SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v SBD* [2010] QSC 104
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **SBD** (respondent)
FILE NO/S:	SC No 685 of 2010
DIVISION:	Supreme Court
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2010
JUDGE:	P Lyons J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS - ORDERS AND DECLARATIONS RELATING TO VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – REGISTRATION, REPORTING AND LIKE MATTERS – where the applicant seeks an order under s 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) for the appointment of two psychiatrists to examine the respondent and related orders - whether there are reasonable grounds for believing that the respondent is a serious danger to the community absent an order made under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 – whether trading in images of child pornography is a serious sexual offence for the purposes of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 *Child Protection (Offender Reporting) Act* 2004 (Qld), s16 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 3, s 5, s 8, s 11, s 13 *Attorney-General v Fardon* [2003] QSC 331, cited

George v Rockett (1990) 170 CLR 104; [1990] HCA 26, cited
R v Finch ex-parte A-G (Qld) [2006] QCA 60, applied
R v Jones (1999) 108 A Crim R 50; [1999] WASCA 24, cited

COUNSEL: M Maloney for the applicant
S Ryan for the defendant

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the defendant

[1] The applicant seeks an order under s 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (*DPSOA*) for the appointment of two psychiatrists to examine the respondent, and related orders. The application gives rise to a preliminary question, namely, whether there are reasonable grounds for believing that the respondent is a serious danger to the community absent an order made under Division 3 of the DPSOA. Before considering s 8 in detail, and determining this preliminary issue, it is necessary to say something more about the respondent's personal circumstances and history.

Background

[2] The respondent is 49 years of age. He was born in Victoria.

[3] He gives a history of having been abandoned by his natural father when he was one year old. He was raised by foster parents. He says that he was sexually abused as a child. He left school at about age 13, and worked for K-mart from age 14 to age 25, working up from trolley boy to trainee manager.

[4] He then moved to Queensland, where he played football under a contract with an Australian Football League semi-professional team for about two years.

[5] In about 1988, the respondent was sentenced to a term of imprisonment. The offences for which he was sentenced are discussed later, as part of the respondent's criminal history. However, upon his release from prison, the respondent worked as an industrial cleaner, and subsequently conducted his own cleaning business for a number of years. He lost his cleaning contract when the most recent charges became known, and then did some casual cleaning and some work chopping firewood.

[6] The respondent has a criminal history which dates back to his teenage years. It appears that he was then charged with offences related to housebreaking and stealing, though it is not clear that the proceedings were brought to a conclusion.

[7] His history of sexual offending commenced with a conviction on 1 November 1978 of four counts of carnal knowledge of a girl between 10 and 16 years of age. He was then convicted on 1 June 1979 of two counts of carnal knowledge of another girl between 10 and 16 years of age. In each case, the girl was a girlfriend at the time. There was no suggestion that any of the offences was committed without the consent in fact of the girl. The respondent has had a long term relationship with the girl associated with the convictions of 1 November 1978, the relationship lasting for about 21 years. They were married for most of that time, and have three children. It appears that she informed the respondent last year that she wishes to divorce him, a position which he appears to understand well, because of the difficulties he

acknowledges he has caused in her life; and he expects that their relationship will nevertheless continue to be amicable.

[8] It is of some relevance that, in the period from 1984 to 1986, the respondent was convicted on some four occasions of driving a motor vehicle while under the influence of liquor.

[9] In 1988, the respondent was convicted of two counts of rape and one count of indecent assault on a female, all of the offences having been committed on 1 May 1987. The respondent refers to these offences as a "football club gang bang". Three other members of the football club were charged in relation to the incident, but were acquitted. It was submitted on behalf of the respondent that his conviction was a consequence of his admissions, the complainant's evidence indicating that she was significantly affected by alcohol and cannabis, and that she had problems with her memory of the events. It seems clear that the respondent had been drinking alcohol for some time prior to the offences.

[10] The respondent subsequently addressed issues relating to his consumption of alcohol. He attended meetings of Alcoholics Anonymous. There is no suggestion that he has engaged in alcohol-related offending for many years.

[11] The respondent is at present in custody as a result of his conviction of offences committed in the latter part of 2004 and the first half of 2005. Those offences were indecent treatment of a child under 16; the possession of child exploitation material; and the distribution of child exploitation material. On 18 June 2007, the respondent was sentenced for the first offence, to a term of imprisonment of 2 years; for the second, to a term of imprisonment of 18 months, and for the third, to a term of imprisonment of 3 years, all to be served concurrently; with a parole eligibility date of 18 December 2007. However, he remains in custody.

[12] The first offence is that of taking a photograph of one of his children (previously referred to).[1] That was a photograph of her, naked, in the bathroom and covered with soap suds. At his sentence, reference was made to another photograph of his daughter, again naked, in the bath, but that was not the subject of the charge. The daughter was not posing in a sexual way, and the respondent says that the photographs were taken, not for purposes related to sexual gratification, but with a view to embarrassing her on her 18th birthday. His wife had objected to the taking of the photograph, but it seems to have been accepted by the prosecutor at the sentencing that the objection was not because of any suspicion of sexual interest by the respondent in his daughter.

[13] The charge relating to the possession of child exploitation material was based on the fact that the respondent had a number (at one time said to be 47, but elsewhere said to be 60) of images of child pornography, which he had stored on compact disc. The charge concerning the distribution of child exploitation material related to his provision of similar material over the internet.

[14] Over a period of time, the respondent had engaged in "cyber-sex" with two women. He also had an interest in bestiality. The respondent used child pornographic material both to sustain his contact with these two women, and to obtain

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1 The indictment referred to a single photograph. The prosecutor's submissions at the sentencing hearing referred to two photographs.

pornographic material relating to bestiality. In the submissions, the child pornographic material was described as "currency" used by the respondent for these purposes.

[15] In the course of his internet contact with the two women, and to maintain it, the respondent described abuse of his children. It was submitted by his Counsel that a fair reading of the transcripts indicated that it was primarily one of the women who commenced this line of discussion, and that the respondent used it as a springboard for the discussion of sexual activity involving the woman, his real interest being in that, rather than in any sexual activity with his children. The respondent had said of his descriptions of such activity, that they were "fantasy". His Counsel pointed out that his children, when interviewed by the police, spoke fondly of him and made no allegation of sexual abuse. His wife provided a statement, apparently for the sentencing proceedings, which described the respondent as a good father and said he was not a paedophile.

[16] The respondent was interviewed by police officers in relation to these charges on 1 July 2005. He participated in recorded interviews, the transcripts of which took up 66 pages. They contain a number of admissions.

[17] On 5 July 2005 the respondent voluntarily attended at a police station and participated in a short interview, in the course of which he made some further admissions. Later that day, the respondent was arrested, and released.

[18] The following day the respondent telephoned one of the police officers who had interviewed him, apparently crying, and asking for the names of counsellors. He also volunteered information about additional pornography on his hard drive, which he had previously forgotten to mention.

[19] The respondent subsequently attended counselling sessions with the Men's Information and Support Association Inc and worked with the Department of Child Safety on a voluntary basis to address the concerns resulting from the events which gave rise to the charges.

[20] The respondent pleaded guilty to the charges. He was sentenced on 18 June 2007, almost two years after his initial arrest.

[21] He says that he did not use the internet in that two year period, which is supported by the statement of his wife to which I have previously referred. There has been no suggestion the statement is untrue.

[22] A report from a psychologist, Mr Peter Jordan, was prepared for the sentencing. Mr Jordan considered that the respondent had "features of borderline personality disorder particularly in the area of identity problems and impulse control". His early childhood experiences made it likely that he lacked the ability to empathise with others, though Mr Jordan considered that that ability could be developed through intervention. By the time of the report, Mr Jordan thought that that had occurred to some extent; and he thought that the respondent would respond well to further treatment. Mr Jordan noted that paedophiles typically deny their involvement in offences, or deny their level of responsibility in such offences; this was not the case with the respondent, who fully acknowledged his involvement.

The respondent was also able to state why the offences were wrong, which Mr Jordan described as not typical of paedophile behaviour.

[23] In the latter part of 2007, a psychologist, Ms Ashley Phelan, carried out some assessments of the respondent. One was a STATIC-99 assessment. It is said to be designed to assist in the prediction of sexual and violent recidivism for sexual offenders, the estimates being "group estimates based upon reconvictions". It was said in Ms Phelan's report that "these estimates do not directly correspond to the recidivism risk of an individual offender." The result of this assessment was that the respondent was considered to be in the High Risk category.

[24] The other assessment was the STABLE-2000, said not be an assessment of the risk of sexual recidivism, but of the need for intervention. That assessment resulted in a determination that the respondent had high intervention needs in relation to his sexual offending behaviour. Ms Phelan recommended that the respondent undertake the Getting Started: Preparatory Programme ("GSPP"), prior to considering his suitability to undertake the Crossroads: High Intensity Sexual Offending Programme ("HISOP").

[25] Between April and June 2008 the respondent underwent the GSPP. The report prepared at the conclusion of this programme describes the respondent's participation in a rather positive light. For example, it includes the following:

> "(The respondent) openly acknowledges his offending behaviour and takes responsibility for his offences. (The respondent) is a supportive group member, and provides positive feedback, questions, and opens discussions when in group. He participates in every group and does not need to be prompted to provide feedback or discussion. He bonded well with all members and is a respectful and courteous participant. (The respondent) stated that he is optimistic and anticipating the next programme."

[26] The report recommended that the respondent participate in the HISOP programme.

[27] The HISOP programme in which the respondent participated was conducted between November 2008 and August 2009. The report prepared on the completion of the programme also described his participation in positive terms. Its conclusion included the following:

> "Throughout the programme (the respondent) identified and targeted beliefs enabling him to sexually offend against the victim and developed appropriate counter-beliefs which he will need to continue to develop and reinforce upon his release in the community. Additionally his management of high risk factors and support network would be suitably supported by a referral to a Sexual Offending Maintenance Programme in the community. Overall (the respondent) met the programme objectives to a satisfactory standard and was able to apply programme concepts to his own situation. Continued implementation and refinement of these strategies should assist him to make any necessary lifestyle changes to remain offence free."

Dr Sundin's report

[28] Dr Sundin, a psychiatrist, interviewed the respondent for two and a half hours on 4 June 2009.

[29] In her principal report, Dr Sundin refers to a Pre-Sex Offending Programme Assessment of 3 October 2008. She noted inconsistencies in his answers, particularly in relation to pornography, including pornography involving children. She considered that the responses were consistent with the observation of Mr Jordan that the respondent has a borderline personality structure. However, she recorded elsewhere in her report that the stability of his relationship with his wife over many years suggests that he is capable of a degree of stable interpersonal relationships.

[30] Dr Sundin noted the results of the STATIC-99 assessment and the STABLE-2000 assessment. She noted that his participation in the GSPP included disclosure which was open and honest, and that he was considered to have a basic understanding of empathy. She also noted matters relating to his early history, his previous problems with alcohol, and his previous sexual offending.

[31] Her report records that during his time in prison he has remained breach free, and had completed courses in prison on literacy, numeracy and general workplace safety. She also noted that the Southern Queensland Regional Parole Board on 18 August 2008 (prior to the commencement of the HISOP) had considered a relapse prevention plan to lack foresight and to be unrealistic. She also noted the views of the Board expressed on 4 February 2009 that completion of the HISOP would give the respondent "the skills and tools to identify risk factors and triggers for his offending behaviour and develop a comprehensive relapse prevention plan".

[32] Consistently with his interviews with the police in 2005, the respondent told Dr Sundin that his provision of photographs of his children over the internet to other persons, and his discussion relating to an incestuous relationship with his daughter, were for the purpose of his interest in bestiality, and for sexual interest contact with other adult women. He recognised that his conduct was wrong.

[33] Dr Sundin considered that the respondent had lied to her in the course of the interview. She considered that he sought to minimise the seriousness of the 2005 offences, in part by reference to the sentences imposed. Dr Sundin considered that the collection and dissemination of sexually explicit child pornography, combined with engaging in sexually explicit fantasies regarding his daughter, was sufficient to attract the diagnosis of paedophilia, even in the face of the respondent's claim that he had no interest in such material. She did not regard his claims of simple or transient curiosity with regard to child pornography to be credible, though she did accept that the respondent had not acted on the sexual fantasies with regard to his children. She considered that his statement, that he realised only with the arrival of the police that his activities were illegal, to be fatuous; and that his efforts to keep these matters secret suggested a person aware that he was involved in prohibited activities.

[34] Dr Sundin assessed the respondent by the use of a number of "actuarial instruments" which are statistically derived. She noted that they had to be applied with a degree of caution at the individual level "given that they are derived from North American prison populations rather than Australian studies". She specifically

noted that these assessments were "somewhat skewed by his early carnal knowledge convictions in Victoria".

[35] Dr Sundin also noted that while alcohol had been a major problem for the respondent in the past, it did not appear to have been an issue in recent times, though she thought it might "re-flare if he decompensates".

[36] Her conclusion in her principal report is apparent from the following:

> "Taking all these factors together, I consider his potential future risk of sexual recidivism is moderate. If he were to re-offend it seems likely that it would involve a person known to him or he may be unable to resist his paraphilic drives and once again become absorbed in trading child pornographic images for scenes of bestiality. It is unlikely that he would directly attack a stranger."

[37] Dr Sundin explained in her oral evidence that paraphilia was an "umbrella term" which would include bestiality and paedophilia. She concluded her report by recommending that consideration be given to the respondent's release subject to a supervision order aimed at reducing the risk of re-offending behaviour by the respondent. She recommended a variety of forms of assistance, including assistance with continued abstinence from alcohol, and limitations of access to the internet.

[38] Dr Sundin was subsequently provided with a report prepared on the respondent's completion of the HISOP. She noted that the facilitators were "generally very satisfied" with the respondent's progress, and his achievements in that course. She then stated that in light of the report, she was "comfortable" in continuing her recommendation that the respondent was capable of management in the community under the provisions of a supervision order that would ensure his access to the internet is limited and supervised, that required him to abstain from alcohol, that required him to attend a sexual offenders maintenance programme, and that required him to continue in individual therapy.

[39] In her oral evidence, Dr Sundin confirmed that, even with the favourable report of the respondent's participation in the HISOP, she maintained her assessment of the risk of recidivism as moderate. However, she stated that participation in such a program is considered to lower the risk of recidivism for all offenders. She also noted that that term "moderate" covered quite a broad range. Asked whether her assessment would be affected if it were true that the respondent had not made use of the internet between his detection in mid 2005 and his sentence in June 2007, she said that would reduce her assessment to the lower end of the moderate range. It was apparent from her oral evidence that her concerns about the risk of any future offence involving paedophilia were in part based on statistical studies relating to people who download child pornography, and statistical studies of persons who have "elements of sexual sadism". Her inclusion of the respondent in the latter category seems to be associated, not with the enjoyment by him of a victim's physical pain, but because of his interest in bestiality, which Dr Sundin referred to as sexually degrading, and involving the humiliation of women.

Section 8 DPSOA

[40] Section 8 includes the following:

> **8 Preliminary hearing**
>
> (1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.

[41] The section also confers powers to make related orders, including for an examination of the prisoner by psychiatrists.

[42] It is useful to place s 8 in its context within the DPSOA. I commence with a reference to the objects of that Act:

> "**3 Objects of this Act**
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> 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."

[43] Section 8 appears within Part 2 of the Act, dealing with continuing detention or supervision. The first step in the proceedings envisaged by Part 2 is an application for orders authorised by s 8. The terms of s 8 make it necessary to have some appreciation of the nature of a Division 3 order, and some related provisions. A Division 3 order is either an order that a prisoner be detained in custody for an indefinite term for control, care or treatment (referred to as a *continuing detention order*); or an order that a prisoner be released from custody subject to requirements considered appropriate and stated within the order (referred to as a *supervision order*).

[44] An important aspect of the considerations raised by s 8 is whether there are reasonable grounds for believing that the person is question is "a serious danger to the community in the absence of a division 3 order". The expression "serious danger to the community" is defined in the Schedule to the DPSOA by reference to s 13(1), where reference is made to a person being such a danger "in the absence of a division 3 order". Section 13(2) then explains the expression in the following terms:

> "(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."

[45] Section 13(4) then provides:

> "(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—
>
> (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."

[46] It will be apparent that at least one of the matters mentioned in s 13(4) can have no application in determining the question relating to whether a person is a serious danger to the community in the absence of a Division 3 order, under s 8. I refer to reports prepared under s 11, which can only occur after a determination is made under s 8. Otherwise, a consideration of the language of the provisions I have mentioned rather strongly points to the conclusion that s 13 identifies the matters to be considered in determining the issue raised by s 8.

[47] That conclusion is supported by the general structure of the legislation. An application for orders under s 8 is the prelude to an application for orders under s 13. The expression "a serious danger to the community" appears in both sections. It is highly likely, therefore, that the legislature intended that the matters identified for consideration in s 13 would inform a determination under s 8 (with any adaptation made necessary by the fact that an application under s 8 is made at an early stage of proposed proceedings).

[48] It therefore seems to me to be correct to say that matters for consideration on an application for orders under s 8 include whether there are reasonable grounds for believing that there is an unacceptable risk that the person in question will commit a serious sexual offence if released from custody, or if released from custody without a supervision order being made. The range of considerations set out in s 13(4), save for that in paragraph (a), are accordingly relevant. Those conclusions are, I understand, consistent with the contentions made by Counsel for both parties.

[49] A question arises whether, when considering the issues raised by s 8, I should bear in mind the provisions of s 13(3):

> "(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."

[50] Counsel for the applicant submitted s 13(3) was irrelevant to the determination of the question raised by s 8. Counsel for the respondent made a contrary submission, arguing that it provided part of the statutory context, in what is quite unusual legislation.

[51] It seems to me to be possible that s 13(3) has some indirect relevance to an application for orders under s 8. That is to say in dealing with such an application, the court does not need to be satisfied that a person is a serious danger to the community in accordance with the standard set out in s 13(3). But in determining whether there are reasonable grounds for believing that a person is a serious danger to the community in the absence of a Division 3 order, it seems to me that one can bear in mind the standard in s 13(3) will apply in the final determination of the question whether a person is a serious danger to the community in the absence of such an order.

[52] Counsel for the applicant referred to the following passage from *George v Rockett*[2], a case concerning a statutory provision requiring reasonable grounds for believing something to support the issue of a search warrant:

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending upon the circumstances, leave something to surmise or conjecture."

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2 (1990) 170 CLR 104, 116.

[53] Reference to s 13 raises the question whether there are reasonable grounds for believing that there is an "unacceptable risk" that the respondent will commit a serious sexual offence if released from custody without a supervision order being made. In the course of submissions, I queried whether, to the extent that there was a prospect that the respondent would re-offend, the nature of the possible offence was relevant to the question whether the risk was unacceptable. Counsel for the respondent submitted that it was, and counsel for the applicant did not contest that proposition.

[54] I should mention at this stage that in relation to matters of construction, and the making of a determination under s 8, Counsel for the respondent made reference to the fundamental importance which the common law attaches to personal liberty, and the exceptional nature of the DPSOA, referred to in *Attorney-General v Fardon.*[3]

[55] There is a question which is relevant to the operation of s 8 in the present case, relating to the scope of the expression "a serious sexual offence". Before dealing with that question, it is convenient to identify the principal features of the applicant's case relating to the risk that the respondent will commit further offences if released from custody.

Applicant's case on risk of re-offending

[56] Obviously, the applicant relies upon the respondent's criminal history. However, reliance seems primarily to be based on Dr Sundin's assessment of his risk of re-offending, coupled with her recommendation that he be released subject to a supervision order which would include appropriate conditions. It is therefore necessary to focus more carefully on Dr Sundin's conclusions.

[57] I have previously set out what appeared to me to be a key passage from Dr Sundin's principal report. It obviously envisages a risk that the respondent would engage in trading child pornographic images for scenes of bestiality.

[58] The passage also made reference to some future offence "(involving) a person known to him". The expression was not explained. Counsel for the applicant described the offences for which the respondent is currently in custody as "non-contact and primarily internet-related in nature". No real basis has been identified in the evidence for thinking that there is any risk of present significance that the respondent would engage in any other form of sex-related conduct involving children.

[59] In this context, I should mention again the passage in Dr Sundin's report where she identified matters which she considered to be sufficient to attract the diagnosis of paedophilia. In her oral evidence, she stated that she suspected the respondent to have paedophilic tendencies. There has been no suggestion that the offences of which the respondent was convicted in 1978 and 1979 were associated with paedophilia. At the time, the respondent was in his teenage years, and the girls involved were not much younger than him. Otherwise, there is no basis whatever for thinking that, in the past, the respondent has engaged in sexual activity with children; and the applicant's case, as I understood it, was really based on the prospect of the respondent engaging in trading in pornographic images of children.

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3 [2003] QSC 331.

[60] As mentioned, Dr Sundin thought it unlikely that the respondent "would directly attack a stranger".

Serious sexual offences

[61] The view that has been taken on this application of the question whether a person is a serious danger to the community requires a consideration of whether there are reasonable grounds for believing that there is an unacceptable risk that the person will commit a serious sexual offence if released without a supervision order. That becomes apparent from a consideration of the combined effect of the provisions of s 8 and s 13. The meaning of the expression "a serious sexual offence" is therefore relevant to the question raised by s 8 whether there are reasonable grounds for believing that the person in question is a serious danger to the community in the absence of a Division 3 order.

[62] However, the making of an application for an order under s 8 is authorised by s 5(1), "in relation to a prisoner". The term "prisoner" is then defined in s 5(6) to mean "a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence …". The meaning of the expression "serious sexual offence" is also relevant to the question whether the present application is authorised by the DPSOA.

[63] The expression "serious sexual offence" is defined in the Schedule to the DPSOA to mean "an offence of a sexual nature … against children".

[64] For the respondent it is submitted that the offence of which the respondent was convicted which relates to the photographing of his daughter is not a serious offence of a sexual nature for the purposes of the legislation. The written submissions are to the effect that the other two offences "are not of the magnitude or severity to warrant the application of this exceptional legislation". As I understood the oral submissions for the respondent, it was put in issue whether the offences for which he is now in custody are serious sexual offences, under the DPSOA. It was also submitted that, to the extent there is a risk of re-offending, such offences could not be serious offences of a sexual nature, primarily because they are not likely to be offences of a sexual nature "against children".

[65] Counsel for the applicant referred me in this context to authorities for the proposition that offences involving child pornography are not "victimless crimes". The primary authority to which I was referred was *R v Jones*[4] where the following passage appears:

> "The production of child pornography for dissemination involves the exploitation and corruption of children who are incapable of protecting themselves. The collection of such material is likely to encourage those who are actively involved in corrupting the children involved in the sexual activities depicted and who recruit and use those children for the purpose of recording and distributing the results. The offence of possessing child pornography cannot be characterised as a victimless crime. The children, in the end, are the victims."

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4 (1999) 108 A Crim R 50 at [9].

[66] That passage has been widely adopted in a sentencing context. Recent examples to which Counsel for the applicant referred me are *R v Carson*[5]*; R v Mara*[6]*;* and *R v Sykes*[7].

[67] Counsel for the respondent drew support for her submission from the decision of the Court of Appeal in *R v Finch ex-parte A-G (Qld)*[8]. That case dealt with the provisions of s 9 of the *Penalties and Sentences Act* 1992 (Qld) ("PSA"). Under s 9(2) a sentencing court was required to have regard to the principle that a sentence of imprisonment should be imposed as a last resort. However, that was qualified by s 9(5), which stated that the principle did not apply "to the sentencing of an offender for any offence of a sexual nature committed in relation to a child under 16 years". The offender in that case had pleaded guilty to a charge that he "knowingly had possession of child abuse computer games". The question raised, therefore, was whether by virtue of the s 9(5) of the PSA, the principle identified in s 9(2) did not apply. Williams JA (with whom the other members of the court agreed) said[9]:

> "However, it is difficult to conclude that the offence here was 'committed in relation to a child under 16 years'. Whilst the expression 'in relation to' is generally given a wide meaning, there is certainly no identifiable child under 16 years with respect to whom this offence was 'committed'. In my view it is unhelpful to say that the images depict children under the ages of 16 years."

[68] He concluded that s 9(5) of the PSA did not apply to the offence under consideration. The legislation was subsequently amended, apparently as a consequence of this decision.

[69] Although the context in which s 9(5) of the PSA is found is not the same as the context provided by the DPSOA, they are not entirely unrelated. Since the DPSOA can lead to the imprisonment of a person, other than as a penalty for an offence, it might well be considered that a stricter approach should be taken to the construction of its provisions, than to the construction of s 9 of the PSA.

[70] The expression "in relation to" used in s 9(5) envisages a less direct connection between the offence and a child, than the expression "against". That case provides, in my view, considerable support by way of analogy for the submission made on behalf of the respondent.

[71] It seems to me that the question whether an offence involving child pornography is an offence of a sexual nature "against children" will depend upon the facts said to constitute the offence. Where, for example, a person charged with the offence of the indecent treatment of a child under the age of 16, had procured the child to engage in sexual activity which was then photographed, it may well be the case the offence is an offence against that child, and that it comes within the definition of a serious sexual offence.

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5 [2008] QCA 268 at [28].
6 [2009] QCA 208 at [17].
7 [2009] QCA 267 at [19].
8 [2006] QCA 60.
9 At [19].

[72] On the other hand, it seems to me that where a person obtains pornographic material involving children, in the production of which that person has played no role, and that person uses the material to obtain sexual gratification from that person's dealings with another adult, it does not seem to me that that involves the commission of a serious sexual offence, as defined in the DPSOA. The connexion between the offending conduct and any particular child seems to me to be too remote to come within the statutory provision.

[73] On that basis, I am of the view that any future offence to which Dr Sundin referred by her statement that "(the respondent) may be unable to resist his paedophilic drives and once again become absorbed in trading child pornographic images for scenes of bestiality" is not a serious sexual offence for the purposes of the DPSOA.

[74] With respect to the competence of the application, on the same basis it seems to me that the offences of possessing child exploitation material and distributing child exploitation material (at least to the extent that they relate to material which the respondent obtained by means of the internet, intended for use, and used, for the purpose of obtaining sexual gratification from adults) do not constitute serious sexual offences.

[75] However, one of those offences is identified as the "indecent treatment of a child under 16". That is an offence to which the respondent pleaded guilty. It relates to the taking of a photograph or photographs of his daughter. The respondent says that the photograph was not taken for purposes associated with sexual gratification, though it was later used along with pornographic material obtained over the internet, in the manner I have described. For present purposes, I propose to accept that the respondent's evidence is truthful.

[76] Nevertheless, it seems to me that I am constrained to act upon the charge and the respondent's plea of guilty, resulting in a conviction. The offence of which he was convicted was the indecent treatment of a child under 16 years of age. The indecency can only relate to something of a sexual nature. The plea of guilty constitutes an admission that the photograph was indecent, and that there was no legitimate reason for it. The offence directly involved a child. It seems to me that this offence is a serious sexual offence for the purposes of the DPSOA.

Prospects of further sexual offending

[77] The offences committed by the applicant for which he was convicted in 1978 and 1979 were committed with girls only a little younger than him. There is no suggestion that the girls did not in fact consent. Each was apparently a girlfriend at the time of the offending. There is in my view no real basis for thinking that any analogous offence might be committed by the respondent in the future

[78] The offences committed in May 1987 were committed under the influence of alcohol, and at a time when the respondent was having difficulties with the control of his consumption of alcohol. That is apparent from the series of offences which he committed at about that time, relating to driving a motor vehicle, whilst under the influence of alcohol. He says he has taken steps to control his intake of alcohol. There has been no suggestion of any subsequent of any alcohol-related offence. Beyond that, it is clear that these offences were committed at a time when the respondent, who was then a member of a football club, was in the company of other

young men who faced similar charges. It is likely that the "group dynamic" played some role in the commission of the offences.

[79] It is now almost 23 years since those offences were committed. There has been no suggestion of any analogous offence in that time. Indeed, the respondent has recently undergone the HISOP. He is reported as displaying empathy to the victim of his offences (this is referred to in the report on the completion of the HISOP, and by Mr Jordan, though the reference might be to the "victim" of later offences). Dr Sundin thought that it was unlikely that the respondent "would directly attack a stranger".

[80] On the material before me, I am satisfied that there is no reasonable ground for believing that the respondent will commit an offence analogous to those committed by him in May 1987.

[81] So far as the offences committed in about the first half of 2005 relate to the taking indecent photographs of his daughter, that seems to have formed a relatively minor element of his conduct at that time. I have previously referred to the role which it played in his sexual conduct. The reports before me indicate that he is deeply regretful of involving her in that conduct; and that he has a deep attachment to his children. On detection, he immediately sought counselling. He has undertaken a number of courses subsequently. In my view, there is no reasonable ground for thinking that there is any real risk that he would engage in such conduct in the future.

[82] With respect to the other offences of which he was convicted in 2007, I have formed the view that they are not serious sexual offences for the purposes of the DPSOA, and accordingly not relevant to the question raised by s 8 of that Act. However, I understand that there has been no previous consideration of this question, and am conscious that a different view might ultimately prevail. I therefore propose to proceed on the basis that my view is not correct; and that the offences that related to the obtaining and use of child pornographic material by means of the internet are serious sexual offences.

[83] It will be recalled that Dr Sundin considered that the prospect that the respondent would commit further similar offences was moderate. However, she described this expression as covering a broad range. She expressed the view that, if within a period of 2 years between detection and the time he was sentenced, the respondent had not used the internet, her assessment of the risk would be at the low end of the moderate range.

[84] Counsel for the respondent submitted that I should take into account, in considering the risk that the respondent might re-offend after his release, that he will be required to report to the Commissioner of Police the details identified in s 16 the *Child Protection (Offender Reporting) Act* 2004 (Qld). That no doubt would serve as a reminder to the respondent that there is ongoing interest in his conduct, and that he is likely to be easily located should he offend. While this may reduce the risk that the respondent will commit offences in the future, it is not a matter on which I place a great deal of weight.

[85] It seems to me that I am required to consider the evidence as a totality, in determining whether there are reasonable grounds for believing that the respondent

is a serious danger to the community if released in the absence of a supervision order.

[86] I accept that the respondent did not use the internet in the 2 year period between 2005 and 2007.

[87] It seems to me that I should consider Dr Sundin's opinion in the light of the steps the respondent took, almost immediately after detection to change his behaviour, including his seeking of counselling and other assistance; his willingness to undertake programmes in prison; and their favourable outcomes. I am conscious of the great significance which parole boards attached to programmes such as the HISOP. It seems to me that I should not ignore the fact that courts recognise that imprisonment has an effect of personal deterrence. The respondent's history suggests that he has been responsive to such deterrence in the past.

[88] Further, the question I have to consider is whether there are reasonable grounds for believing that the respondent, if released without a supervision order, would be a serious danger to the community, in the sense that there is an unacceptable risk that he would commit a serious sexual offence. Accepting for this purpose that the offences relating to obtaining, and passing on, child pornography are such offences, it seems to me that I should consider whether there are reasonable grounds for believing that if the respondent were released without a supervision order, there would be an unacceptable risk that the respondent would commit such an offence. The objects of the Act relevantly include an intention to ensure "adequate protection of the community"; and it seems to me to follow that the acceptability or otherwise of the risk of a further offence must be considered, bearing in mind the potential harm caused to others by the offending. In the case of offences involving child pornography of the kind presently under consideration such harm is indirect, and relatively remote. It seems very difficult to think that any further offence of this kind which might be committed by the respondent would have any perceptible effect on the extent to which children are involved in such pornography, or indeed on the extent to which adults engage children in activities for this purpose.

[89] Bearing in mind the relatively low level of risk that the respondent would commit further offences of this kind, and the very remote prospect of any perceptible detriment to others, it seems to me that there is no reasonable ground for believing that if the respondent were released without being subject to a supervision order, he would be a serious danger to the community. I should add that I have reached this conclusion without considering the standard of satisfaction identified in s 13(3).

[90] Dr Sundin expressed a view that there was an "identified concern" that the respondent might engage in contact sexual offences involving children. In part, as mentioned, this was based on a statistical study of persons who downloaded child pornographic material from the internet; and in part on a correlation between sexual sadism and paedophilia. Dr Sundin also placed some weight on the fact that the respondent sought to hide the material relating to child pornography from his wife and children, it being "the pattern of people involved in child pornography" to "seek to keep the material secret".

[91] The use which the respondent made of the child pornographic material seems to me to be atypical. It seems to me to be difficult to apply the statistical results drawn from persons who download child pornography to the applicant. Dr Sundin's

concerns about any secretiveness on the part of the respondent does not seem to reflect his overall pattern of behaviour. While he not surprisingly sought to avoid a situation where his wife and children might see the pornographic material, he was relatively open with the police who investigated the offences. He volunteered additional information to them. He also admitted his guilt, which Mr Jordan considered to be a little unusual for a person who is a paedophile. Indeed, Mr Jordan also noted that the respondent fully acknowledged his involvement in the activities which led to the charges against him. The number of pornographic images held by the respondent on his computer was very low, by comparison with other people who have been convicted of offences involving child pornography. The diagnosis relating to sexual sadism seems to me to be rather oblique, which casts some doubt on the utility of the statistics referred to by Dr Sundin. The utility of that evidence with respect to the respondent is cast further in doubt by his engagement in activities prior to his imprisonment to address his conduct; and by his successful undertaking of the HISOP. Taken in the context of the evidence as a whole, I do not consider that Dr Sundin's somewhat tentative concerns in this area give rise to reasonable grounds for thinking that if the respondent is released without being the subject of a supervision order, there is an unacceptable risk that he will commit a serious sexual offence.

[92] I consider that there is no real prospect the respondent would commit any other type of sexual offence, by reason of which he could be said to be a serious danger to the community. Counsel for the applicant pointed out that the respondent had an unusual history, in that the nature of his sexual offending had changed over time. That may have been intended to raise the prospect that he may in the future engage in some form of sexual offence, other than those of which he has been convicted. That prospect seems to me to be speculative. Dr Sundin does not give evidence which supports it; nor do I consider that it provides a reasonable ground for believing that the respondent would be a serious danger to the community, if released without being subject to a supervision order.

Conclusion

[93] In my view, the applicant has not established that there are reasonable grounds for believing that the respondent, if released without a supervision order, would be a serious danger to the community. I propose to dismiss the application.