SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Buckby* [2010] QSC 174
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** Applicant v **DESMOND GEORGE BUCKBY** Respondent
FILE NO/S:	BS11102/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	21 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2010
JUDGE:	Ann Lyons J
ORDER:	**1. The decision made on 7 December 2007 that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 part 2 of the Act be affirmed and** 2. **That the respondent continue to be subject to the continuing detention order made on 7 December 2007**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – OTHER MATTERS – where respondent's criminal history commenced in 1984 – where respondent's sexual offending commenced in 1981 – where respondent contravened a Supervision Order imposed in 2007 and was ordered to be detained in custody for an indefinite period under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 – where Attorney-General for the State of Queensland seeks an annual review of the continuing detention order – whether the respondent should remain the subject of that continuing detention order.

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)

Attorney-General for the State of Queensland v Francis

[2006] QCA 324.
Fardon v Attorney-General (Qld) (2004) 78 ALJR 1519.

COUNSEL: J Rolls for the applicant
G McGuire for the respondent

SOLICITORS: The Crown Solicitor for the applicant
Legal Aid Office (Qld) for the respondent

ANN LYONS J:

[1] This is an application filed on 22 April 2010 pursuant to s 27 (2) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act) for the annual review of a continuing detention order made under the Act by Mullins J on 9 June 2009.

[2] The respondent is 62 years of age and is currently an inmate of the Townsville (Stuart) Correctional Centre. He has a criminal history which discloses repeated and serious criminal offending involving sexual offences with young children predominately pre pubertal girls. Prior to his release from imprisonment in 2007 for sexual offences for which he was sentenced in 2004 the Attorney-General sought an indefinite detention order under the Act.

[3] On 12 April 2007 Atkinson J was satisfied that the respondent constituted a serious danger to the community in the absence of an order pursuant to Div 3 of the Act and ordered that he be released from prison subject to 40 conditions by which the risk to the community was to be managed. The respondent was released into the community on 14 May 2007.

[4] He was taken into custody again on 4 October 2007. The respondent had contravened a requirement of the supervision order in that he had breached the conditions set out in the order by being found with five children under the age of 16 in his unit in Townsville without the prior written approval of an authorised Corrective Services officer. Neither had he disclosed the terms of the order and the nature of his offences to the father of the children, as required by the conditions of his supervision order.

[5] On 4 December 2007 White J rescinded the supervision order made by Atkinson J on 12 April 2007 and ordered that the respondent be detained in custody for an indefinite period, for controlled care and treatment. At that hearing the respondent conceded through his counsel and in his affidavit that he had contravened the requirement of the supervision order made on 4 April 2007 in that he had been in contact with children and he had not advised their father of the nature of the offences for which he had been convicted.

Background

[6] The respondent's criminal history commenced in Victoria in 1974. His sexual offending commenced in 1981 when he was dealt with in Melbourne for indecent assault and released on a good behaviour bond. In 1994 there were further

convictions for stealing and in 1987 he had been convicted of making a false statement in connection with Social Security benefits.

[7] In 1990 he was imprisoned for 12 months by the District Court at Brisbane for indecent dealing with a child under the age of 12. In October 1995 he was convicted of a number of serious offences of a sexual nature which had taken place over several years. Those offences included carnal knowledge of a child, wilful exposure of a child to an indecent video and three charges of indecent dealing with a child under 12. The most serious offence was the charge of carnal knowledge of a child with a circumstance of aggravation which was committed in 1993. He was imprisoned for a period of 10 years. His appeal against his conviction was successful in that the sentence of 10 years was set aside and a sentence of seven years was imposed.

[8] After he had served that period of imprisonment he was in the community for a year when he, once again, offended against children. In July 2004 he was convicted in the Cairns District Court of indecent treatment of two children under the age of 16 with a circumstance of aggravation, of administering a drug for the purpose of a sexual act and of attempting to administer a drug for the purpose of a sexual act. Judge White imposed a head sentence of four years.

[9] Justice White in her reasons of 4 December 2007 for rescinding the supervision order of April 2007 indicated that the respondent has maintained a strong stance of denial in relation to the 1995 and 2004 sexual offences. On 9 June 2009 Mullins J conducted the annual review of the order made by White J on 4 December 2007. As Mullins J noted in her reasons, the respondent's sexual offences involved victims ranging from nine years to 13 years of age, in the context of a situation where the respondent developed a relationship of trust with the parents of the victims. The 1995 offences occurred against a background where he had shown pornographic videos and attempted to administer a stupefying drug and sodomise one of the children who was 15. In relation to the 2004 offences, the victims were 11 and eight and the respondent had befriended their parents while staying at a caravan park. He gave the children sleeping tablets, telling them they were lollies. Those victims reported that they had fallen asleep and one victim reported that when she woke up she felt a finger in her vagina. The respondent pleaded guilty to those charges.

[10] Concerningly, the circumstances involving the breach of the supervision order in 2007 were that the respondent had befriended the father of five children who lived near his unit. On 1 October 2007 the respondent was given a direction in writing that he was to have no contact with children under the age of 16 without written approval. He signed the direction. He was also told that if he was to have prolonged contact with the children next door he was to disclose his situation to the father. On 3 October 2007 a correctional officer made a random visit to the respondent's home and he saw the respondent sitting on a couch with five children, with the youngest aged six wearing a bikini. They were watching a movie with the respondent.

[11] In the reasons for ordering the continuing detention order in June 2009, Mullins J indicated that the respondent had undergone the Getting Started Preparatory Sexual Offenders Program. Her Honour noted that once again the difficulty for the respondent was that whilst he has been in prison he had strongly denied his

offending conduct. Her Honour noted that it is the denial of the offending which has caused the psychiatric opinion to be against Mr Buckby in evaluating his risk of re-offending.

[12] Mullins J referred to the respondent's assessment by Dr Harden, who considered that the respondent both minimised and rationalised his offending. Dr Harden's evidence to the court at that hearing was that it was important that Mr Buckby participate in the High Intensity Sexual Offending Program, to build on the limited gains that he had made in the preparatory course. Her Honour noted, however:

> "Unfortunately, Mr Buckby made it absolutely clear in the course of the hearing today that he has no intention of undertaking the High Intensity Sexual Offending Program. It is a shame that Mr Buckby will not endeavour to do something further to address his risk of re-offending. Dr Harden, in his report, emphasised the lack of insight that the respondent displayed to Dr Harden about the respondent's own psychological functioning with regard to his prior sexual offending or even his functioning at the time that he was interviewed."

[13] Dr Harden's opinion was that Mr Buckby should remain in detention.

[14] Professor James also gave evidence at that hearing and he referred to the respondent's lack of insight also. Professor James considered that the respondent was incapable of learning either from experience or as a result of education. Professor James' evidence at that hearing was that he considered it highly likely that the respondent's offending behaviour would be similar to that which occurred when he was grooming children whilst on a supervision order.

[15] Professor James considered that any treatment program for the respondent had to commence with the building up of a working relationship with the respondent, so that meaningful counselling or therapy could be engaged in with him. He considered that any such counselling program should be undertaken whilst the respondent was in custody.

[16] In view of that evidence, Mullins J raised the issue of whether it was possible for the respondent to take part in an individual counselling program within the prison system "as a bridge to doing the High Intensity Sexual Offending program".

[17] Ultimately her Honour was satisfied that on all of the evidence before her, the respondent's high risk of sexual re-offending was an unacceptable risk under the Act. She was not satisfied that given the respondent's state of denial of his prior sexual offending, that it made him suitable for a supervision order. She was not satisfied that appropriate conditions could be formulated under a supervision order to address the adequate protection of the community. Her Honour also considered that the psychiatric evidence showed that the respondent did not have the skills that enabled him to understand and comply with the types of conditions that would be needed to ensure the adequate protection of the community.

[18] On 11 January 2010 the respondent was sentenced to 20 further offences which had occurred contemporaneously with his 2003 offending and for which he was sentenced by Judge White in Cairns in July 2004. Judge Everson in sentencing the

respondent for these further offences set out the circumstances of the offending in his sentencing remarks;

> "The circumstances of the offending involved in counts 1 to 19, concerned you taking indecent photographs of a girl who was aged 9 years of age at the relevant time....The photographing of the victim occurred, apparently in your caravan.
>
> You photographed her in a number of obscene poses pursuant to which she manipulated her body in such a away as to expose the inside of her vagina. Count 19 involves you actually using your hand to position her in such a way as to assist in the taking of an obscene photograph. Count 20 involves the possession 13 highly obscene images of young female children which include them placing various objects in their vaginas, and on occasions, their anuses."

[19] His Honour sentenced the respondent to 9 months imprisonment for those further offences taking into account the totality principle. His Honour stated "The sentence imposed by Judge White on that date is relevant to the sentences I'm imposing today. The complainant is respect of counts 1 to 19, before me, was one of the complainants." The sentence imposed by his Honour clearly reflected the principle that his Honour was required to impose a sentence that would have been imposed if the respondent had been sentenced for the additional 20 offences at the time he was sentenced by Judge White in 2004. His Honour concluded that had Judge White been aware of these further offences the head sentence would have been higher by 9 months.

Psychiatrists Reports

[20] For this annual review, once again reports were prepared by the psychiatrists. Dr Barry Nurcombe examined the respondent on 15 March 2010. He considers that the respondent has a diagnosis of paraphilia, being paedophilia of a non exclusive heterosexual type which is regressive in nature, a residual post traumatic stress disorder and a depressive disorder. He also describes the respondent as having an avoidant personality disorder with narcissistic and psychopathic features. He also considers that there is a possible personality change due to brain damage following a closed head injury.

[21] Dr Nurcombe stated that "the emotional context of his sex offences is not clear, since he is unable or unwilling to give an honest account of what happened". He denies ever being involved in any sexual offence. He considers the respondent uses defences of denial, minimisation, rationalisation and projection (blaming his victims or their parents for the allegations made against him). The respondent considers himself to be a generous helpful person who has been persecuted on four separate occasions by children who brought forward false allegations against him. He feels sorry for himself[1] and has no remorse or empathy with any of the victims.

[22] Dr Nurcombe's view is that future offending would be likely to involve indecent dealing with female children aged 5 to 15 as he is fixated on pre pubertal female genitalia. Sexual violence is not imminent and he is unlikely to harm his victims or

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[1] See paragraph 36 report B Nurcombe exhibit BN3 at page 34.

abduct them. Neither is likely to offend against males. He considered that the psychological harm to victims would be considerable. Dr Nurcombe's view was that offending should it occur is likely to take place after a period of familiarisation, integration or grooming of families and victims. He was concerned about the fact that his recent offending involved the use of sedatives to "stupefy his victims".

[23] Dr Nurcombe notes that the respondent has no friends or community support. He notes the offending is more likely to occur if he lives in situations such as in caravan parks where he has access to female children. He also considers it is unlikely that the respondent will agree to enter sexual offender therapy unless he forms a relationship with a therapist who can persuade him otherwise.

[24] Alcohol and drug taking are not involved in his offending.

[25] In relation to the respondent's scoring on the actuarial instruments on the Psychopothy Checklist Revised he scored 18 out of 40 indicating a moderate level of psychopathic traits but short of the cut off point for a diagnosis of psychopathic personality disorder.

[26] On the Static-99, the respondent scored 7/12 which indicates a high risk of sexual recidivism. Dr Nurcombe considered the respondent was likely to re-offend at 5,10,15 year intervals at 39%, 45%, 52% respectively.

[27] On the Stable 2000, the respondent scored a 12 out of 12 indicating he can be grouped with prisoners who have a high risk of sexual reoffending.

[28] When the Static and Stable results were combined the respondent was placed in the high risk category.

[29] Dr Nurcombe concluded –

> *"From both a clinical point of view and in accordance with actuarial assessment, Desmond George Buckby can be regarded at high risk of reoffending. He maintains intransigent denial, minimization, rationalization, and projection of the blame concerning his sexual offences. He is highly resistant to sexual offender treatment, probably on the basis that he is terrified of fating the fact that he is a paedophiliac.*
>
> *Given the high risk of recidivism and the likelihood of psychological damage to victims, it would be unwise to release Mr Buckby from prison before he has a better understanding of his problems and he is able to design a Relapse Prevention Plan. At the present time, the possibility that he will accept treatment seems remote. Nevertheless, he needs psychiatric treatment for his current depression and psychological counselling for his sense of helplessness. It is possible that, if a psychiatrist and a counsellor could form a relationship with him, possibly through empathizing with his current desperate circumstances and his terror of paedophilia, he could be encouraged to take a different view of therapy and discharge. Without such a therapeutic relationship, it would be fruitless to persuade him to undertake sex offender treatment. I do not underrate the difficulty of such a task."*

[30] Professor Basil James also prepared a report dated 8 April 2010 in relation to the respondent. Dr James had also prepared previous reports and he noted that little had changed since March 2007 when he first examined the respondent.

[31] Dr James noted that the material in the medico legal brief recorded events which occurred subsequent to the Order made by Mullins J on 9 June 2009. He also noted that Judge Everson had stated that the respondent had made no progress towards rehabilitation and had refrained form every opportunity to rehabilitate himself.

[32] Dr James also noted that in relation to some offences he had a "steadfast …denial of wrongdoing". He also stated that the respondent projected the blame for his current incarceration on other persons. Dr James states –

> *"In my opinion, the risk of his re-offending should Mr Buckby be discharged from prison even on a Supervision Order remains very high; he is very likely to seek the opportunity, probably via degree of grooming, to cultivate relationships with children; and in my opinion there would be little doubt that such relationships would become rapidly sexualised.*
>
> *It is my opinion that this very high risk is unlikely to change unless and until Mr Buckby shows clear evidence of a wish to serious self-exploration in the context of a Sexual Offenders Treatment Programme. I see no sign, however, that Mr Buckby has moved in this respect from his earlier position of recalcitrance previously reported."*

[33] Clearly then there is psychiatric evidence which identifies that the risk that the respondent's release presents is high and that such an offence would if committed relate to the sexual abuse of a pre-pubescent female child. He may use stupefying drugs.

[34] At the hearing today Counsel for the respondent on the basis of Mr Buckby's instructions made no submissions in relation to the application and filed no material.

Statutory Scheme

[35] The objects of the Act[2] are to provide for continued detention or supervision of a particular class of prisoner and to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

[36] The Act establishes a scheme for the continued detention in custody or supervised release of prisoners who are deemed to be at risk of committing serious sexual offences if released at all, or if released without appropriate supervision. The Act makes provision for the Supreme Court to hear applications for orders under the Act, and s 5 of the Act and places the responsibility for making the necessary applications on the Attorney-General.

[37] Once an order has been made under Division 3 of the Act, then the Attorney must make application for a review to be carried out.[3] The application for review is governed by s. 30 of the Act. This provision is as follows:

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> *(1) This section applies if, on the hearing of a review under section 27or 28 and having regard to the matters mentioned in section 13(4),6 the court*

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2 See s 3 of the Act

3 See s 27 of the Act

affirms a decision that the prisoner is a serious danger to the community in the absence of a division 3 order.

(2) On the hearing of the review, the court may affirm the decision 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 affirm the decision.

(3) If the court affirms the decision, the court may order that the prisoner—

(a) continue to be subject to the continuing detention order; or

(b) be released from custody subject to a supervision order.

(4) In deciding whether to make an order under subsection (3)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

(5) If the court does not make the order under subsection (3)(a), the court must rescind the continuing detention order."

[38] Arrangements must be made for the respondent to be examined by two psychiatrists.[4]

[39] Section 13(2) of the Act provides that a prisoner is a serious danger to the community if there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or if released from custody without a supervision order being made. This definition would be applicable and applies to the determination that is required to be made under s 30 of the Act.

[40] The expression "*unacceptable risk*" is undefined by the Act. It is incapable of precise definition but is an expression which requires the striking of a balance.[5] The relevant risk is the risk of commission of a serious sexual offence i.e. an offence of a sexual nature involving violence or against children. Risk means the possibility, chance or likelihood of commission of such an offence. An unacceptable risk is a risk which does not ensure adequate protection of the community. This phrase was considered in *Attorney-General for the State of Queensland v Francis*[6] when the Court of Appeal observed:

> *" [39] Insofar as his Honour was concerned that, if the appellant began to use alcohol or drugs, he might abscond, the risk of a prisoner absconding is involved in every order under s 13(5)(b). The Act does not contemplate that arrangements to prevent such a risk must be "watertight"; otherwise orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."*

[41] The means of avoiding that risk is a continuing detention order or a supervision order.

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4 See s 29(1) of the Act

5 See *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at [22], [60] and [225].

6 [2006] QCA 324.

[42] If the court, on the review hearing, affirms a decision that the prisoner is a serious danger to the community in the absence of a Division 3 Order then the discretion granted by s30(3) is enlivened.

[43] Section 30 of the Act permits the court to affirm the decision if it is satisfied by acceptable, cogent evidence; and to a high degree of probability, that the evidence is of sufficient weight to affirm the decision that the prisoner is a serious danger to the community in the absence of a Division 3 order. Once that decision has been affirmed then the court is able, by s 30(3) of the Act, to order the respondent to be subject to continuing detention or be released from custody subject to a supervision order.[7]

[44] In determining whether to make such an order the "paramount consideration" is to "ensure adequate protection of the community".[8]

[45] If the court declines to order continuing detention then the court must rescind the continuing detention order.[9]

[46] In determining whether the decision ought to be affirmed the matters mentioned in s 13(4) of the Act must be considered. Section 13(4) provides:

> *"**13 Division 3 orders***
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> *(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—*
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> *(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."*

[47] For the Court to make a Division 3 order, it must be satisfied that the prisoner is a serious danger to the community in the absence of such an order: subs (1). Subsection (2) defines what is a "*serious danger to the community*". There must be

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7 See s 30(3)(a) and (b) of the Act
8 See s 30(4) of the Act
9 See s 30(5) of the Act

an unacceptable risk that the prisoner will commit a serious sexual offence if released at all, or if released without a supervision order.

[48] The Schedule to the Act defines what a serious sexual offence is:

> *"serious sexual offence" means an offence of a sexual nature, whether committed in Queensland or outside Queensland— involving violence; or against children".*

[49] The offence must be of a sexual nature, with the added requirement that it either involve violence, or is an offence against children.

[50] To be satisfied under s 13(1) of the Act that the prisoner would pose a serious danger to the community in the absence of an order, the Court must be satisfied by acceptable, cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to justify the decision[10].

[51] The psychiatric evidence unequivocally indicates that the respondent presents as a serious danger to the community in the absence of a division 3 order under the Act.

[52] I am therefore satisfied that there is acceptable cogent evidence to a high degree of probability that the respondent remains a serious danger to the community in the absence of a division 3 order under the Act.

[53] I consider that given the respondent's failure to engage in rehabilitation, the persistence of his offending against pre pubertal girls, his lack of insight into his offending as well as his persistent denial of some of his offending that he is not suitable for a supervision order. I do not consider that any conditions which could be imposed would adequately address the risk which the respondent poses. In this regard I note the earlier observations of Mullins J when her Honour indicated that the psychiatric evidence indicates that the respondent does not have the skills that would enable him to comply with the conditions that would be required to be imposed. The psychiatric evidence clearly indicates that nothing has changed in this regard.

[54] I consider that the decision of White J made on 7 December 2007, and affirmed by Mullins J of 9 June 2009, should be affirmed.

[55] Accordingly the respondent continues to be subject to the continuing detention order made on 7 December 2007 whereby he is detained in custody for an indefinite term for care, treatment or control pursuant to the provisions of s 13 (5) (a) of the Act.

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[10] s13(3) of the Act