# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Yeo v Attorney-General for the State of Queensland* [2011] QCA 170 |
| PARTIES: | **RAYMOND YEO**<br>(appellant)<br>**v**<br>**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(respondent) |
| FILE NO/S: | Appeal No 11983 of 2010<br>SC No 9323 of 2005 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 22 July 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 May 2011 |
| JUDGES: | Margaret McMurdo P, Muir and White JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The Court is satisfied to the requisite standard and affirms the decision that Raymond YEO (the appellant) is a serious danger to the community in the absence of an order under s 13 *Dangerous Prisoners (Sexual Offenders) Act* 2003.**<br>**2. The continuing detention order made on 4 August 2009 is rescinded.**<br>**3. The appellant is released from custody subject to the following requirements until 22 July 2021.**<br><br>**The appellant must:**<br>**(i) be under the supervision of an Authorised Corrective Services Officer: (Authorised Corrective Service Officer) for the duration of this order;**<br>**(ii) report to an Authorised Corrective Services Officer at the Queensland Corrective Services Probation and Parole Office closest to his place of residence within 24 hours of the day of release from custody and at that time advise the officer of the appellant's current name and address;** |

**(iii)** **report to, and receive visits from, an Authorised Corrective Services Officer at such times and at such frequency as determined by Queensland Corrective Services;**

**(iv)** **notify and obtain the approval of an Authorised Corrective Services Officer for every change of the appellant's name at least two business days before the change occurs;**

**(v)** **notify an Authorised Corrective Services Officer of the nature of his employment, or offers of employment, the hours of work each day, the name of his employer and the address of the premises where he is or will be employed;**

**(vi)** **seek permission and obtain approval from an Authorised Corrective Services Officer prior to entering into an employment agreement or engaging in volunteer work or paid or unpaid employment;**

**(vii)** **reside at a place within the State of Queensland as approved by an Authorised Corrective Services Officer by way of a suitability assessment;**

**(viii)** **not reside at a place by way of short term accommodation including overnight stays without the permission of an Authorised Corrective Services Officer;**

**(ix)** **seek permission and obtain the approval of an Authorised Corrective Services Officer prior to any change of residence;**

**(x)** **not leave or stay out of Queensland without the written permission of an Authorised Corrective Services Officer;**

**(xi)** **not commit an offence of a sexual nature during the period of this order;**

**(xii)** **not commit an indictable offence during the period of this order;**

**(xiii)** **comply with every reasonable direction of an Authorised Corrective Services Officer;**

**(xiv)** **respond truthfully to enquiries by an Authorised Corrective Services Officer about his whereabouts or movements;**

**(xv)** **not have any direct or indirect contact with a victim of his sexual offences;**

**(xvi)** **notify an Authorised Corrective Services Officer of the make, model, colour and registration number of any vehicle owned by or generally driven by him, whether hired or otherwise obtained for his use;**

**(xvii)** **attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor or other mental health**

**professional as directed by an Authorised Corrective Services Officer at a frequency and duration which shall be recommended by the treating professional, the expense of which is to be met by Queensland Corrective Services;**

**(xviii) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) as deemed necessary by the treating psychiatrist or an Authorised Corrective Services Officer, and permit the release of the results and details of the testing to Queensland Corrective Services, if such a request is made for the purpose of amending the supervision order or for ensuring compliance with this order, the expense of which is to be met by Queensland Corrective Services;**

**(xix) permit any medical, psychiatric, psychological or other mental health practitioner to disclose details of treatment, intervention and opinions relevant to the appellant's level of risk of re-offending and compliance with this order to Queensland Corrective Services, if such a request is made for the purpose of amending the supervision order and/or ensuring compliance with this order;**

**(xx) attend and participate fully in any program or course conducted by a psychologist, counsellor, or other professional, in a group or individual capacity, as directed by an Authorised Corrective Services Officer in consultation with any treating medical, psychiatric, psychological or other mental health practitioner where appropriate, with any expense of such program to be met by Queensland Corrective Services;**

**(xxi) submit to and discuss with an Authorised Corrective Services Officer a schedule of his planned and proposed activities on a weekly basis or at such other intervals as directed by an Authorised Corrective Services Officer, which must, if required by the Authorised Corrective Services Officer, disclose the identity of any person who will accompany the appellant during any of those activities and the extent to which that person has been advised by the appellant of the nature of his sexual offences;**

**(xxii) not undertake any trip, visit or other activity away from his approved place of residence without the prior written approval of an Authorised Corrective Services Officer, unless an Authorised Corrective Services Officer dispenses with this requirement;**

**(xxiii) report to an Authorised Corrective Services Officer on a weekly basis or at such other intervals as directed by an Authorised Corrective Services Officer on trips, visits and other activities that the appellant has undertaken since last reporting to an Authorised Corrective Services Officer and the identity of any persons in whose company the appellant undertook such trips, visits or activities, unless an Authorised Corrective Services Officer dispenses with this requirement;**

**(xxiv) not initiate or maintain any supervised or unsupervised contact with any child under 16 years of age or with any physically or intellectually impaired person (other than a sibling of the appellant), except with the prior written approval of an Authorised Corrective Services Officer. The appellant is required to disclose the terms of this order and details of his convictions for sexual offences to the guardians and caregivers of the child or impaired person, before any such contact can take place; provided that Queensland Corrective Services may disclose that the appellant is subject to this supervision order and the terms of this order to guardians or caregivers of the child or impaired person and external agencies (e.g. Department of Child Safety) in the interest of ensuring the safety of the child or impaired person;**

**(xxv) not join, affiliate with, attend on the premises of or attend at the activities carried on by any club or organisation in respect of which there are reasonable grounds for believing there is either child membership or child participation without the prior written permission of an Authorised Corrective Services Officer;**

**(xxvi) not visit or attend at a caravan park without the prior written permission of an Authorised Corrective Services Officer;**

**(xxvii) not visit a public park without the prior written permission of an Authorised Corrective Services Officer;**

**(xxviii) comply with every reasonable curfew direction or monitoring direction of an Authorised Corrective Services Officer;**

**(xxix) not access pornographic images on the internet or otherwise;**

**(xxx) abstain from the consumption of alcohol without the prior written permission of an Authorised Corrective Services Officer;**

**(xxxi) submit to alcohol testing including breath testing**

**as directed by an Authorised Corrective Services Officer, the expense of which is to be met by Queensland Corrective Services.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – GENERALLY – where the appellant breached a previous supervision order by attending a support group of ex-prisoners at a McDonald's restaurant – where the breach was proved and the appellant was placed on a continuing detention order – where the trial judge ordered that the appellant continue to be subject to the continuing detention order – where the appellant contended there was insufficient evidence to warrant an order for the appellant's continued detention – where the appellant further argued the judge erred in not finding that the appellant's breach of the supervision order was relatively minor and in failing to take into account international law – whether the trial judge erred in exercising his discretion under the Act – whether the community would be adequately protected under a supervision order

*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), Pt 2, , Pt 3, Pt 4, s 3, s 8, s 11, s 12, s 13, s 16, , s 20, s 22, s 43, s 43A, s 43B
*Dangerous Prisoners (Sexual Offenders) and Other Legislation Amendment Act* 2010 (Qld)
*International Covenant on Civil and Political Rights* [1980] ATS 23, art 9(1)
*Optional Protocol to the International Covenant on Civil and Political Rights* [1991] ATS 39, art 4(2)

*Attorney-General v DGK* [2011] QSC 73, cited
*Attorney-General for the State of Queensland v Fardon* [2011] QCA 155, cited
*Attorney-General of Queensland v Fardon* [2003] QSC 331, considered
*Attorney-General v Francis* [2007] 1 Qd R 396; [2006] QCA 324, applied
*Attorney-General (Qld) v Lawrence* [2010] 1 Qd R 505; [2009] QCA 136, considered
*Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, cited
*Attorney-General (Queensland) v Sybenga* [2009] QCA 382, considered
*Attorney-General for the State of Queensland v Yeo* [2006] QSC 63, cited
*Attorney-General (Qld) v Yeo* [2007] QSC 274, cited
*Attorney General for the State of Queensland v Yeo* [2009] QSC 214, cited
*Attorney-General for the State of Queensland v Yeo* [2010] QCA 69, considered

*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [1992] HCA 64, cited
*Fardon v Attorney-General* (Qld) (2004) 223 CLR 575; [2004] HCA 46, considered
*House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited
*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24, cited
*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; [1995] HCA 20, applied
*R v Y* (1995) 81 A Crim R 446; [1995] QCA 373, cited
*R v Yeo* [2001] QCA 368, cited
*R v Yeo* [2002] QCA 383, cited

COUNSEL: P E Smith, with L P Burrow, for the appellant
P J Davis SC, with A D Keyes, for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Crown Law for the respondent

[1] **MARGARET McMURDO P:** This appeal is from an order of a judge of the Trial Division of this Court on 10 September 2010 under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act"). The judge affirmed the decision made on 4 August 2009, that the appellant, Raymond Yeo, is a serious danger to the community in the absence of an order under Div III of the Act. His Honour ordered that the appellant continue to be subject to the continuing detention order made on 4 August 2009.

[2] Counsel for the appellant ultimately condensed his 12 grounds of appeal into the following three contentions. First, the evidence was insufficient to warrant an order for the appellant's continued detention under the Act. Second, the judge erred in not finding that the appellant's breach of the supervision order under the Act was relatively minor. Third, the judge erred in not taking into account international law in exercising his discretion under the Act.

[3] Before returning to these grounds of appeal, it is, I think, helpful to set out in some detail the relevant legislative scheme under the Act, the background facts, the evidence before the primary judge, and the primary judge's reasoning.

**The relevant aspects of the Act**

[4] It is common ground that Reprint No 2B is the relevant reprint of the Act pertaining to this case.

[5] The objects of the Act are to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community[1] and to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.[2]

[6] The Attorney-General can apply to the Supreme Court for an order under s 8 (Preliminary hearing) or s 13 (Final orders) concerning a prisoner who is serving

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1 The Act, s 3(a).
2 The Act, s 3(b).

a sentence of imprisonment for a serious sexual offence during the last six months of that sentence[3] to detain the prisoner in custody beyond the sentenced period of imprisonment. A serious sexual offence is an offence of a sexual nature, whether committed in Queensland or outside Queensland, involving violence or against children.[4] Violence includes intimidation or threats.[5]

[7] If the court were satisfied at a preliminary hearing that there were reasonable grounds for believing the prisoner was a serious danger to the community in the absence of an order under s 13, the court must set a date for the hearing of the Attorney-General's application for a s 13 order.[6] At the preliminary hearing the court may order that the prisoner undergo examinations by two psychiatrists.[7] If so, the psychiatrist must prepare a report indicating the psychiatrist's assessment of the level of risk that the prisoner will commit another serious sexual offence if released from custody, whether with or without a supervision order, and the reasons for that assessment.[8] The report is to be given to the Attorney-General and the prisoner.[9]

[8] Final orders are made under s 13 of the Act which provides:

"**Division 3 Final orders**

**13 Division 3 orders**

(1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).

(2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—

(a) if the prisoner is released from custody; or

(b) if the prisoner is released from custody without a supervision order being made.

(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the decision.

(4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following—

(a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;

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3 The Act, s 5.

4 The Act, Sch Dictionary, "serious sexual offence".

5 The Act, Sch Dictionary, "violence".

6 The Act, s 8(1).

7 The Act, s 8(2).

8 The Act, s 11(1) and (2).

9 The Act, s 12.

(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;
(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;
(g) the prisoner's antecedents and criminal history;
(h) the risk that the prisoner will commit another serious sexual offence if released into the community;
(i) the need to protect members of the community from that risk;
(j) any other relevant matter.

(5) If the court is satisfied as required under subsection (1), the court may order—
(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (***continuing detention order***); or
(b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (***supervision order***).

(6) In deciding whether to make an order under subsection (5)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)."

[9] The Attorney-General or a prisoner to whom the Act applies may appeal against a decision to the Court of Appeal.[10] The Court of Appeal's powers on appeal include:

"**43 Court of Appeal's powers on appeal**

(1) An appeal is by way of rehearing.

(2) The Court of Appeal—
(a) has all the powers and duties of the court that made the decision appealed from; and
(b) may draw inferences of fact, not inconsistent with the findings of the court; …"

[10] If granted supervised release, the prisoner is subject to an order containing the mandatory requirements set out in s 16, namely:

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10 The Act, Pt 4, s 31 to s 43.

**16 Requirements for supervised release**

(1) If a judicial authority orders that a prisoner's release from custody be supervised under a supervision order or interim supervision order, the order must contain requirements that the prisoner—

(a) report to a corrective services officer at the place, and within the time, stated in the order and advise the officer of the prisoner's current name and address; and

(b) report to, and receive visits from, a corrective services officer as directed by the judicial authority; and

(c) notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least 2 business days before the change happens; and

(d) be under the supervision of a corrective services officer; and

(da) comply with a curfew direction or monitoring direction; and

(db) comply with every reasonable direction of a corrective services officer; and

(e) not leave or stay out of Queensland without the permission of a corrective services officer; and

(f) not commit an offence of a sexual nature during the period of the order.

(2) The order may contain any other requirement the judicial authority considers appropriate—

(a) to ensure adequate protection of the community; or

*Examples for paragraph (a)—*

- a requirement that the prisoner must not knowingly reside with a convicted sexual offender
- a requirement that the prisoner must not, without reasonable excuse, be within 200m of a school
- a requirement that the prisoner must wear a device for monitoring the prisoner's location

(b) for the prisoner's rehabilitation or care or treatment."

[11] A prisoner released under a supervision order or interim supervision order, or the chief executive with the Attorney-General's consent, may apply to amend a supervision order or interim supervision order.[11]

[12] A warrant may be issued for the arrest of a released prisoner[12] who contravenes or is reasonably suspected of contravening a supervision order. If the court is satisfied on the balance of probabilities that the prisoner is likely to contravene, is contravening or has contravened the supervision order, the court must rescind it and make a continuing detention order, unless the released prisoner satisfies the court on the balance of probabilities that the adequate protection of the community can be ensured despite the contravention.[13] If the released prisoner does satisfy the court on these matters, the court may amend the order in a way it considers appropriate to

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11 The Act, Pt 2, Div 4, s 18 to s 19A.

12 The Act, s 20.

13 The Act, s 22(2).

ensure adequate protection of the community or for the prisoner's rehabilitation or care or treatment.[14]

[13] A person subject to a supervision order who without reasonable excuse contravenes a requirement of the order commits an offence.[15] A prisoner subject to a continuing detention order is subject to annual review[16] and remains a prisoner.[17]

**Factual background**

[14] The appellant is 65 years old. He has criminal convictions but it is predominantly his convictions for sexual offences against children that are relevant in this appeal. He was convicted in the Brisbane District Court on 8 November 1995 of one count of sodomy of a 16 year old boy with some intellectual disability on 11 December 1993. The appellant and the complainant were staying in the same house at the time of the offences. He successfully appealed against his conviction and the facts of that offending are set out in *R v Y*.[18] He was again convicted on a re-trial and sentenced to three years imprisonment.

[15] He committed further sexual offences in 1999 and was again sentenced to three years imprisonment, this time for nine counts of indecent treatment; two counts of permitting indecent treatment; and two counts of wilfully exposing himself to a child. The victims were two boys aged nine and 11. The appellant resided in the same house as the complainant children, either permanently or from time to time. He again appealed against his conviction, this time unsuccessfully: see *R v Yeo*.[19]

[16] He was next convicted on two counts of indecent treatment of a six year old boy and once more appealed against his conviction and sentence, again unsuccessfully: see *R v Yeo*.[20] The first offence occurred when the complainant and his mother, who resided at the same caravan park as the appellant, were fishing from a pontoon. The appellant cuddled the child and touched him under his pants "in the nuts". The second offence occurred when the appellant visited the family home where the boy was asleep in his room. The appellant went into the boy's bedroom to wake him up. He touched the boy's genitals through his shorts. The boy complained to his mother. In refusing the appellant's application for leave to appeal against sentence, this Court noted that "though these offences involve misconduct at the less serious end of the range", as the appellant was on bail for like offending at the time and because of his prior criminal history, the two year cumulative sentence was warranted.

[17] The appellant completed serving his most recent effective sentence of five years imprisonment on 4 April 2006. He has always denied and continues to deny that he committed any of these sexual offences against children.

[18] On 3 April 2006, on the application of the Attorney-General, Philippides J made a continuing detention order under the Act in respect of the appellant.[21] His case

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14 The Act, s 22(7). This reverses the onus of proof under s 13(7), cf *Attorney-General v Fardon* [2011] QCA 155.

15 The Act, s 43B.

16 The Act, Pt 3.

17 The Act, s 43A(2).

18 (1995) 81 A Crim R 446.

19 *R v Yeo* [2001] QCA 368.

20 [2002] QCA 383.

21 *Attorney-General v Yeo* [2006] QSC 63.

was annually reviewed under the Act by Mullins J on 23 August 2007 and 13 September 2007. On 2 October 2007, Mullins J placed him on a supervision order under the Act.[22] He remained under that supervision order, residing in the community, for 17 months from October 2007 until March 2009 when the Attorney-General brought breach proceedings under the Act and applied to rescind the supervision order or, alternatively, to amend it.

[19] The appellant was detained for the alleged breach on 16 March 2009 and has been in custody for the past two years and three months. The breach occurred when the appellant attended a meeting of a support group of ex-prisoners conducted by a chaplain from Community Care Network at a McDonald's restaurant at Booval, contrary to oral directions from corrective services officers. Ann Lyons J found the breach proved and made a continuing detention order in respect of the appellant.[23]

[20] The appellant unsuccessfully appealed from that order on 26 March 2010.[24] Muir JA, with whom Chesterman JA and I agreed, referred to the report of psychologist Dr Whittingham, who was treating the appellant whilst in the community under the supervision order. Dr Whittingham noted that the appellant's progress in self-regulating his risk of sexual re-offending was mixed. There was some positive progress but overall there had been a "slight worsening" of risk factors.[25] Muir JA noted:

> "The contravened direction significantly expanded the restrictions imposed on the appellant by prohibiting him from attending the McDonald's restaurant for a legitimate purpose. The prospect that the appellant, in the company of other attendees at the Bad Boyz meeting would place minors at risk of sexual interference or place himself at risk of reoffending, were remote. There was no suggestion that the restaurant staff were not present in the normal way and the appellant was accompanied by a chaplain with Community Care Network. The appellant's case managers would not have been aware, when giving the subject directions, of the identity of the persons who would have been present with the appellant in the restaurant. However, they would have been aware that the appellant's prior offending had occurred in circumstances in which the appellant had developed social contact with the victim, or where he had ingratiated himself into the confidence of the victim's family.
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> In those circumstances, one can see why the appellant may have harboured a sense of grievance and set out to defy or evade the subject directions. That explanation, whilst not justifying the appellant's conduct, does support the submission by the appellant's counsel that the breach was relatively minor.
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> I accept that the evidence tends to show that the appellant will continue to "seek loopholes or ways around [his] restrictions and [that] he will do so in an astute and glib and ... plausible manner".
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> However, in my respectful opinion, the above discussion shows that there is much to be said for the view that the exercise by the

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22 *Attorney-General v Yeo* [2007] QSC 274.

23 *Attorney General v Yeo* [2009] QSC 214.

24 *Attorney-General v Yeo* [2010] QCA 69.

25 Above, [34], [47].

> appellant's case managers of careful supervision, allied with the issuing of clear written directions, whenever directions are required, would suffice to ensure the adequate protection of the community."[26]

This Court was not persuaded, however, that the appellant had demonstrated any judicial error in the *House v The King*[27] sense and dismissed the appeal.

[21] It followed that the appellant remained in detention under the Act until his next annual review which took place before Martin J on 10 September 2010.

**The primary judge's reasons**

[22] Martin J gave the following *ex tempore* reasons for ordering that the appellant be subject to a continuing detention order.

[23] After setting out the background to this matter and referring in general terms to the sexual offences of which the appellant had been convicted, his Honour observed that the appellant had maintained his innocence in respect of all these convictions. The appellant was placed on a supervision order in 2007, but in July 2009 Ann Lyons J revoked the order because of its contravention, and considered that a supervision order could not adequately address the risk posed by the appellant's attitude to any constraints placed on him. Her Honour made a continuing detention order and an appeal from that order was dismissed.

[24] His Honour noted that, on a review under the Act, the court may affirm the decision that the appellant is a serious danger to the community in the absence of an order under s 13 only if satisfied by acceptable cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to affirm the decision. If the decision is affirmed, the court may order either that the appellant continue to be subject to the detention order, or that the appellant be released from custody subject to a supervision order.

[25] The appellant is a serious danger to the community if there is an unacceptable risk that he will commit a serious sexual offence if released from custody, or, if released, without a supervision order: s 13. The judge referred to the meaning of "unacceptable risk" as discussed in *Attorney-General v Francis*.[28] Martin J then referred to the further psychiatric reports prepared for the review by Dr Beech and Dr Moyle, both of whom had examined the appellant on a number of prior occasions.

[26] Dr Beech described him as having an anti-social personality disorder and a borderline psychopath. He had the sexual deviance of homosexual paedophilia and demonstrated no remorse or empathy. He had not undertaken any rehabilitation courses and showed little insight into his risk of further offending. He no longer had any family support in the community. He took no responsibility for his own control or behaviour as he saw no reason to do so. He was a glib, plausible man who could easily gain the confidence of adults and prey on young boys. His victims could again suffer significant emotional effects from the abuse. He had no empathy to hold back once his offending commenced. The appellant's release was possible, subject to a supervision order, but the appellant would need to be closely monitored

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26 Above, [51]-[54].
27 (1936) 55 CLR 499, 504-505.
28 [2007] 1 Qd R 396.

and those charged with his supervision would need to be vigilant. The appellant would seek to find "loopholes" in the order and test the limits of the supervision.

[27] Dr Moyle considered the appellant's behaviour was homosexual paedophilia of a kind not modified by the presence of a supervising adult when he was in the presence of children. The appellant considered he had been returned to custody because he thought for himself and made moral judgments based on his own wishes over the advice of those supervising his behaviour in the community. His lifelong personality features on the psychopathy checklist placed him in the psychopathic range. There was little evidence that the appellant would listen to others if that advice conflicted with his future wishes. The appellant was of at least a moderately high risk of sexually offending against vulnerable others, including intellectually disabled young men and children, if he was not subject to a supervision order in the community, or if not detained in custody. He was likely to continue to challenge authorities where there was a conflict with his own beliefs. This could have a draining effect on any professional supervising officers who monitored him. He was likely to try to find ways to evade a supervision order so as to allow him to continue to live as he did in the past.

[28] The judge concluded that there was acceptable cogent evidence of a high degree of probability that the appellant remained a serious danger to the community in the absence of a s 13 order. The appellant did not dispute this. The only issue was whether he should be subject to a continuing detention order or be released subject to a supervision order. His risk of re-offending was at least moderately high. The likely offending would be against a male child, perhaps a child with an intellectual disability. There was an obvious risk of physical or psychiatric damage to such a child. The appellant could not or would not accept responsibility for his conduct, including the contravention which gave rise to his return to incarceration. The judge then returned to consider the psychiatric evidence.

[29] Dr Beech stated that if the appellant were released on a supervision order, he would need to be closely monitored and those charged with his supervision would need to be vigilant. The appellant would take no responsibility for his own control or behaviour. He would actively seek to find loopholes and test the limits of supervision. The success of a supervision order would depend on the vigilance of those supervising him to manage the risk he presented. Intensive oversight in the community would reduce the risk to moderate. Dr Beech was uncertain if, even then, it would deter the appellant from acting as he did in his last offences against the young boy. Dr Beech considered that the appellant would seek to get around any rules in order to commit sexual offences. He had committed a previous offence in the presence of the victim's mother. His criminal history does not suggest he has changed his ways as a result of those convictions. The consequences of contravening the earlier supervision order were unlikely to deter him from breaching a new supervision order. There was a moderate risk that he could befriend a family in order to gain access to a child quite quickly upon his release. He could not be trusted to comply with a supervision order without more intensive monitoring to prevent him, for example, forming relationships with families.

[30] Dr Moyle agreed with Dr Beech's diagnoses about personality disorder and psychopathy. He considered the appellant's recent return to jail would act as a disincentive to further breaches but only while he remembered and thought about it; with his history of impulsivity he could ignore it. Dr Moyle considered the appellant's risk of re-offending was moderately high, even with a supervision order.

[31] The judge noted that this Court in *Francis*[29] emphasised that the question in determining whether to grant a supervision order under s 13(5)(b) of the Act was whether the protection of the community was adequately ensured. If supervision could ensure adequate protection, an order for supervised release should be preferred to a continuing detention order.

[32] The evidence supported the conclusion that little or no trust could be placed in the appellant to comply with a supervision order. When given the opportunity of a supervision order in the community, the appellant breached it and was returned to custody. The paramount consideration under the Act was protection of the community.

[33] The judge referred to this Court's decision in *Attorney-General v Yeo*[30] where the Court formed the view that the appellant's breach of the supervision order was relatively minor. The evidence led in the application from Dr Moyle and Dr Beech caused Martin J to reach the contrary view. Dr Beech's evidence in this application showed that the breach was of a kind which could have placed a boy or young man in jeopardy; the mere presence of staff would be insufficient to prevent the appellant from re-offending. The appellant's attendance at the meeting at McDonald's was consistent with his refusal to accept directions made under the supervision order. The evidence given in earlier hearings, together with the most recent psychiatric reports, led the judge to conclude that the community could not be adequately protected should the appellant be released subject to a supervision order. The appellant's behaviour in challenging directions under the supervision order was consistent with his well-documented psychopathic nature. As the judge could not be satisfied that the appellant would comply with a supervision order, he made a continuing detention order.

**The evidence in the application before Martin J**

*Dr Beech*

[34] Psychiatrist Dr Beech interviewed the appellant on 18 June 2010 and prepared a report under the Act dated 8 August 2010. Dr Beech noted that in his 2007 risk assessment test on the appellant, he formed the opinion that his sexual offending history was consistent with homosexual paedophilia and that his risk of re-offending in the community was high.

[35] During the June 2010 interview, the appellant commenced by stating: "[N]othing much has changed, so this should be easy." Since his return to custody, the appellant was participating in three hours of Bible studies courses each day which he found helpful. He commenced a preparatory program for sexual offenders but he was removed because he had always maintained his innocence of all sexual offences. He was in good general health apart from diabetes and high cholesterol. He had some contact with an elderly sister and brother in law but he told them not to visit as it was difficult for them to attend prison. He has telephone contact with a brother and three friends. He was receiving no counselling whilst in custody.

[36] Whilst under the supervision order in the community, the appellant lived in a housing commission unit. He requested to attend a meeting of a rehabilitation

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29 Above, 405 [39].

30 [2010] QCA 69, [52].

group, Bad Boyz. He claimed he was given approval to attend the first meeting which was held at McDonald's. When he asked to attend the second meeting permission was refused because there was a children's playground at the venue. He argued that because he was allowed to go to the first meeting, it was wrong to prevent him from going to the second. He also argued that there was closed circuit television and parental supervision at McDonald's so that there was no significant risk of anything improper occurring. He argued that he wanted to attend the program to build positive adult social networks and to become involved in activities, such as senior citizens' bus trips. He wanted a written direction if he was not to attend such a meeting. He also argued that, as he was innocent of the original charges, he was no risk in any case. He considered that it was "definitely wrong" to offend against children; the scriptures said so; but he claimed that he had never committed such wrongs.

[37] If released into the community, he would apply again for a housing commission unit and would insist on written instructions from the corrective services officers as to where and when he could attend venues. He was concerned that any supervision order would be so strict that it would be difficult for him not to contravene it. He seemed to enjoy the challenge of legal argument. If granted a supervision order, he planned to avoid contact with children because the order required it, not because he was a risk to anyone.

[38] Whilst in the community, the appellant had seen psychologist Dr Whittingham for 46 sessions between 2007 and 2009. Dr Whittingham helped him "to some degree but not in any sexual connotation"; he provided general guidance and helped him cope in the community. The appellant attended appointments with Dr Whittingham punctually and appeared to cooperate with therapeutic tasks within sessions. He participated in activities and developed a risk management plan. Dr Whittingham considered that the appellant had responded reasonably to psychological intervention, but that the breach in visiting McDonald's highlighted his need for external controls and demonstrated a slight worsening of risk related to his cooperation with supervision. Dr Whittingham considered the appellant should complete intervention programs that examined general self-regulation.

[39] Since his return to custody, the appellant had not been subject to any breaches of discipline. Despite his denials of offending, he had the sexual deviance of homosexual paedophilia and, in keeping with his psychopathy, he demonstrated no remorse or empathy for his victims. His criminal history showed that detention has not been an effective deterrent and he had brazenly re-offended. He had no remorse or insight and had not undertaken rehabilitation courses. He did not have the support of his family in the community.[31] He contravened the supervision order either in wilful disobedience or brazenly attempting to be where children might be found. He continued to argue technicalities projecting blame and responsibility onto others. Without an order under the Act, he would take no steps to avoid children and would be at very high risk of re-offending, probably within two years of release. He could easily gain the confidence of adults and prey on young boys. If so, this would cause his victim significant emotional effects. The appellant had no empathy to hold him back once his offending commenced.

[40] If released subject to a supervision order, he would need to be closely monitored and those charged with his supervision would need to be very vigilant to manage the

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[31] This seems inconsistent with Dr Beech's earlier reference to his contact with elderly siblings and a brother in law.

risk he presents. He would take no responsibility for his control or behaviour but would actively seek loopholes in any order. With intensive supervision, the risk would be reduced to moderate but Dr Beech remained "uncertain if even then it would deter him from acting as he did with his last offences against the young boy when he was invited into the home and assaulted the boy in his bedroom".

[41] Dr Beech also gave oral evidence before the primary judge. Dr Beech repeated that, if released into the community on a supervision order, the appellant would seek loopholes in the order so that he could get around the restrictions it placed on him with a view to committing sexual offences.

[42] As for the McDonald's incident, Dr Beech noted that the fact that staff were present would not constrain the appellant from offending: one of his last sexual offences was committed in the presence of the boy's mother and the other in the boy's bedroom whilst parents were in the house. Dr Beech added, however, that the appellant did not commit offences suddenly; he groomed his victims and their families. Once having done so, he acted quickly and impulsively.

[43] Dr Beech considered that, although the appellant had been returned to custody for this breach, as detention had not deterred him in the past, he may not be deterred from again breaching a supervision order. But as offenders age, the idea of returning to prison usually becomes increasingly unattractive. The appellant was institutionalised and did not have much in the community by way of support so that returning to prison was not as much of a disincentive for him as for others. Nevertheless, the appellant's preference was to be in the community and he was not actively seeking to return to prison.

[44] Dr Beech was shown a draft supervision order in respect of the appellant.[32] He noted that, if the appellant were released into the community on such an order, the supervision period should be ten years: he was an extra-familial recidivist child sex offender within that group of people who are at highest risk of offending over a long period of time. The appellant's poor attitude to supervision meant that those supervising him would need to work harder than with others.

[45] In cross-examination, the appellant's counsel suggested that as he had now been in custody for over a year for contravening the supervision order, he had an incentive to comply if again released on a supervision order. Dr Beech agreed that made sense but added that the appellant was pessimistic that he would be able to keep to the conditions of a supervision order. Dr Beech agreed that, apart from the McDonald's breach, the appellant had complied generally with the supervision order and had been regularly visiting Dr Whittingham.

[46] His past offending suggested that his risk of future offending against children would be in circumstances where he had ingratiated himself with a family with children, but he could do this as quickly as in an afternoon. He had never previously sexually assaulted a child who was a stranger to him in an impulsive way. The appellant did not wilfully disobey other more significant conditions of his supervision order in which children may have been placed at greater risk, such as presenting a false schedule of events or disobeying a curfew. It was possible that the appellant simply wanted to attend the Bad Boyz meeting.

[47] The appellant's risk to the community would be reduced to moderate under a supervision order but the appellant could not be trusted to adhere to the conditions

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32 Similar to that set out in the final paragraph of these reasons.

of the order without surveillance and more monitoring than most. The draft supervision order provided a reasonable restriction on his liberty to protect the community but depended on oversight of his compliance. The appellant's compliance would be motivated by a desire not to return to prison.

*Dr Moyle*

[48] Psychiatrist Dr Moyle interviewed the appellant on 24 June 2010 and prepared a report under the Act dated 13 August 2010. Dr Moyle concluded that the appellant was "of at least moderately high risk of sexually re-offending against vulnerable others including intellectually disabled young men and children if he is not subject to a supervision order in the community or if he is not detained in custody."

[49] Dr Moyle considered it likely the appellant had:

> "alcohol dependence in remission and homosexual paedophilia untreated so far and a lifelong antisocial personality disorder. … His mode of offending includes winning the trust of childrens' guardians … It is likely he will continue to challenge authorities wishes if those wishes conflict with his own even when those wishes are only motivated to assist him to live safely in the community. This could have a draining effect on the mental health professionals and supervising officers who monitor his progress and compliance with any conditions placed on his release by a court. He is likely to seek to find chinks in the orders that allow him to continue to live as he did in the past. So far he has shown no signs of serious change in attitude to his behaviour that places him at risk, but to his credit he has been persistent with his bible studies and the religious group providing most support have also persevered. His family apparently accept his innocence. Neither is rehabilitation but are important if he is to make a successful transition to community living. They cannot be relied on to monitor his compliance with court ordered supervision conditions as he is skilled at persuasion.
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> [The appellant] remains a moderately high risk of serious re-offending sexually against vulnerable young adults and children in particular if released from custody. That risk is most likely to be positively modified, if so released, by a combination of long term monitoring of compliance with supervision orders, while he is encouraged by treating mental health professionals to see the positives of adhering to such conditions if he is to gain goals he wishes outside of sexual behaviour with vulnerable others."

[50] Dr Moyle also gave evidence before the primary judge. As the appellant believed he had not committed any sexual offences, it was not possible to address with him his offending behaviour. This made his supervision more difficult. He could not be trusted to comply with conditions unless they were monitored and supervised, including by surveillance. The Corrective Services Department has a surveillance unit. The appellant's prior offending showed that it was important to keep the presence of any child or young male from his care or oversight. If placed on a supervision order, the order should be for ten years; five years would be far too short a time to expect change. He had interviewed the appellant on a number of occasions over the past five years and had seen no change in his attitude.

[51] In cross-examination, he agreed that the appellant's only attempt to find a loophole in the conditions of his supervision order was in justifying his present breach. Since incarcerated, prison officers considered him polite and compliant. If he met the conditions designed to control those with whom he associated, the community would be protected. The only evidence of his non-compliance with such a provision was the current breach. He was unhappy about his return to prison and saw it as punishment for contravening his supervision order. This was "[a]s much of an incentive as it can be" for his contravention of the order. He was, however, impulsive and his impulsivity might dominate. He agreed that a skilled corrective services officer could regularly remind him of the consequences of the contravention. It was more likely the appellant would comply with clearly expressed written rules. Dr Moyle considered the risk of the appellant committing a serious sexual offence if released into the community without a supervision order was at least moderately high. A supervision order would lower the risk but not reduce it to a moderate risk. Even with a supervision order, the risk remained moderately high as the appellant did not have well-developed internal constraints.

**Was the judge required to take into account international law in exercising his discretion under the Act?**

[52] The appellant does not contend that the Act is unconstitutional but nonetheless submits that the judge erred, in exercising his discretion under the Act, in not taking into account Australia's international legal obligations, namely, the United Nations International Covenant on Civil and Political Rights, particularly art 9(1), which provides:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[53] Australia signed the Covenant on 18 December 1972 and ratified it on 13 August 1980. The Covenant entered into force in Australia (except for art 41) on 13 November 1980. Australia acceded to the Optional Protocol to the Covenant on 25 September 1991 and the Protocol entered into force for Australia on 25 December 1991.

[54] The international law concept of the right to liberty set out in art 9(1) is also a common law right. As Atkinson J explained in *Attorney-General v Fardon*:[33]

> "[19] The right to personal liberty is the most basic and fundamental of the human rights recognised by the common law. This fundamental right was referred to by Mason and Brennan JJ in their joint judgment in *Williams v The Queen* as follows:
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> > "The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights': *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause': *Commentaries on the Laws of England* (Oxford, 1765), Bk 1, pp 120-121, 130-131. He warned:

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33 [2003] QSC 331

> 'Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities'.
>
> …
>
> The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes."

[20] The importance of the right to personal liberty was recognised internationally by the *United Nations Covenant on Civil and Political Rights…*

...

[21] The fundamental importance which the common law attaches to personal liberty was discussed at some length by the Full Court of the Federal Court of Australia in *MIMIA v Al Masri*. As their Honours pointed out, even minor deprivations of liberty are viewed seriously by the common law. Their Honours referred to the decision of Walsh J in *Watson v Marshall* … where his Honour observed that: "any interference with personal liberty even for a short period is not a trivial wrong".

[22] The fundamental nature of this right is reflected in the rule of statutory construction to prefer a strict construction with (sic) favours liberty. As Kirby P (as his Honour then was) said in *Director of Public Prosecutions v Serratore*: …

> "Traditionally, in our law, liberty has been regarded as a most precious civic right. Legislation which has the effect of derogating from the right of an individual to enjoy liberty is conventionally accorded (in the case of ambiguity) a strict construction which favours liberty: *Piper v Corrective Services Commission of New South Wales* (1986) 6 NSWLR 352 at 358"…

[23] The statutory construction which contains the presumption against the curtailment of fundamental freedoms has been most recently set out by Gleeson CJ in the High Court in *Plaintiff S157/2002 v Commonwealth* where his Honour said:

> "courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment: *Coco v R* (1994) 179 CLR 427 at 437."

> [24] These are the principles of the common law which inform both the interpretation of the statute and the disposition of the decision in this matter. It is of fundamental importance to recognise that we live in a society where a core value of the common law, no matter what the popular clamour, is the protection of the liberty of the individual. The common law does not sanction preventive detention. The protection of liberty afforded by the common law applies equally to the most powerful and the least powerful, the most deserving and the least deserving in our society. It can only be removed or curtailed by, and to the extent of, specific statutory provisions to that effect." (footnotes omitted)

[55] One difficulty for the appellant is that the terms of the Act are indeed specific. In 2004, the majority of the High Court in *Fardon v Attorney-General (Qld)*[34] held that the Act was not unconstitutional in that it was not incompatible with the Supreme Court of Queensland's constitutional role as a potential repository of federal judicial power, distinguishing *Kable v Director of Public Prosecutions (NSW)*.[35]

[56] Since the High Court's decision in *Fardon* and the primary judge's decision in this case, the Act has been significantly amended but those amendments are neither relevant nor applicable in the present case.[36]

[57] Perhaps of more relevance in this case is that on 10 May 2010, the United Nations Human Rights Committee found that the Act, in allowing for the detention of prisoners in prison after they had completed serving their sentences, breached art 9(1).[37] Under art 4(2) of the Protocol, the Committee requested that Australia provide "information about the measures taken to give effect to the Committee's views" within 180 days of receiving the communication.[38] Australia has not responded to the Committee's Communication under art 4(2) of the Protocol.

[58] Some time before the Committee's Communication in *Fardon*, this Court in *Attorney-General v Sybenga*[39] expressed similar concerns. Keane JA, Holmes JA and Fryberg J each noted the growing number of prisoners under the Act who are held in a custodial setting designed for the serving of sentences by those convicted of offences. Their Honours each also noted that prisoners under the Act should be held in an alternative secure form of accommodation to prison, accommodation designed for protective and rehabilitative, not punitive, purposes.[40]

[59] I respectfully agree with their Honours' views. If prisoners under the Act were housed in secure accommodation designed for their continuing control, care or treatment, separate from the general prison population serving sentences for

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34 (2004) 223 CLR 575.

35 (1996) 189 CLR 51.

36 The current version of the Act is Reprint 2C. *Dangerous Prisoners (Sexual Offenders) and Other Legislation Amendment Act* 2010, Act No 34 of 2010, relevantly omitted s 43B and amended Pt 3 of the Act.

37 Fardon v Australia, Communication 1629/2007. See also Tillman v Australia, Communication 1635/2007.

38 Fardon v Australia, Communication 1629/2007, para 10.

39 [2009] QCA 382.

40 Above, Keane JA, [1]-[3], Holmes JA, [30], Fryberg J, [31]-[33].

criminal offences, art 9(1) may not be breached. This outcome would be entirely consistent with the objects of the Act in s 3.[41]

[60] Australia's federal system means that, although Australia has ratified the Covenant and acceded to the Protocol, the State of Queensland is not a party to the Covenant or the Protocol. It can be accepted, however, that international law considerations, are likely to wrought considerable influence in the development of Queensland government policy.[42]

[61] In *Minister for Immigration and Ethnic Affairs v Teoh*,[43] Mason CJ and Deane J in a joint judgment referred to the well-established principle that provisions of an international treaty to which Australia is a party are not part of Australian law unless legislatively incorporated into municipal law. But where a statute is ambiguous, courts will favour the construction which accords with Australia's obligations under a treaty or convention to which Australia is a party, at least where the legislation is enacted after or in contemplation of entry to or ratification of an international instrument. That is because parliament must be taken to intend to give effect to Australia's international law obligations. The concept of ambiguity in this context is a wide one so that if the language of the legislature is capable of a construction consistent with the terms of the international instrument and the obligations it imposes on Australia, then that construction should be preferred.[44] See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[45]

[62] The High Court's decision in *Fardon* meant that the primary judge was duty bound to apply the Act irrespective of its infringement of art 9(1). It is common ground that the appellant is a serious danger to the community in the absence of an order under s 13. It followed that, the question for determination was whether the judge should detain the appellant in custody for an indefinite term for control, care or treatment by way of a continuing detention order under s 13(5)(a), or whether he should release the appellant from custody subject to appropriate requirements by way of a supervision order under s 13(5)(b). In making that decision, the paramount consideration was the need to ensure adequate protection of the community.[46] Section 13 clearly sets out the judge's duty in such circumstances; it does not leave room for the operation of art 9(1) in determining any ambiguity.

[63] Although art 9(1) could not overrule the clear and unambiguous requirements of the Act, the importance of the liberty of the subject both at common law and under international law is a factor relevant to the exercise of discretions under the Act. The judge in making his decision under s 13 followed this Court's approach in *Francis*[47] and appreciated that, if a supervision order could ensure adequate community protection, he must order supervised release rather than a continuing detention order. Accepting that it was appropriate to take art 9(1) into account in exercising his discretion, the judge could have done no more than take the *Francis*

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41 Referred to in [5] of these reasons.

42 See Bryan Horrigan and Brian Fitzgerald, "International and Transnational Influences on Law and Policy Affecting Government" in Bryan Horrigan ed, *Government Law and Policy: Commercial Aspects*, The Federation Press, 1998, Ch 1, pp 2 – 54.

43 (1995) 183 CLR 273.

44 Above, 286-288.

45 (1992) 176 CLR 1, Brennan, Deane and Dawson JJ, 38; Mason CJ agreeing at 10.

46 The Act, s 13(6).

47 [2007] 1 Qd R 396, 405 [39], referred to in [31] of these reasons.

approach. It follows that the judge did not err in failing to take into account international law in making his decision. This ground of appeal is without substance.

**Did the judge err in not finding that the breach of the supervision order was relatively minor?**

[64] The appellant contends the primary judge erred in making the following finding:

> "Given the evidence led this morning, I must, with respect, differ from the view expressed by the Court of Appeal in the most recent appeal brought by the [appellant] that the breach of the supervision order was relatively minor. On the basis of Dr Beech's evidence, the breach was of a nature which could have placed a boy or young man in jeopardy and the mere presence of staff would not be sufficient to prevent the [appellant] from re-offending in a situation of that order.
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> His attendance at the meeting at McDonald's was consistent with his refusal to accept the purpose of the orders and his desire to misconstrue them and directions made under them. His past behaviour and the evidence led in earlier hearings, together with the most recent reports of the psychiatrists, lead me to the view that the community could not be adequately protected should the [appellant] be released subject to a supervision order."

[65] The views of this Court to which his Honour referred are set out at [20] of these reasons. The appellant's breach was his single attendance at McDonald's, in contravention of oral directions from corrective services officers. It is self-evident that the breach was not trivial because of the appellant's history of offending against male children. There was a children's playground at the McDonald's. Further, his breach constituted an offence under the Act.[48] But the following matters are uncontentious. He was attending McDonald's for a purpose related to his rehabilitation in the community, namely, to attend a meeting of a support group of ex-prisoners (none of whom were child sex offenders) supervised by a minister of religion, who, it is not suggested, was irresponsible or without relevant training and experience. The chaplain accompanying the appellant stated that at no time did he see the appellant approach children. The appellant left McDonald's with the chaplain after 15 minutes when the meeting was cancelled. Importantly, psychologist Dr Whittingham who treated the appellant during 46 consultations over the previous 17 months when the appellant was living in the community under the supervision order, considered the breach to constitute only a "slight worsening" of risk.[49] It is also relevant that all the appellant's prior sexual offending involved ingratiating himself with adult family members before taking advantage of vulnerable male children. Dr Beech agreed in cross-examination that the appellant had never previously impulsively assaulted a child who was a stranger to him.

[66] Psychiatrists Beech and Moyle persuasively identified the potential seriousness of letting such a breach continue and the need to set firm, clear and uncompromising boundaries on the appellant. He is not presently someone who should be permitted to attend a McDonald's at random and without supervision. In such circumstances, male children may well be at risk and the breach would have been concerning. But

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48 The Act, s 43B (now repealed).

49 See Dr Beech's evidence referring to Dr Whittingham's report at [38] of these reasons.

his attendance at McDonald's on the occasion constituting the breach was to attend an adult support group meeting aimed at rehabilitation supervised by an apparently responsible adult. He left with the chaplain after a short time and without incident. In those circumstances and on that occasion, his past offending patterns did not suggest children were at any particular risk; the chaplain's presence and the short period of attendance at McDonald's did not give him the opportunity to ingratiate himself with the families of vulnerable boys, as was his past modus operandi. The breach was, as this Court originally identified, a relatively minor one.

[67] I consider that the judge erred in concluding that this particular breach, which was immediately and firmly prosecuted, was anything other than "relatively minor". It was not, as the judge considered, a breach of a nature apt to place a boy or young man in jeopardy. The judge's mistaken characterisation of the breach was a critical factor in his Honour's decision to refuse to grant a supervision order and to instead order that the appellant continue to be detained in custody. It is an error of the kind referred to in *House v The King*[50] and warrants the setting aside of the judge's decision. This Court must now re-determine the difficult question of whether to grant a continuing detention order or a supervision order under s 13. As neither party has suggested there is any further relevant evidence, the question must be decided on the material before the primary judge.

[68] In deciding that question, it is necessary to focus upon the particular nature of the risk which the appellant poses to the community: *Francis*.[51] The appellant is a risk to vulnerable young males into whose families he ingratiates himself. The making of a supervision order does not require that it be "watertight" with no prospect of breach.[52] If a supervision order can be framed in a way to ensure adequate community protection having regard to the risk to the community posed by the prisoner, then a court should make a supervision order rather than a continuing detention order. This is because, as this Court explained in *Francis*:

> "[T]he 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."[53]

[69] This Court, differently constituted, took a similar approach in *Attorney-General v Lawrence*,[54] where Chesterman JA, with whom Muir JA and Margaret Wilson J agreed, noted that:

> "The liberties of the subject and the wider public interest are best protected by insisting that the Attorney-General, as applicant, discharges the burden of proving that only a continuing detention order will provide adequate protection to the community."[55]

In refusing Lawrence special leave to appeal to the High Court of Australia, French CJ seemed to endorse that approach.[56]

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50 (1936) 55 CLR 499, 504-505.
51 [2007] 1 Qd R 396, 404 [38].
52 Above, 405 [39].
53 Above.
54 [2010] 1 Qd R 505.
55 Above, 512-513 [33].
56 *Lawrence v Attorney General (Qld)* [2009] HCA Trans 244, French CJ.

[70] I accept the strongly held views of both Dr Beech and Dr Moyle that the appellant is a homosexual paedophile with an anti-social personality disorder at least bordering on the psychopathic. Dr Moyle also considered he may have alcohol dependence in remission. Dr Beech considered that, should the appellant be released on a suitably structured supervision order like that set out in the final paragraph of these reasons, his risk of committing a serious sexual offence against a male child was moderate. Dr Moyle was more cautious. He considered if the appellant was released into the community without a supervision order the risk would be at least moderately high. If he were released into the community with a supervision order, the risk would be reduced, but not so far as to become a moderate risk.

[71] Whilst the appellant was living in the community under a supervision order for 17 months between 2007 and 2009, he saw psychologist Dr Whittingham for 46 sessions. Dr Whittingham considered that the appellant had responded reasonably well to psychological intervention although his breach of the supervision order by attending at McDonald's highlighted his need for external controls and indicated a slight worsening of risk. Dr Whittingham considered the appellant should complete intervention programs aimed at general self-regulation.

[72] The appellant foolishly and deliberately breached his supervision order in contravening directions from corrective services officers not to attend McDonald's. His punishment was swift and severe. As a result, he has been returned to custody for well over two years. Although his insight may not be great, I accept the views of both psychiatrists that he now has at least some concept of the drastic consequences to him of breaching a supervision order, even if the breach is relatively minor. The proposed supervision order requires full and detailed disclosure of every aspect of his life to a corrective services officer; continuing treatment of the kind previously provided by Dr Whittingham; abstinence from alcohol and submission to testing; written approval from a corrective services officer for any trip away from his residence; and compliance with every reasonable curfew or monitoring direction of a corrective services officer. The evidence of Dr Beech and Dr Moyle suggests that intensive supervision and intermittent surveillance may be needed to ensure a supervision order provides adequate protection of the community. Such supervision and surveillance is available.

[73] Under s 13(6), the paramount consideration in determining whether to order a continuing detention order or a supervision order is the need to ensure adequate protection of the community. This requires the judge to make a value judgment based on the evidence. It is impossible to eliminate all risk of criminal offending, including offending against children, from a community. A judge must determine what is *adequate* protection of the community in all the circumstances.[57] The respondent has not persuaded me that the adequate protection of the community in this case cannot be assured by the release of the appellant into the community under a carefully structured supervision order, conscientiously supervised by corrective services officers. It follows that I must release the appellant on an appropriate supervision order.

[74] Both Dr Beech and Dr Moyle opined that a supervision order of more than five years was warranted and that a 10 year supervision order was prudent. The nature

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[57] *Attorney-General v Sutherland* [2006] QSC 268, [28]-[30]; *Attorney-General v DGK* [2011] QSC 73, [28].

of the appellant's past offending and the fact that he is a homosexual paedophile with an anti-social personality disorder bordering on the psychopathic supports a 10 year supervision order, at least at this time. If he does successfully rehabilitate earlier, he can apply to amend the terms and period of the order.[58]

**Was the evidence sufficient to support a continuing detention order under the Act?**

[75] The appellant also contended that the evidence before the primary judge was insufficient to warrant an order for the appellant's continued detention under the Act. As in my view the appeal must be allowed on another basis, it is not necessary to consider this remaining ground of appeal in any detail. It is sufficient to note that this is a difficult, borderline case on which reasonable minds could properly differ as to whether the respondent demonstrated that releasing the appellant into the community on a supervision order would not provide adequate community protection. I have thoroughly reviewed the evidence earlier in these reasons. The evidence, particularly that of Dr Moyle, was capable of supporting the primary judge's view. It follows that this ground of appeal is not made out.

**Orders**

[76] I would allow the appeal, set aside the order of Martin J of 10 September 2010 and instead order that:

1. The Court is satisfied to the requisite standard and affirms the decision that Raymond YEO (the appellant) is a serious danger to the community in the absence of an order under s 13 *Dangerous Prisoners (Sexual Offenders) Act* 2003.
2. The continuing detention order made on 4 August 2009 is rescinded.
3. The appellant is released from custody subject to the following requirements until 22 July 2021.

The appellant must:

(i) be under the supervision of an Authorised Corrective Services Officer: (Authorised Corrective Service Officer) for the duration of this order;

(ii) report to an Authorised Corrective Services Officer at the Queensland Corrective Services Probation and Parole Office closest to his place of residence within 24 hours of the day of release from custody and at that time advise the officer of the appellant's current name and address;

(iii) report to, and receive visits from, an Authorised Corrective Services Officer at such times and at such frequency as determined by Queensland Corrective Services;

(iv) notify and obtain the approval of an Authorised Corrective Services Officer for every change of the appellant's name at least two business days before the change occurs;

(v) notify an Authorised Corrective Services Officer of the nature of his employment, or offers of employment, the hours of work each day, the name of his employer and the address of the premises where he is or will be employed;

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58 The Act, Div 4, s 18 to s 19A.

(vi) seek permission and obtain approval from an Authorised Corrective Services Officer prior to entering into an employment agreement or engaging in volunteer work or paid or unpaid employment;

(vii) reside at a place within the State of Queensland as approved by an Authorised Corrective Services Officer by way of a suitability assessment;

(viii) not reside at a place by way of short term accommodation including overnight stays without the permission of an Authorised Corrective Services Officer;

(ix) seek permission and obtain the approval of an Authorised Corrective Services Officer prior to any change of residence;

(x) not leave or stay out of Queensland without the written permission of an Authorised Corrective Services Officer;

(xi) not commit an offence of a sexual nature during the period of this order;

(xii) not commit an indictable offence during the period of this order;

(xiii) comply with every reasonable direction of an Authorised Corrective Services Officer;

(xiv) respond truthfully to enquiries by an Authorised Corrective Services Officer about his whereabouts or movements;

(xv) not have any direct or indirect contact with a victim of his sexual offences;

(xvi) notify an Authorised Corrective Services Officer of the make, model, colour and registration number of any vehicle owned by or generally driven by him, whether hired or otherwise obtained for his use;

(xvii) attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by an Authorised Corrective Services Officer at a frequency and duration which shall be recommended by the treating professional, the expense of which is to be met by Queensland Corrective Services;

(xviii) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) as deemed necessary by the treating psychiatrist or an Authorised Corrective Services Officer, and permit the release of the results and details of the testing to Queensland Corrective Services, if such a request is made for the purpose of amending the supervision order or for ensuring compliance with this order, the expense of which is to be met by Queensland Corrective Services;

(xix) permit any medical, psychiatric, psychological or other mental health practitioner to disclose details of treatment, intervention and opinions relevant to the appellant's level of risk of re-offending and compliance with this order to Queensland Corrective Services, if such a request is made for the purpose of amending the supervision order and/or ensuring compliance with this order;

(xx) attend and participate fully in any program or course conducted by a psychologist, counsellor, or other professional, in a group or individual capacity, as directed by an Authorised Corrective Services Officer in consultation with any treating medical, psychiatric, psychological or other mental health practitioner where appropriate, with any expense of such program to be met by Queensland Corrective Services;

(xxi) submit to and discuss with an Authorised Corrective Services Officer a schedule of his planned and proposed activities on a weekly basis or at such other intervals as directed by an Authorised Corrective Services Officer, which must, if required by the Authorised Corrective Services Officer, disclose the identity of any person who will accompany the appellant during any of those activities and the extent to which that person has been advised by the appellant of the nature of his sexual offences;

(xxii) not undertake any trip, visit or other activity away from his approved place of residence without the prior written approval of an Authorised Corrective Services Officer, unless an Authorised Corrective Services Officer dispenses with this requirement;

(xxiii) report to an Authorised Corrective Services Officer on a weekly basis or at such other intervals as directed by an Authorised Corrective Services Officer on trips, visits and other activities that the appellant has undertaken since last reporting to an Authorised Corrective Services Officer and the identity of any persons in whose company the appellant undertook such trips, visits or activities, unless an Authorised Corrective Services Officer dispenses with this requirement;

(xxiv) not initiate or maintain any supervised or unsupervised contact with any child under 16 years of age or with any physically or intellectually impaired person (other than a sibling of the appellant), except with the prior written approval of an Authorised Corrective Services Officer. The appellant is required to disclose the terms of this order and details of his convictions for sexual offences to the guardians and caregivers of the child or impaired person, before any such contact can take place; provided that Queensland Corrective Services may disclose that the appellant is subject to this supervision order and the terms of this order to guardians or caregivers of the child or impaired person and external agencies (e.g. Department of Child Safety) in the interest of ensuring the safety of the child or impaired person;

(xxv) not join, affiliate with, attend on the premises of or attend at the activities carried on by any club or organisation in respect of which there are reasonable grounds for believing there is either child membership or child participation

without the prior written permission of an Authorised Corrective Services Officer;

(xxvi) not visit or attend at a caravan park without the prior written permission of an Authorised Corrective Services Officer;

(xxvii) not visit a public park without the prior written permission of an Authorised Corrective Services Officer;

(xxviii) comply with every reasonable curfew direction or monitoring direction of an Authorised Corrective Services Officer;

(xxix) not access pornographic images on the internet or otherwise;

(xxx) abstain from the consumption of alcohol without the prior written permission of an Authorised Corrective Services Officer;

(xxxi) submit to alcohol testing including breath testing as directed by an Authorised Corrective Services Officer, the expense of which is to be met by Queensland Corrective Services.

[77] **MUIR JA:** I have had the advantage of considering the reasons of Margaret McMurdo P. I respectfully agree that, for the reasons given by her Honour, the exercise of the primary judge's discretion miscarried and that this court must exercise the discretion afresh. I agree with her Honour that the primary judge gave insufficient consideration to the nature and circumstances of the offending conduct. In my view, the risks to which that conduct gave rise were overstated. In particular, insufficient regard was had to: the appellant's purpose in attending the McDonald's restaurant; the company the appellant was in at the restaurant; the openness of the appellant's conduct; and the evidence that the appellant had never previously impulsively assaulted a child outside the context of an established social relationship. It is significant also that the appellant resided in the community for 17 months from October 2007 until March 2009 without there being any evidence of a breach by him of the terms and conditions of his strict supervision order apart from the breach under consideration. There was no suggestion that that breach involved any attempted or even contemplated sexual misconduct by the appellant.

[78] I respectfully agree that the appeal should be allowed. I agree also with the order proposed by Margaret McMurdo P at paragraph [76] of her Honour's reasons and with her reasons for concluding that such an order ought to be made.

[79] As Margaret McMurdo P's reasons demonstrate, it is abundantly plain that in construing and applying the *Dangerous Prisoners (Sexual Offenders) Act* 2003 a court is obliged to observe the statute's dictates irrespective of the content of any international treaty to which Australia may be a party. I find it unnecessary to consider the role that art 9(1) of the United Nations Covenant on Civil and Political Rights may play in the event of a statutory ambiguity: no ambiguity was identified.

[80] **WHITE JA:** I have had the advantage of reading the comprehensive reasons of Margaret McMurdo P. I agree with her Honour for those reasons that the appeal should be allowed, the continuing detention order rescinded and the applicant be released from custody subject to the extensive and stringent conditions set out at [76] of her Honour's reasons.

[81] I agree with her Honour that this is a matter where other reasonable and fully informed persons might reach a different conclusion. While the Act mandates the

protection of the community as the paramount consideration, the extraordinary nature of the court's jurisdiction to detain preventatively must be constantly in mind. This suggests to me that the object of the Act can be adequately achieved in this case by the requirements of the order as proposed.

[82] I also wish to endorse strongly the observations made in *Attorney-General v Sybenga*,[59] and by her Honour here,[60] that accommodation separate from that provided for the punitive detention of prisoners serving a sentence of imprisonment which is specifically designed to acknowledge the basis upon which a person is detained under the Act should be considered by the authorities.

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59 [2009] QCA 382.

60 At [58]-[59].