is no reason why he should not live near a school.”

- [28] Further, the conclusion reached by Chesterman J, notwithstanding the further breaches, still remains compelling.<sup>7</sup>
- [29] It is important always to bear in mind:
- (a) That the test laid down by Parliament is whether *adequate* protection of the community can be ensured by the existing order, and
  - (b) if supervision of a prisoner under the Act will ensure such *adequate* protection then supervised release is to be preferred to continuing detention because offenders, having fully served their sentence, should not be deprived of their liberty unless that is a clear requirement of the Act.<sup>8</sup>
- [30] On the basis of the expert evidence, and in the absence of any suggestion that the current breaches indicate an increased risk, I am satisfied that the respondent has discharged the onus under s 22(2) and I dismiss the application to have Toms returned to custody.
- [31] The Attorney-General sought, in the alternative, an order that Toms be released subject to such conditions as this court thinks appropriate. The conditions under which he was placed on the last occasion were formulated in the light of expert evidence which has not been supplemented in these proceedings. It was not suggested that any more stringent conditions were necessary to ensure adequate protection. Indeed, both Dr Beech and Professor James were of the opinion that there is no increase in the risk of re-offending because of the consumption of alcohol. It should not be thought, though, that breaches of a supervision order can never lead to an order returning a person to custody. Some breaches may be of greater severity than others and may lead to the conclusion that adequate protection cannot be provided by such an order.

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<sup>7</sup> See [26].

<sup>8</sup> *Attorney-General for Queensland v Fardon* [2006] QCA 512 at [26].

- [32] Toms is to be released from custody subject to a supervision order in the same terms as that made by Chesterman J in *Attorney-General for the State of Queensland v Toms* [2007] QSC 290.

**SCHEDULE 1**

Upon release from prison, the respondent be subject to the following conditions until 8 November 2011 or further;

**THE ORDER OF THE COURT IS THAT:**

The respondent must;

1. Be under the supervision of a Corrective Services Officer ("the supervising Corrective Officer") for the duration of this order;
2. Report to the supervising Corrective Services Officer at The Department of Corrective Services District office closest to his place of residence within 24 hours of his release, and therein to advise the officer of the respondent's current name and address;
3. Reside at the accommodation currently agreed between the Chief Executive of Brisbane Boarders Inc and The Department of Corrective Services, and thereafter at such other places within the State of Queensland as approved by a Corrective Services Officer by way of a suitability assessment;
4. Report to and receive visits from the supervising Corrective Services Officer at such frequency as determined necessary by the Supervising Corrective Services Officer;
5. Notify the supervising Corrective Services Officer of every change of the prisoner's name at least two business days before the change occurs;
6. Notify the supervising Corrective Services Officer of the nature of his employment, the hours of work each day, the name of his employer and the address of the premises where he is employed;
7. Notify the supervising Corrective Services Officer of every change of employment at least two business days before the change occurs;
8. Notify the supervising Corrective Services Officer of every change of the respondent's place of residence at least two business days before the change occurs;
9. Not leave or stay out of the State of Queensland without the written permission of the supervising Corrective Services Officer;
10. Not commit a serious sexual offence as defined in the Dangerous Prisoners (Sexual Offenders) Act 2003 during the period which these orders operate;
11. Obey the lawful and reasonable directions of the supervising Corrective Services Officer;
12. Respond truthfully to enquiries by the supervising Corrective Services Officer about his whereabouts and movements generally;
13. Notify the supervising Corrective Services Officer of the make, model, colour and registration number of any motor vehicle owned by, or regularly used by him;
14. Abstain from the consumption of alcohol for the duration of this order;
15. Abstain from illicit drugs for the duration of this order;
16. Take prescribed drugs as directed by a medical practitioner;
17. Submit to alcohol and drug testing as directed by a Corrective Services Officer, the expense of which is to be met by the Department of Corrective Services;
18. Attend on such psychiatrist or other mental health practitioner who has been approved by the supervising Corrective Services Officer at a frequency and duration which shall be recommended by the treating

psychiatrist or other mental health practitioner, the expense of which is to be met by the Department of Corrective Services.

## **SCHEDULE 2**

THE ORDER OF THE COURT IS THAT:

1. Upon release from prison, the respondent be subject to the following conditions until 8 November 2011 or further order of the Court.
2. The respondent must:
  - (i) be under the supervision of a Corrective Services officer ('the supervising Corrective Services officer') for the duration of this order;
  - (ii) report to the supervising Corrective Services officer at the Brisbane office of Queensland Corrective Services within 48 hours, and therein to advise the officer of the respondent's current name and address;
  - (iii) reside at the accommodation currently agreed between the Chief Executive of Brisbane Boarders Inc and Queensland Corrective Services, and thereafter at such other places within the State of Queensland as approved by a Corrective Services officer by way of a suitability assessment;
  - (iv) report to and receive visits from the supervising Corrective Services officer at such frequency as determined necessary by the supervising Corrective Services officer;
  - (v) notify and obtain the approval of the supervising Corrective Services officer for every change of the Respondent's name at least two business days before the change occurs;
  - (vi) notify the supervising Corrective Services officer of the nature of his employment, the hours of work each day, the name of his employer and the address of the premises where he is employed;
  - (vii) notify the supervising Corrective Services officer of every change of the respondent's place of residence at least two business days before the change occurs;
  - (viii) not leave or stay out of the State of Queensland without the written permission of the supervising Corrective Services officer;
  - (ix) not commit an offence of a sexual nature during the period of this order;
  - (x) obey the lawful and reasonable directions of the supervising Corrective Services officer;
  - (xi) respond truthfully to enquiries by the supervising Corrective Services officer about his whereabouts and movements generally;
  - (xii) notify the supervising Corrective Services officer of the make, model, colour and registration number of any motor vehicle owned by, or regularly used by him;
  - (xiii) abstain from the consumption of alcohol for the duration of this order;
  - (xiv) abstain from use of illicit drugs for the duration of this order;
  - (xv) take prescribed drugs as directed by a medical practitioner;

- (xvi) submit to any form of alcohol and drug testing including both random urinalysis and breath testing as directed by the supervising Corrective Services officer, the expense of which is to be met by Queensland Corrective Services;
- (xvii) attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by the supervising Corrective Services officer at a frequency and duration which shall be recommended by the treating intervention specialist, the expense of which is to be met by Queensland Corrective Services;
- (xviii) permit any treating psychiatrist or mental health practitioner to disclose details of medical treatment and opinions relating to his level of risk of reoffending and compliance with this order to Queensland Corrective Services if such request is made in writing for the purposes of updating or amending the supervision order and/or ensuring compliance with this order;
- (xix) attend any program, course, psychologist, counsellor or other mental health practitioner, in a group or individual capacity, as directed by the supervising Corrective Services officer in consultation with treating medical, psychiatric, psychological or other mental health practitioners where appropriate, the expense of which is to be met by Queensland Corrective Services;
- (xx) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) by decision of the treating psychiatrist and the Supervising Corrective Services Officer, and permit the release of the results and details of the testing to Queensland Corrective Services, if such a request is made in writing for the purposes of updating or amending the supervision order, the expense of which is to be met by Queensland Corrective Services.
- (xxi) seek permission and obtain approval from the supervising Corrective Services officer prior to entering into an employment agreement or engaging in volunteer work or paid or unpaid employment;
- (xxii) not reside at a place by way of short term accommodation including overnight stays without the permission of the supervising Corrective Services officer;
- (xxiii) not commit an indictable offence during the period of this order;
- (xxiv) submit to and discuss with the supervising Corrective Services officer a schedule of his planned and proposed activities on a weekly basis or as otherwise directed;
- (xxv) not to have any direct or indirect contact with a victim of his sexual offences;
- (xxvi) for 12 months from 24 April 2007, not visit premises licensed to supply or serve alcohol, without the prior written permission of the supervising Corrective Services officer in consultation with the Respondent's alcohol counsellor;
- (xxvii) participate in alcohol and drug counselling or substance abuse programs as directed by the supervising Corrective Services officer;
- (xxviii) for 12 months from 24 April 2007, submit to electronic monitoring by Queensland Corrective Services and the conditions of electronic monitoring including wearing a monitoring device as directed by the supervising Corrective Services officer;

- (xxix) for 12 months from 24 April 2007, be in attendance and not leave the approved place of residence between the hours of 10pm and 6am without the prior written approval of the supervising Corrective Services officer. The appropriateness and continuation of the curfew is to be reviewed by the supervising Corrective Services officer upon the Respondent's request, or every 3 months whilst the curfew remains in force;
- (xxx) comply with all reasonable curfew restrictions imposed by the supervising Corrective Services officer.

### SCHEDULE 3

#### THE ORDER OF THE COURT IS THAT:

1. The Respondent be released from prison until 8 November 2011 or until further order subject to the following conditions.

- (i) be under the supervision of a Corrective Services officer ('the supervising officer') for the duration of this order;
- (ii) report to an authorised Corrective Services officer at the Queensland Corrective Services Probation and Parole Office closest to his place of residence between 9am and 4pm on the day of release from custody;
- (iii) reside at a place within the State of Queensland as approved by a Corrective Services officer by way of suitability assessment;
- (iv) report to and receive visits from the supervising Corrective Services officer at such frequently as determined necessary by the supervising Corrective Services officer;
- (v) notify and obtain the approval of the supervising Corrective Services officer for every change of the Respondent's name at least two business days before he change occurs;
- (vi) notify the supervising Corrective Services officer of the nature of his employment; the hours of work each day, the name of his employer and the address of the premises where he is employed;
- (vii) notify the Corrective Services officer of every change of the respondent's place of residence at least two business days before the change occurs;
- (viii) not leave or stay out of the State of Queensland without the written permission of the supervising Corrective Services officer;
- (ix) not commit an offence of a sexual nature during the period of this order;
- (x) comply with every reasonable direction of an authorised corrective services officer;
- (xi) respond truthfully to enquiries by the supervising Corrective Services officer about his whereabouts and movements generally;
- (xii) notify the supervising Corrective Services officer of the make, model, colour and registration number of any motor vehicle owned by, or regularly used by him;
- (xiii) abstain from the consumption of alcohol for the duration of this order;
- (xiv) abstain from the use of illicit drugs for the duration of this order;
- (xv) take prescribed drugs as directed by a medical practitioner;
- (xvi) submit to any form of alcohol and drug testing including both random urinalysis and breath testing as directed by the supervising Corrective Services officer the expense of which is to be met by Queensland Corrective Services;

- (xvii) attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by the supervising Corrective Services officer at a frequency and duration which shall be recommended by the treating intervention specialist, the expense of which is to be met by Queensland Corrective Services;
- (xviii) permit any treating psychiatrist or mental health practitioner to disclose details of medical treatment and opinions relating level of risk of reoffending and compliance with this order to Queensland Corrective Services if such request is in writing for the purpose of updating or amending the supervision order and/or ensuring compliance with this order;
- (xix) attend any program, course, psychologist, counsellor or other mental health practitioner, in a group or individual capacity, as directed by the supervising Corrective Services officer in consultation with treating medical, psychiatric, psychological or other mental health practitioners where appropriate, the expense of which is to be met by Queensland Corrective Services;
- (xx) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) by decision of the treating psychiatrist and the supervising Corrective Services officer; and permit the release of the results and details of the testing to Queensland Corrective Services, if such request is made in writing for the purpose of updating or amending the supervision order, the expense of which is to be met by Queensland Corrective Services;
- (xxi) seek permission and obtain approval from the supervising Corrective Services officer prior to entering into an employment agreement or engaging in volunteer work or paid or unpaid employment;
- (xxii) not reside at a place by way of short term accommodation including overnight stays without the permission of the supervising Corrective Services officer;
- (xxiii) not commit an indictable offence during the period of this order;
- (xxiv) submit to and discuss with the supervising Corrective Services officer a schedule of his planned and proposed activities on a weekly basis or as otherwise determined;
- (xxv) not to have or attempt to have any direct or indirect contact with a victim of his sexual offences including their spouses, their children, or other immediate family members;
- (xxvi) not visit premises licenced to supply or serve alcohol, without the prior written permission of the supervising Corrective Services officer;
- (xxvii) participate in alcohol and drug counselling or substance abuse programs as directed by the supervising Corrective Services officer; and
- (xxviii) comply with a curfew or monitoring direction.