

# SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Bragg* [2009] QSC 9

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**  
(applicant)  
**v**  
**JOHN ROBERT BRAGG**  
(respondent)

FILE NO/S: BS 8983 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 January 2009

DELIVERED AT: Brisbane

HEARING DATE: 21 January 2009

JUDGE: Applegarth J

ORDER: **A supervision order be made in terms of the order made on 1 March 2007, as amended by the order of Justice Douglas made on 27 March 2008.**

CATCHWORDS: CRIMINAL LAW – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – OTHER MATTERS – where the respondent was subject to a supervision order under the Dangerous Prisoners (Sexual Offenders) Act 2003 – where the respondent breached that order on two occasions by consuming cannabis – where expert opinion did not conclude that the two occasions increased the risk of sexual re-offending – where possible future escalation of cannabis use may increase risk of re-offending – whether the order should be amended – whether adequate protection of the community can be ensured by the existing order.

*Dangerous Prisoners (Sexual Offenders) Act 2003, s 22(2), s 22(7)*

*Attorney-General for the State of Queensland v Toms* [2008] QSC 131, applied

COUNSEL:	B Mumford for the applicant	1
	The respondent appeared in person	
SOLICITORS:	Crown Solicitor for the applicant	
	The applicant appeared in person	
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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

APPLEGARTH J

No BS8983 of 2006

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

Applicant

and

JOHN ROBERT BRAGG

Respondent

BRISBANE

..DATE 21/01/2009

ORDER

HIS HONOUR: This is an application by the Attorney-General pursuant to s 22 of the Dangerous Prisoner's (Sexual Offenders) Act 2003, (the Act) based upon contraventions of a supervision order made on 1 March 2007, as amended by an order made by Douglas J on 27 March 2008. There is no dispute that two contraventions occurred though the smoking of small amounts of cannabis in March and November 2008.

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The particulars of the contraventions are:

1. On 13 March 2008 the respondent provided a urine sample which tested positive for cannabinoids and was in breach of clause (xx) of the order of Byrne J by not abstaining from the use of illicit drugs during the duration of the order which was in force until 30 March 2017.

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2. On 12 November 2007 the respondent provided a urine sample which gave a preliminary positive result for cannabinoids.

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3. On 19 November 2008 it was confirmed that the sample supplied on 12 November 2008 was positive for cannabinoids. The respondent thereby was in breach of clause (xx) of the order of Justice Byrne by not abstaining from the use of illicit drugs during the duration of the order which was in force until 30 March 2017.

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Under s 22(2) of the Act unless the respondent satisfies me on the balance of probabilities that the adequate protection of the community can, despite the contravention, be ensured by

the existing order as amended under s 22(7), I must rescind the supervision order and make a continuing detention order.

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Under s 22(7) if the respondent satisfies me on the balance of probabilities that the adequate protection of the community can, despite the contravention, be ensured by a supervision order I must make an order to include certain terms. Those terms already exist. I may amend the existing order in a way that I consider appropriate to ensure adequate protection of the community or for the prisoner's rehabilitation or care or treatment.

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The essential issue on today's hearing is whether I am satisfied on the balance of probabilities that the adequate protection of the community can be ensured by the making of a further order in terms of the existing supervision order.

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By way of background, on 1 March 2007 Byrne J ordered that the respondent be released from custody on a supervision order which was to expire on 30 March 2017. Condition (xx) of that order required the respondent to abstain from illicit drugs for the duration of the order. The respondent was released from custody on 30 March 2007. On the 13th of March 2008 he provided a urine sample, which as I've indicated, was indicative of his having taken cannabis.

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The respondent explained that he used cannabis once. It was offered to him by someone who told him that he looked stressed, and he accepted it. His evidence is that it was not

planned and it was a one-off incident.

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In his oral evidence today he described it as a spur of the moment thing, that he did not think about the consequences, although had he thought about them he would have appreciated that he was at risk of even that small amount of cannabis being detected as it, in fact, was.

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On 20 March 2008 the respondent was arrested pursuant to a warrant issued in respect of that positive drug test. He admitted to using cannabis. He was charged with breaching a condition of his supervision order and he was remanded in custody. On 26 March 2008 he pleaded guilty in the Ipswich Magistrates Court to a breach of s 43B of the Act and was sentenced to two months' imprisonment wholly suspended for 12 months.

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On 27 March 2008 Douglas J ordered that the respondent be released from custody. A supervision order was amended to include requirements that the respondent submit to a curfew and have electronic monitoring as directed, and that he submit to and discuss with an authorised corrective services officer a schedule of his planned and proposed activities on a weekly basis or as otherwise directed. There were directions for the conduct of a contravention hearing.

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As matters developed there were some conflicts involving the rigours of the curfew and the requirements of the order. The

respondent's position is that certain requirements caused difficulty for him in the conduct of the business that he operates and restricted his having any social life outside of his work.

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He has described in his evidence today the very difficult circumstances in which he found himself, after March 2008, being subject to a breach order, and that breach order attracted adverse publicity which falsely and harmfully described him as a paedophile. That unjustifiable defamation of him led to deterioration in his business which up to that time had employed five contract welders. People refused to deal with him.

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He sought some relief by riding his motorbike, however on one occasion he fractured his leg when his bike ran over a piece of wood. He suffered as a result. The fracture did not mend and he could not enjoy even the recreational activity of riding a motorbike.

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A combination of circumstances led to him being severely depressed, but despite being in this severely depressed position he managed to comply with the orders. He managed to maintain a business. He did so despite these difficulties, the curfew and the consequences of his injury to his leg.

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On one occasion in early November 2008 he was running late and returning from a business commitment when he committed a speeding offence. That led to the loss of his licence. He

was speeding because he wanted to comply with his curfew.

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Despite the difficulties that he described occurring to him in the middle and later part of 2008, the only breach of the supervision order was the consumption of cannabis on an occasion in late 2008 when it was supplied to him by a former business associate. Unsurprisingly, due to the frequency of urine testing, his taking of that illicit drug was detected in a test on 19 November 2008.

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The respondent must have appreciated that that would be the case. As he described in his evidence today, it was a stupid thing to have done. It was done, in his words, almost on purpose in order to bring matters to a head and to bring the matter back into Court. On reflection he accepts it was a stupid thing to do, but that was the thinking behind what he describes as a self-destructive act.

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The consumption of cannabis both in March and November 2008 fortunately did not lead to any more serious situation by way of re-offending, apart from the drug offences themselves and the breach of the supervision order.

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On 19 November the respondent was arrested pursuant to a warrant that was issued as a consequence of the positive drug test. On 20 November Lyons J ordered that he be detained in custody pending a final determination of the application under s 22. The respondent has been in custody since, and he will face another Court for the consequences of his breach of the

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supervision order by taking cannabis in November 2008.

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It is fairly acknowledged in the submissions made by counsel for the Attorney-General that the breaches did not lead to re-offending. It is also accepted in those submissions that the respondent has not otherwise re-offended.

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It is not submitted that the breaches materially alter the risk assessments that were undertaken by Court-appointed experts, Dr Lawrence and Dr Moyle, and which formed the basis for the supervision order originally made by Byrne J and amended by Douglas J.

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The reports to which I will turn do not suggest that the breaches indicate that the respondent is more likely to commit sexual offences. Instead they highlight a risk that if matters are not appropriately dealt with that there is a risk that increased use of cannabis may have deleterious effects and it is to that risk that I must direct my attention.

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In dealing with this application I accept that the application does not involve any aspect of punishment for breach. That is made clear in the submissions on behalf of the Attorney-General. The respondent has already paid a significant price for his admitted breaches of the supervision order in being detained, as I already have explained, over the last few months with obvious consequences for his business. He faces further consequences by other Courts for the offence which will be constituted by that breach, and he also faces

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the fact that the commission of an offence during the period of the suspension of the earlier sentence may have consequences for him.

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I need to consider whether the applicant has satisfied the onus upon him and if he has not satisfied that onus, the implications are, as I have stated, that the supervision order will be rescinded and he will be subjected to a continuing detention order. If I had reached that conclusion, it would have been necessary for me to consider whether such a continuing detention order would be punitive and inconsistent with the objectives of the Act. However, I am not persuaded that I should accede to the application so as to rescind the existing supervision order.

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The conclusion which I have reached is that the respondent has satisfied the task of persuasion imposed upon him under s 22(7) and that the adequate protection of the community can, despite his contraventions, be ensured by the making of a further supervision order. I will explain my reasons for that.

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It is important to place the two contraventions in their proper legal and factual context. The breaches do not in themselves demonstrate that a supervision order would not provide adequate protection of the community.

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The submission is made on behalf of the Attorney-General that an important consideration is that the respondent swore in an

affidavit in March that his use of cannabis was a one-off incident which would not be repeated, and that he swore that he would abide by the condition to abstain from using illicit drugs. The submission is made that any similar assurance given by the respondent in these proceedings should be viewed with some scepticism.

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I accept that submission and I do not simply accept the well-intentioned assurances of the respondent that he has learnt his lesson and will not be so foolish as to consume cannabis again.

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It is not the case that the respondent has to assure me that there is no risk that he will breach a supervision order. That is fairly accepted by Mr Mumford of counsel on behalf of the Attorney-General. However, as the medical evidence makes clear, the likelihood of further breaches is relevant in assessing whether adequate protection of the community can be given by a supervision order. The consumption of cannabis with any great frequency or in any great amount carries the very real risk of a substantial escalation in the risk of re-offending.

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The issue is not whether there can be a guarantee by the respondent that he will not breach the supervision order again. The issue is whether a supervision order with appropriate terms provides adequate protection of the community. If the respondent was to breach any such order by smoking cannabis on another occasion then the consequences for him may be severe.

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I turn to consider the medical evidence. Dr Lawrence provided a report dated 24 June 2008 following an interview with the respondent on 3 June 2008. At that time Dr Lawrence considered that the positive cannabis result in mid March 2008 appeared as an isolated event. Dr Lawrence addressed the respondent's personal circumstances and his compliance with the order, his attendance at a sexual offender maintenance program and matters arising out of her interview with him. Importantly those matters related to complaints which the respondent had about the conditions of his release and the circumstances under which he took medication. Dr Lawrence reported the respondent's business involved frequently moving around on a daily basis and that the respondent had practical problems complying with orders that required him to ring the authorities many times a day detailing where he was going.

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Dr Lawrence also had regard to intervening events including the adverse publicity and loss of business that was caused to the respondent. Dr Lawrence addressed the circumstances of the breach. The respondent said that he was with some people who were smoking marijuana and that he took his focus off the "big picture and had a smoke". He did so in March 2008 because he was, "just feeling flogged. People were coming to the house, talking to the neighbours, announcing themselves loudly (which the neighbours told me had happened)". In essence, his explanation to Dr Lawrence was that he took marijuana as a one-off incident in March 2008 because of the circumstances which developed as a result of

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pressures of work and difficulties that he had in complying with the orders. Dr Lawrence's evidence about intervening events relates to matters which occurred both before and after the March 2008 consumption.

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Dr Lawrence's consideration of matters at that time was that in the 12 to 15 months after the respondent's release he had been able to utilise his skills and abilities to establish self-employment and that he had achieved a considerable sense of self-esteem in the process. This included being able to obtain finance and expand his business.

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Dr Lawrence expressed concern in paragraph 16.5 of her report that although the respondent accepted responsibility for his conduct in his responses, he went on to attribute his lapse to the stress and strain of the supervisory conditions.

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Importantly, Dr Lawrence said at paragraph 16.6, "The significance of this one breach is that, were he to continue his use of marijuana, his use is likely to escalate rapidly, with disinhibition of his hostility and sexual drive and increased risk of re-offending sexually".

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Dr Lawrence referred to the respondent's dissatisfaction with wearing an electronic monitor and his dissatisfaction with a range of other matters associated with his supervisory process. In Dr Lawrence's opinion that reflected the nature of the respondent's personality difficulties. Dr Lawrence anticipated in her report of 24 June 2008 that the

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respondent's frustrations would continue, and concluded, "It seems that Mr Bragg would only be satisfied if all restrictions could be lifted so as to allow him freedom to act in a way which he thinks is warranted". Dr Lawrence's opinions were prescient and well made. So much appears from the subsequent course of events.

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Dr Lawrence's further report of 16 January 2009 was not based upon a further interview but was based upon materials placed before her. It addresses the cessation of the clinical relationship between the respondent and Dr Arthur, the respondent's physical health including the difficulties that arose out of his leg fracture, the ineffective treatment which he received for that injury and his need to take drugs for the pain and suffering that he experienced because of that incident.

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Dr Lawrence also referred to the respondent experiencing very considerable frustration at the restrictions of his supervision order throughout the period. The record shows his considerable frustration after making various requests for a relaxation of the curfew to improve his business and to provide him with some greater social life. In October 2008 he effectively demanded that these curfew conditions be altered.

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As I have mentioned, the November breach appears to have occurred at about the time that the respondent was attempting to expand his business and was caught speeding back from a job

in Gympie which led to the loss of his licence. Those matters are closely related in time to the November 2008 breach.

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Dr Lawrence's opinion was that the further information to which she had regard was indicative of ongoing expressions of the respondent's narcissistic personality disorder. His behaviour at times is said by Dr Lawrence to display "an arrogance and entitlement which he is apparently unable to conceal, usually under the added stress of increasing frustration of his desires."

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Dr Lawrence stated at paragraph 12.2, "Whilst he appears to be making efforts to comply with the Supervision Orders there is no doubt that he is experiencing very considerable frustration and anger in the process with periodic outbursts expressing that frustration both verbally and behaviourally. In my opinion the use of cannabis is an expression of that rebellion against the supervisory orders and the expression of his frustration and anger".

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Dr Lawrence adhered to her previous opinion that the risk of re-offending comes not from one episode of cannabis consumption. According to Dr Lawrence, the risk is that, "unless curtailed, such consumption of an illicit drug would escalate and lead to increasing disinhibiting behaviour leading to further inappropriate expression of other impulses also frustrated at the present time."

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Dr Lawrence concluded at paragraph 12.4 that the respondent

"is capable of controlling his behaviour as evidenced by the significant periods of compliance with his Order but it is clear that at times his ability to control his frustration and anger dissolves leading to a breach of his Order. The more restrictive the conditions, the greater the frustration and the more likely the use of an illicit disinhibiting drug. Any escalation of those breaches would increase the risk of reoffending".

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Dr Lawrence stated in her opinion that were these breaches to be overlooked, the respondent would be likely to interpret them as a licence to continue, with the likelihood that the behaviours and breaches would escalate with escalating risk of reoffending.

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A report that arose as a result of an interview on 27 May 2008 with Dr Moyle provides an insightful account of the respondent's condition and a comprehensive survey of material. It is not materially different in its assessment to that of Dr Lawrence. Relevantly Dr Moyle found that in the previous year the respondent had been more settled and that he had been forced to contain and control the worst excesses of his behaviour due to almost constant supervision. Dr Moyle was prepared to reduce somewhat his assessment of the risk posed by the respondent.

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Importantly for present purposes at page 6 of that report Dr Moyle said, after conducting clinical and risk management assessments, that he would probably lower the risk to a moderate level. Dr Moyle said, "I am concerned that he has

lapsed into drug abuse and continues to minimise in his own mind at times the potential effect of the use of marijuana and alcohol. It does strike me that this man wishes he has the freedom to enjoy an occasional drink and an occasional use of marijuana without realising the dangers the latter, at least, brought to him in the past. Alcohol is a very destabilising factor. I still think he displays attitudes that are worrying in his behaviours to new, young Correctional Officers who are female. I think he needs to address over time and come to terms with his behaving towards others in a similar way to his father, and others in his background, and maybe if he experiments with behaving a little differently he may find he feels better about himself".

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The upshot of Dr Moyle's report was that it was appropriate that the respondent should be subjected to a supervision order, and those in charge of it should remain diligent in performing their tasks in respect of it.

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Dr Moyle's second report received on the 7th of January 2009 contains a helpful summary of the case file including what must be said to be aspects of positive dealings with the authorities and progress in various aspects. It also identifies circumstances in which the respondent had come into conflict with those who supervised his order, and experienced and expressed frustration of the kind that Dr Lawrence reported.

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In his most recent report Dr Moyle said, "Overall I would not

see a need to change my prior advice. I see this arrest [as] a sign that restrictions are enforced putting the brakes on escalating levels of emotionality and discontrol hopefully lowering risk. I know of no literature that marijuana use, absent these other factors and personality attributes, generally increases the risk a person will become a sexually abusive individual. I have attempted a medicine search using sexual offending and descriptors with no helpful findings".

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The medical evidence, the other material relied upon by the Attorney-General and the oral evidence given today indicates that there has been and will be, if a further supervision order is made, potential for conflict between the respondent and those who supervise his orders.

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That is due to the applicant's personality and his ambitions. Aspects of his personality do not easily enable him to accept restrictions which he thinks are unfair or inhibiting his rehabilitation or the proper conduct and expansion of his business.

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The medical reports are insightful in that regard. They do not provide any guarantee that the respondent will not breach a further order, but nor do they suggest that the making of a further supervision order will provide inadequate protection or that the circumstances are such that the two breaches, or the matters that underlie them, lead to any greater risk of re-offending.

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On the contrary, neither doctor suggests that the risk profile

has been increased by recent events or that the two breaches, in themselves, suggest a heightened risk. Instead, they provide a timely warning that any further breaches and any escalation in those breaches will increase the risk of offending.

The issue for me is not precisely whether or not the respondent will breach any further supervision order. The issue is whether on all the evidence I am persuaded on the balance of probabilities that the adequate protection of the community can be served by a further order and, in particular, by a further order in terms of the existing order. I am persuaded that that is the case.

As concerning as the two breaches are, they did not lead to re-offending. Two breaches are far worse than one. That said, the two breaches were isolated in their nature, and it was fairly acknowledged by counsel for the Attorney-General in his submission that the two breaches were over a period approaching two years.

This is not a case in which an individual who is subject to a supervision order leads a sedentary life and is content to remain at home. The supervision orders and the guidance of people who administer them, along with the respondent's own motivation and efforts, have enabled him to lead a productive life and to start his own business.

His understandable, but, to some extent, worrying desire to be

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free of restrictions and curfews has brought him into conflict  
with the authorities. His desire to be able to be more free  
to conduct his business without predicting where he will be  
has been the cause of frustration. His desire to do more than  
10 simply work, then go home and be under a curfew between 6 p.m.  
and 6 a.m. is a source of frustration. But until there is a  
basis for an application for a supervision order to be amended  
this is the situation with which the respondent must deal. I  
take the view, in conformity with what Dr Lawrence said, that  
20 any further supervision order should not at this point  
ameliorate or alter the restrictions which the respondent  
finds frustrating. It is for the respondent to observe those  
requirements with all of their rigours and frustrations and  
to, in the first instance, request appropriate relaxation of  
30 curfews and other matters once he has demonstrated that that  
is an appropriate course. If he cannot persuade the  
authorities that such relaxation is appropriate, then he may  
bring an appropriate application.

In conformity with what Dr Lawrence says I would not be  
40 inclined to make any adjustment to the supervision orders  
which acceded to the respondent's concerns. It is important  
that the respondent comply with the existing orders and that  
he not perceive that breaching the orders in the manner that  
he has somehow brings about a relaxation in those orders.  
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In the evidence which he gave today, the respondent said  
that the last few months that he has had in prison has given

him time to reflect on his situation and that regaining his life is more important to him than a few puffs of marijuana. I accept his evidence. The breaches themselves give rise to a risk of re-offending or re-offending behaviour. Although the respondent has a challenging personality and, by his own admission, in the past has engaged in somewhat rebellious behaviour with a view to pushing back the curfew, he realises the consequences of that behaviour and will attempt to alter his ways.

He has a confidence that those who are presently charged with dealing with supervision orders are more understanding of the situation than other officers. Whether that's the case or not is not for me to say, but his indication of a preparedness to be more cooperative with officers whom he trusts gives some cause for confidence that he will not breach his order again.

The respondent impressed me in his oral evidence, both with the sincerity with which the evidence was given, and the insights that he gave about the situation in which he finds himself. The period in custody has enabled him to reflect on the consequences of using marijuana.

I consider that the respondent's successful rehabilitation and reintegration into the community is best served by the continuation of a supervision order. The rescission of the existing order and his return to custody would have a number of adverse effects upon the respondent and his business. These effects on the respondent's rehabilitation would

adversely affect the public interest if he was to be granted a further supervision order at a later review.

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It is unfortunate, but perhaps inevitable, that despite the respondent's best intentions, he will test the limits of the order and seek some adjustment of it. I do not make any prediction that his dealings with the authorities under a new supervision order will be free of difficulty. However, I consider that the making of a supervision order in the same terms as the existing order will provide adequate protection. That is because the respondent will be subjected to routine and frequent drug testing and, if contrary to his assurances, he does take marijuana, that will be detected. He will be apprehended and he will face severe consequences of which he indicates he is aware. It will, in short, be a case of three strikes, and he will be before the court upon the detection of any further cannabis use.

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I adopt, with respect, what was said by Martin J in Attorney-General for the State of Queensland v Toms [2008] QSC 131 at [29]; namely, that it is important always to bear in mind:

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(a) that the test laid down by Parliament is whether adequate protection of the community can be ensured by the existing order; and

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(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.

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I consider on the basis of the evidence, in particular, the medical evidence to which I have referred and the absence of any suggestion that the two breaches to which I have had regard indicate an increased risk of sexual reoffending, that the respondent has discharged the onus under s 22(2).

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Accordingly, I do not accede to the application that the respondent be returned to custody as the result of rescission of the supervision order.

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The respondent has satisfied me on the balance of probabilities that the adequate protection of the community can, despite his contraventions, be ensured by a supervision order.

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I have considered whether the existing order should be amended in any further respects. The Attorney-General does not seek further, more stringent orders. That is an appropriate position to take. The respondent has not sought today to amend those orders to, in effect, provide a relaxation of the curfew, reporting and other conditions. He will be subjected to conditions that include the conditions which Byrne J originally ordered. He will be subjected to monitoring and, in those circumstances, I do not consider that there is an unacceptable threat of degeneration into heavy marijuana use and a heightened risk of re-offending.

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In the circumstances I deal with the application as I have

indicated, by making an order that a supervision order be made in terms of the order made on 1 March 2007 as amended by the order of Justice Douglas made on 27 March 2008.

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Are there any other matters that need to be addressed?

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MR MUMFORD: No, there are no other matters, your Honour.

HIS HONOUR: I take it then that Mr Bragg remains in custody by virtue of the other orders that arise as a consequence of his breach?

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MR MUMFORD: Yes, he does.

HIS HONOUR: So I don't need to make any further orders in relation to his custody?

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MR MUMFORD: No.

HIS HONOUR: Mr Bragg, is there anything else I need to deal with today?

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RESPONDENT: No, your Honour.

HIS HONOUR: Thank you.

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