

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Qld v Ellis* [2011] QSC 382

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)

v

ANDREW CLIVE ELLIS
(respondent)

FILE NO/S: 4389/11

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 25 October 2011

DELIVERED AT: Brisbane

HEARING DATE: 19 October 2011

JUDGE: Ann Lyons J

ORDER: **I will hear from counsel as to the terms of the order**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – OTHER MATTERS –where the Attorney-General seeks orders pursuant to s 13(5)(a) or s 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* that the respondent be subject to a continuing detention order or released from custody subject to a supervision order – where recommendation by reporting psychiatrists that the respondent complete a High Intensity Sexual Offending Program and a substance abuse program – where evidence that the respondent is likely to re-offend – whether there is a high degree of probability of re-offending – whether re-offending will involve offences of a serious nature – whether a Supervision order can ensure adequate protection of the community and the respondent’s rehabilitation

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13

A-G (Qld) v Francis [2006] QCA 324

A-G (Qld) v WW [2007] QCA 334,

COUNSEL: B Mumford for the applicant
 J Lodziak for the respondent
 SOLICITORS: Crown Law for the applicant
 Legal Aid Queensland for the respondent

- [1] **ANN LYONS J:** The Attorney-General, pursuant to an application filed on 24 May 2011, seeks an order pursuant to s 13(5)(a) or s 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) that the respondent be (a) detained in custody for an indefinite term for controlled care or treatment (a continuing detention order) or (b) released from custody subject to the requirements the court considers appropriate and that are stated in the order (a Supervision order).
- [2] In the circumstances of the current case the applicant seeks a Continuing Detention Order principally so that Mr Ellis can undergo treatment because the three psychiatrists who have prepared reports all consider that he should commence the High Intensity Sex Offender Program (HISOP) and participate in therapy whilst in custody and before being released into the community.

Background

- [3] Mr Ellis is currently 28 years of age. He was 22 years of age when he committed the index sexual offences on 12 August 2005.
- [4] On 5 June 2006 he was sentenced by Howell DCJ in relation to those offences namely one count of sexual assault and one count of a sexual assault with a circumstance of aggravation, as well as the summary offence of wilful exposure. He was given a head sentence of three years' imprisonment.
- [5] At the time of committing those offences, the respondent was the subject of a suspended sentence imposed on 12 April 2004 in respect of property and drug offences. The balance of the suspended sentences, (5½ months in prison), was therefore activated and was ordered to be served cumulatively on that term.
- [6] He had also been charged previously as a 12 year old in 1996 with indecent assault and with aggravated sexual assault as a 13 year old.

The index offences

- [7] The index charges of sexual assault occurred on the morning of 12 August 2005 and involved Mr Ellis accosting a 17 year old girl and a short time later a 13 year old girl.
- [8] The facts relied upon by the Crown at sentence indicated that just before 7.00am on 12 August 2005, the first complainant, a 17 year old High School student, was walking to the bus stop, when she noticed the respondent following her. He crossed the road, and from that side of the street, exposed his penis to the complainant and said "*do you want to suck me off, babe?*" The complainant started to walk away, but Mr Ellis ran up behind her, stood beside her, offered to walk her to school, and asked "*do you want to suck me off?*"
- [9] The complainant continued to walk away from the respondent. He continued to follow her, touched her on the buttocks and said "*I'll spread your legs for you.*"

The complainant jumped away from him and walked to the driveway of a nearby house. She swore loudly at Mr Ellis in an effort to get him to leave. After an unsuccessful attempt to use a telephone, the complainant told a school friend, and then a teacher, who called police.

- [10] Almost immediately after committing those offences, the respondent approached the second complainant, a 13 year old girl who was also on her way to school. When the respondent approached her he told her that “*she was going to do something for him or he was going to stab her.*” Mr Ellis pushed her to the ground and pulled down her tracksuit pants. He touched her in the area of her breasts, on the outside of her clothing. In the latter stages of this episode, the respondent pulled down his pants. The complainant yelled out in an effort to draw attention to the situation. Mr Ellis stopped and left the area.
- [11] The respondent admitted his conduct to his father two weeks later, by showing him a newspaper article about the attacks. Two days after that, the police were informed. After initially denying any involvement, he made fairly detailed admissions in an interview. He told police that he was “*off his face*” on drugs.

History in prison

- [12] Whilst in prison Mr Ellis has committed a number of wilful damage offences. Cumulative terms imposed for those offences initially resulted in a full time discharge date of 12 October 2011 however due to more offences being committed in custody in August 2011 he now has a current fulltime release date of 12 January 2012. He has also committed a number of breaches of prison discipline whilst in custody including failing a urine test, failing to supply a specimen as well as threatening and assaulting other inmates. He also assaulted a corrective services officer on 8 June 2010.
- [13] His convictions for offences committed in prison have added over 3 years to the sentences imposed by Howell DCJ in August 2006.
- [14] The respondent completed the Getting Started - Preparatory Program on 16 March 2011 and was assessed as being suitable for HISOP. The respondent has not as yet undertaken the course as he initially refused to participate because the course would take 9 months to complete and he only had 5 months left to serve on his sentence. He subsequently indicated a willingness to undertake the course.
- [15] The relevant timeline is as follows;
- | | |
|----------------|--|
| June 2005 | Respondent discharged from custody on earlier sentence |
| 12 August 2005 | Index sexual offences committed |
| 29 August 2005 | Remanded in custody on index offences |
| 5 June 2006 | Sentenced in the Brisbane District Court <ul style="list-style-type: none"> • Head sentence of 3 years imprisonment • 5½ months of suspended sentence activated (cumulative) |
| 17 June 2005 | First offence committed in custody |
| August 2008 | Estimated end date for the three (3) year head sentence imposed for index offending |
| 24 May 2011 | Subject Application filed in Supreme Court at Brisbane |
| 14 June 2011 | Respondent advised that full time discharge date had been recalculated from February 2012 to 12 October 2011 |

11-14 August 2011 Last offence committed in custody

12 January 2012 Current full time release date

[16] On 24 May 2011 the applicant filed this application and relied on the report of Professor Barry Nurcombe dated 26 September 2010.

[17] On 28 June 2010 the court was satisfied there were reasonable grounds for believing the prisoner was a serious danger to the community in the absence of an order pursuant to Division 3 and ordered that a hearing date be set. Mr Ellis was also ordered to undergo examinations by two psychiatrists, namely, Dr Joan Lawrence and Dr Scott Harden, who were to prepare reports in accordance with s 11 of the *Dangerous Prisoners (Sexual Offenders) Act 2003*.

The psychiatrist's reports.

[18] There are therefore three expert psychiatric reports. In addition to Professor Nurcombe's report which was prepared in relation to the initial application, Dr Scott Harden has prepared a report dated 25 September 2011 and Dr Joan Lawrence has prepared two reports dated 15 August 2011 and a supplementary report dated 19 August 2011.

Dr Joan Lawrence's report

[19] Dr Lawrence in her report noted that Mr Ellis' adult criminal history commenced at the age of 17 on 19 October 2000 and that he has a total of 17 charges since that time. There are also nine breaches of some form of order, probation or suspended sentence. The offences were mostly against property with three drug possession type offences and one fraud.

[20] Dr Lawrence noted that since his imprisonment the prison records show that he has been charged with numerous offences mostly of wilful damage as a result of breaches in various prison settings.

[21] Dr Lawrence noted that Mr Ellis had a disturbed family background and his parents separated when he was three or four years old and that he went to live with his father. When he was 8 or 9 his father was arrested and charged with sexual offences against one of the five girls who were living in the home at the time. Three of the girls were his then partner's children and the other girls were children from his previous relationships. After his father's arrest he moved back to live with his mother who found him difficult to cope with.

[22] Dr Lawrence noted that he began using marijuana excessively at a young age and he was placed in foster care until he was 13 and then he went to Boys Town until he was 16 years of age. He absconded and was frequently homeless. He returned to his mother for a short period but his drug use was extensive and when his father was released from prison he returned to live with him. He experienced an unsolicited sexual encounter at the age of 10 and this contributed to his excessive use of drugs.

[23] Dr Lawrence noted that a cognitive assessment carried out by Peter Perros indicated he had an IQ of 76 which is in the borderline range of the 50th percentile. Mr Perros noted that his low IQ made him vulnerable to influence and that he copes "maladaptively with stress through substance abuse". Mr Perros also reported that

there was “a lot of anger and unhappiness in him and that his poor insight will likely make him a challenging person to work with”. He was concerned that “in jail he will likely gravitate toward charismatic psychopaths and pick up their bad habits with potential legal consequences down the line”.

- [24] In relation to the index offences, Dr Lawrence noted that Mr Ellis had a reasonable recall of the events and acknowledged that he had performed the acts with sexual intent and could not explain and did not understand why he did what he did. Dr Lawrence noted the program participation records for the Getting Started - Preparatory Program and stated that the assessment undertaken for that program indicated illicit substance abuse had been a consistent feature of his functioning and increased his sexual arousal. The assessment also noted an extensive history of self-harm and that there were 38 recorded self-harm episodes at the time of that report on 21 October 2010.
- [25] Dr Lawrence also noted that there was a history of institutional non-compliance including various breaches due to poor behaviour as well as threatening and intimidating behaviour towards staff and other offences. Other offences included assaults against staff and an incident of sexual assault against a female officer which did not result in a charge. Incidents were also described where he was found to be masturbating in full view of officers knowing they were observing him. Dr Lawrence also indicated that Mr Ellis had refused to do the HISOP due to his imminent release date.
- [26] Dr Lawrence noted his early drug taking behaviour which included heroin. She also noted that his life appeared to be controlled by his drug use and dependence. In particular, he would obtain pseudoephedrine tablets from pharmacies by misrepresenting himself and then would deliver them to an amphetamine maker who would supply him with the finished product in exchange. He also resorted to stealing or robbery in order to obtain money for drugs and also dealt in drugs to support his own habit. It would appear that in prison his work was minimal and had not been involved in educational courses to any great extent.
- [27] Dr Lawrence noted that Mr Ellis had developed hepatitis C whilst in jail after using intravenous Subutex which had been obtained illegally from another inmate and had shared a needle. Mr Ellis also reported to Dr Lawrence that he had experienced a drug induced psychosis in 2003/2004. He described hearing voices and being paranoid for some time before admission to Woodford in 2003/ 2004. He had been using intravenous speed and possibly heroin and the symptoms were diagnosed on admission to prison.
- [28] Dr Lawrence indicated that Mr Ellis reports being under the Prison Mental Health Service for most of the term of imprisonment and that he receives treatment from a psychiatrist because he is having trouble coping. He is currently on Diazepam for anxiety as well as Avanza. He takes Phenergan to assist him to sleep.
- [29] Dr Lawrence stated that Mr Ellis revealed a large number of deliberate self-harming behaviours, the most recent being facial and hand bruising whilst in the detention unit. He claimed one of the self-harm behaviours was with suicidal intent. Dr Lawrence noted that after commencing the Getting Started Program he was breached for assaulting an officer by spitting on him and the subsequent order ensured that he could not attend the program. He was subsequently transferred to

Wolston Correctional Centre for the purpose of completing the program and he did complete it satisfactorily.

- [30] Dr Lawrence stated that Mr Ellis had told his lawyers he would agree to anything to ensure his release and would any program and would agree to supervision and drug tests. However Dr Lawrence indicated there was no evidence of any actual plans or strategies to achieve his release or to recognise the difficulties he would face on release.
- [31] Dr Lawrence carried out a number of tests using the standard actuarial instruments which were also used by the other 2 psychiatrists. On the PCL-R Test for psychopathy he rated at 26. Dr Lawrence indicated that such a score does not reach the cut off figure for a diagnosis of psychopathy but the score was significantly elevated and reflects the respondent's antisocial activities from an early age and other aspects of his personality.
- [32] In relation to the HCR-20 Dr Lawrence noted that the coding for risk management in the future was 10 with his risk being considerably high. In the HCR-20 Dr Lawrence considered that in terms of future risk management his risks were high and the Violence Risk Appraisal Guide (VRAG) he scored as a category 8. In the Sex Offender Risk Appraisal Guide (SORAG) he scored at 27 which is also a category 8. In relation to the SVR-20 the sexual violence risk she records him as a moderate risk of sexual violence. In the STATIC 99, using the sexual offences in 2000 as the index offences, Dr Lawrence indicated he was in the high risk category.
- [33] In terms of diagnosis, Dr Lawrence made the following diagnostic formulation.
- Axis 1 - Poly-Substance Abuse Disorder
 - Past Drug induced psychosis.
 - Axis 2 - Antisocial Personality Disorder
 - Borderline Personality Disorder
 - Borderline Intellectual Functioning ?
 - Axis 3 - Possible Hepatitis C
 - Axis 4 - Poor social supports dependency and employment problems
- [34] Overall, Dr Lawrence noted that Mr Ellis has a primary diagnosis of an Antisocial Personality Disorder as well as Borderline Personality Disorder or significant borderline and narcissistic personality traits, influencing his Antisocial Personality Disorder. She also considers he has a Poly-Substance Abuse Disorder.
- [35] Dr Lawrence considered that his sexual offending occurred in the context of his polysubstance abuse together with considerable anxiety about his sexual functioning. She does not consider he displays sexual deviance but considers that he does have considerable difficulty in establishing significant relationships with others which is based on his early childhood experiences and as a concomitant of his personality disorder.
- [36] Dr Lawrence considers the risks of non-violent offending and sexual offending are high and the risks of violence associated with offending must also be seen as moderately high, although the harm likely to ensue is likely to be moderate.

- [37] Dr Lawrence concluded that Mr Ellis should be required to complete a high intensity sexual offender treatment program prior to release and he should also be required to satisfactorily complete a substance abuse program and other programs based on cognitive behaviour or principles to assist him in developing strategies.
- [38] Dr Lawrence considered that after he is released conditions should be imposed with an emphasis on ensuring abstinence from all intoxicating substances, regular monitoring for his compliance, attending an ongoing sexual offender maintenance program and attending psychiatric or other psychological services.
- [39] In the subsequent report dated 19 August 2011 Dr Lawrence reviewed the Prison Mental Health Service Records and considered that the records indicate that the respondent is unreliable, intermittently non compliant and unlikely to persist for any length of time in behaviours or programs that might assist him in his personality issues. Dr Lawrence also indicated that the respondent is liable to a period of mood disturbance, including depression, usually in response to some external circumstance.
- [40] In her oral evidence Dr Lawrence confirmed that the risk of the respondent offending sexually against young children was low and that the greatest risk was to post pubertal females which included the 13 -16 year old group. Dr Lawrence stated that the risk to 13 to 16 year olds would be greater than to women as a whole. She continued:¹
- “I see this man as having difficulties sexually with his own sexual confidence - and that would apply whether he was sober or be accentuated if he were under the influence of substances but even sober I think he sees himself as pretty inadequate, and therefore would not - he would not seek to impose himself in any way on anyone who felt was his equal or perhaps older, stronger or mentally. Therefore, that leaves young adolescent women being his most likely victims and that's consistent with his behaviour because one was - the younger one, that one he even had to pretend to be armed with, was only 13.”
- [41] Dr Lawrence was asked to comment on the respondent's behaviour in prison and stated:²
- “- it's one of the unusual features about this man, that he has done so badly, and it's more than - it's more than just antisocial behaviour and that is why I speculate that, in view of the sabotaging that he's done or has happened to all of the opportunities he's been given or the excuses that he gave me anyway as to why he had not done, for instance, a substance abuse program which is widely available, well, those excuses didn't really hold water and leads me to the speculation that he has somehow sabotaged this situation with, at some level, really getting - being afraid, I think, really, threatened of going back into wider society because he really doesn't have a great deal of support and - or a network or relationships set up to support him really.”

¹ Transcript day 1 p 20 at ll 1-10.

² Transcript day 1 p 20 at ll 42-55.

[42] In terms of how the respondent would behave on release Dr Lawrence indicated that it was difficult to predict but considered that the breaches of a sexual nature in custody were motivated by spite and resentment towards corrective service officers. As to whether such a motivation would disappear on release Dr Lawrence replied:³

“No, I can't say that. He could have all sorts of negative feelings towards people and particularly females and may well act those out on harmless members of the public, just because of some quirk at the time that occurs to him or the mood that he's in or whatever. People do act in these irrational ways.”

[43] Dr Lawrence was asked to consider whether it would be likely that the respondent would use substances and then commit other sorts of offences before he would offend sexually as follows:⁴

“Would you agree that it would take a number of steps before he was at any real risk of committing a further sexual offence? That it's unlikely that he would just spontaneously, on release, without anything further, commit a sexual offence?-- I'm not suggesting that he would walk out the door of prison or the gate of prison and immediately start to commit a sexual offence against some passing female. I'm not suggesting that at all, but I would point out that he had only been out of gaol a few days before these index sexual offences occurred because he - what he did was just go straight and start partying, then meaning that he was using, extensively, a range of substances; amphetamines and stimulant drugs, and was under the influence of that for some considerable number of hours and was just recuperating from that when the offences occurred. So, the same thing could happen again.”

[44] Dr Lawrence also indicated that given it was 'random' drug testing it was not certain that drug use would necessarily be detected quickly. Dr Lawrence agreed that the conditions proposed by the Supervision order would reduce the risk but would not eliminate the risk.

[45] Dr Lawrence considered that given his personality structure the respondent should undergo dialectical behaviour therapy. This is an intensive form of therapy where the patient is challenged about their behaviour and lifestyle and taught and encouraged to use techniques and strategies to deal with their emotions.

Dr Harden's report

[46] Dr Harden noted a similar history to that obtained by Dr Lawrence. In relation to the formal assessment instruments Dr Harden assessed Mr Ellis on a number of instruments. In relation to STATIC 99 Dr Harden placed Mr Ellis in the high risk category; in the stable 2000 he placed him the high needs group and in the Sexual Offender Risk Appraisal Guide he gave him a score of 40, which was a very elevated score and noted that generally people in this category had “a 100% rate of violent (including sexual violent) re-offending at 7 years and 100 % rate at 10 years”. On the Hare Psychopathy Checklist he gave Mr Ellis a score of 25 which is an elevated score but below the level used as a cut off for psychopathy. In relation to the SVR-20 he gave him a high score.

³ Transcript day 1 p 16 at l 55 - p 17 at l 2.

⁴ Transcript day 1 p17 at ll 3-18.

- [47] Dr Harden noted that the index offences occurred when he was allegedly intoxicated with substances and that the sexual assaults follow a history in his adolescence of two episodes of sexual assault.
- [48] He also noted a long and substantial history of multiple other criminal offences, predominantly involving substance abuse, property crime and breaches of orders. Dr Harden noted a very disrupted early childhood with early parental separation and a close relationship with his father interrupted in early primary school by his father's incarceration for sexual abuse. He noted that Mr Ellis witnessed some of the abuse and that he was also exposed to some inappropriate sexual behaviour by another man himself. He also indicated that his relationship with his mother was "highly conflictual and negative".
- [49] Dr Harden indicated that Mr Ellis had "gone on as an adult to have an emotionally unstable personality characterised by impulsivity, low frustration tolerance, anger, fear of rejection, self-harm, aggression towards others, prominent substance use and dysfunctional interpersonal relationships". Dr Harden commented that the behaviour had persisted to an unusual extent in the structured environment of prison. Dr Harden considered the sexual offences are associated with a mixture of substance use, antisocial attitudes towards others and negative emotional states.
- [50] Dr Harden stated that whilst he had done a preparatory course for sexual offenders with a reasonable outcome, he was recommended to do a high intensity course which he initially refused to do but now professes enthusiasm for. Dr Harden also considered that whilst there was some social support for him in the community via his family, that support had not been tested and was not sufficient to prevent him from offending in his previously chaotic way.
- [51] Dr Harden considered that the actuarial and structured professional judgment measures that he administered indicated that Mr Ellis' future risk of sexual re-offence is high if released into the community without appropriate monitoring, support and therapeutic intervention. He considered if he was to re-offend it would most likely be an impulsive offence against a post-pubertal female whilst intoxicated with substances, and whilst it is likely to be relatively low in physical harm, it would result in potentially high psychological harm to the victim.
- [52] Dr Harden considered that the risk of sexual re-offence could be decreased if he were to be released from custody with a high level of compulsory supervision support and treatment consistent with a Supervision order being made. He considered this would be more likely to succeed in reducing his risk if he were to first undertake the high-intensity sex offender program and to begin a psychological program to address his substance abuse and enhance his distress tolerance, prior to release into the community.
- [53] Dr Harden considered that Mr Ellis met the criteria for substance abuse, predominantly opioids and amphetamines. He also considered he met the criteria for a diagnosis of personality disorder not otherwise specified with marked antisocial and borderline personality features. Dr Harden considered that his borderline personality features are at such a level that they are a critical treatment priority in his opinion with regard to his sexual offence recidivism risk.
- [54] Dr Harden considered that it was critical that Mr Ellis have individual therapy targeted at the features of his borderline personality disorder. He considered that

such therapy should utilise mindfulness and distress tolerance techniques such as found in approaches like dialectical behaviour therapy. He stated that consistency of therapist is important and ideally therapy should commence while he is incarcerated and be continued with the same therapist in the community. He also considered that when released into the community Mr Ellis would require the support of an adult mental health service to provide a structure to manage his impulsive self-harm behaviour and manage his medication requirements.

- [55] Dr Harden considered that Mr Ellis has a very high level of treatment need with regard to his potential future sexual offending. Dr Harden also considered that he should undertake the High Intensity Sexual Offender Program in custody and that it may well be that he would take longer than an average participant to complete the program as his institutional behaviour and negative emotional state may slow his progress.
- [56] Dr Harden considered that the individual therapy should run concurrently with the HISOP. Dr Harden stated that the respondent has a very unstable personality and that the HISOP arouses great levels of feelings particularly as offenders are required to deal with very shameful experiences. There is a very good reason therefore for these courses to be run in a corrective services setting where there can be good therapeutic support in a secure environment. Dr Harden considered that there would be three benefits to the respondent undertaking HISOP whilst in custody. First his participation would be managed and his participation would be assisted. Second he would commence in a therapeutic relationship which could be continued in the community and third he would have other issues such as his substance abuse managed, either as part of the HISOP or pursuant to a further course.
- [57] When asked if substance abuse was the greatest risk factor to further offending Dr Harden referred to the STATIC actuarial instrument which scored the respondent as a high risk of recidivism even in the absence of substances. Dr Harden agreed that substances and particularly intoxication would absolutely increase the risk. He also considered that the respondent's unstable personality was also a significant factor in terms of further offending. Dr Harden considered that it may well be the case that the respondent's behaviour in prison simply reflects his chaotic life outside prison. Dr Harden stated that he had not before "someone who is so difficult to control in the highly structured environment of detention" and he did not consider that the respondent would necessarily behave better outside prison. Dr Harden indicated that the respondent had very few internal personality structures to support him and that usually such people do better in a structured environment.
- [58] Dr Harden considered that the greatest risk would be to post pubertal females and that any offending would be opportunistic and would occur in a context of low supervision. Whilst Dr Harden considered that there would be a progression to sexual offending he did not agree with his colleagues that the progress would necessarily take some time. He indicated that the respondent is a very emotionally unstable individual and that his emotional state can shift suddenly. In his view the given the respondent's unstable emotional state and the fact that he would be in a heightened emotional state on release he considered that could deteriorate quite quickly. This could certainly happen within the space of a day.
- [59] Dr Harden considered that increased detection would reduce the risk and considered the issue of the extent of the reduction as follows:

“To what extent do you think the condition set out in that Supervision order would reduce the overall risk Mr Ellis poses to the community in terms of the serious sexual offending as opposed to general offending?-- I think there would be some reduction in risk because chaotic behaviour or substance abuse is likely to be detected. The quantum of the reduction in risk is a bit unclear to me because - as I said, I think this - this progression people - you've raised, could happen quite quickly. And it doesn't - I don't think it needs to entail property crime or other minor offending, I think it's just a matter of what kind of behavioural outlet is generated. So I think some reduction in risk because of increased detection, but I can't qualify that...”

- [60] Dr Harden agreed that a Supervision order would decrease the risk of serious sexual offending but indicated it was difficult to quantify the extent of the reduction.

Report of Professor Nurcombe

- [61] Professor Nurcombe outlined the circumstances of the index offence as well as the respondent's background. He made the following diagnosis—

Axis 1

- (1) Dysthymic disorder
- (2) polysubstance dependence
- (3) drug induced psychosis.

Axis 2

- (1) Antisocial personality disorder
- (2) Borderline personality disorder

Axis 3

- (1) Hepatitis C infection.

- [62] In relation to the risk analysis that he conducted, Professor Nurcombe indicated that Mr Ellis has a moderate level of psychopathic traits, although he states there is no psychopathic personality disorder and considers that he is below the cut off point for psychopathy. He considers he has a high risk of sexual re-offending on the basis of the STATIC 99 assessment tool but a low score on the violence risk appraisal guide. On the basis of the Stable 2000 assessment tool Professor Nurcombe considered the risk of sexual reoffending was moderate and on the Vermont Assessment of Sex Offender Risk he placed Mr Ellis in the high risk category.
- [63] Professor Nurcombe stated in his report that the major risk relates to Mr Ellis' reversion to substance abuse. He considered that should he revert to substance abuse the risk of sexual re-offending would be high. However, if he was to engage in appropriate employment and engage in appropriate treatment the risk would be moderate or even lower. Professor Nurcombe considered that the community would be protected if Mr Ellis were to be classified as a dangerous prisoner under the DPSOA because that would involve him in being provided with psychological treatment and rehabilitation.

Submissions on behalf of the respondent

- [64] Counsel for the respondent conceded that the psychiatrists all hold concerns about the risk the respondent would pose to the community should he be released and accepts that a return to substance abuse is a significant factor in determining the level of risk. Counsel argues however that much of the discussion by the psychiatrists refers to offending at large, but that is not the risk referred to in the Act. Counsel argues that the legislation was enacted to protect the community from a specific type of risk and that is not general offending or even sexual offending, but rather the Act is confined to considering the risk of “a ‘serious sexual offence’ being committed and whether that risk is unacceptable”.
- [65] It is also argued by the respondent’s counsel that an act of wilful exposure or wilful masturbation in front of a person over 16 without more is not an offence which is really at the severe end of the spectrum of sexual offences. It is submitted that there has to be an identified risk not merely speculation that offending might include serious sexual offending.
- [66] Counsel for the respondent submits therefore that a focus on the drug problem will address much of the risk of committing a serious sexual offence in the community. In particular it is argued that the use of substances is likely to be a precursor to his offending and that there is no doubt that Mr Ellis was under the influence of a number of drugs at the time the serious sexual offences were committed in August 2005.
- [67] It is also argued that a Supervision order can include conditions to target this specific risk factor and that the requirements of the Supervision order could order that Mr Ellis attend drug and alcohol counselling as directed and not consume alcohol and substances. Counsel argued that the risk of reoffending by Mr Ellis would be managed by a Supervision order in a manner similar to that discussed in *Attorney-General for the State of Queensland v WW*⁵, where the trial judge in that case indicated that “... it is unlikely that the respondent would reoffend without first breaching the order I’m about to make and without the detection of such a breach or breaches.”
- [68] Counsel also referred to the stress and pressures of prison life and that the respondent responds to this and has not dealt with incarceration well. Counsel further argued that the respondent’s behaviour in custody does not necessarily lead to an inevitable conclusion that he will contravene the Supervision order. Counsel submits that the respondent has performed much better in the environment of the Getting Started Preparatory Program than he did in his prison life generally. The environment of prison has had in fact a detrimental effect on him and his mental health and he may respond better to authority in the community. It is also submitted that issues in relation to depression, low self-esteem and difficulty controlling his emotions could be combated by the continued use of medication and in engaging in recommended therapy in the community.
- [69] Counsel pointed out that despite a recent incident of declining to take part in the HISOP there was ample evidence in his file of him expressing a willingness to participate in courses to address his reoffending. It is also submitted that the respondent has only one entry on his adult criminal history that refers to offending

⁵ [2007] QCA 334.

of a sexual nature and the offences were committed on the one day while he was under the influence of a number of substances. It is submitted that there is not therefore a pattern of serious sexual offending on his part.

Should the respondent be subject to a Supervision order or a Continuing Detention Order?

- [70] Section 13 (1) of the Act provides that division 3 orders under the Act apply to prisoners who are considered to be a serious danger to the community in the absence of such an order.
- [71] Section 13(2) then provides when a prisoner is considered to be 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.”
- [72] ‘Serious sexual offence’ is defined in the Dictionary in the Schedule of the Act as follows;
- “*serious sexual offence* means an offence of a sexual nature, whether committed in Queensland or outside Queensland-
- (a) involving violence; or
- (b) against children”
- [73] Violence is defined in the Dictionary in the Schedule to include both intimidation and threats.
- [74] One of the index offences involved an offence of a sexual nature with respect to a 13 year old girl. The offence also involved a threat by the respondent that he would stab her. Accordingly given the definitions in the Act there is no doubt that the respondent has previously committed a serious sexual offence.
- [75] The index offences attracted a term of imprisonment of three years. Those offences were committed on the same day whilst he was under the influence of drugs. I accept that the offences are not at the severe end of the spectrum in terms of sexual offending. They are the only sexual offences the respondent has committed as an adult. He has not been convicted of sexual offence since the index offences in 2005 despite inappropriate sexual behaviour in jail.
- [76] The evidence indicates that the respondent is not a paedophile or a sexual deviant.
- [77] All psychiatrists agree that the risk of the respondent offending against a young child sexually is low.
- [78] All three psychiatrists consider that the respondent is at risk of committing a sexual offence against a post pubescent girl. Professor Nurcombe considers that the most likely victims would be “attractive young women somewhere between 13 and 20”. Dr Harden considered that he would be attracted to someone with the physical manifestations of adulthood. It is clear therefore that his likely victims include women under 16 who would therefore fall within the definition of children. It is

also likely that the sexual offence would involve violence although probably at a low level. Accordingly pursuant to the definition the respondent is a risk of committing a serious sexual offence. Clearly however the risk can be reduced if he is subject to conditions which restrict his involvement with young women.

- [79] The real issue is whether there is an *unacceptable* risk that he will commit further serious sexual offences involving young women or involving threats of violence or violence. Can the risk be moderated by the conditions imposed by a Supervision order so that the risk posed is not an unacceptable risk? Or is the risk so unacceptable that the only way to manage the risk is to require a continuing detention order for treatment, care or control. In particular is the risk so great that he should be required to complete the HISOP and undertake therapy before he can be released.
- [80] I accept that it is of concern that the respondent has done nothing to address his substance abuse which is the major triggering factor.
- [81] The respondent has been in prison for the last six years and there are clearly concerns that whilst the respondent has completed the Getting Started Preparatory Program for Sex Offenders (GSPP) he has not completed any other courses. Significantly despite six years in custody he has not done a course addressing Substance Abuse. There is nothing to suggest that this is the result of delays in course availability or any other delay not of the respondent's making. However his substance abuse issues can be addressed by undertaking those courses and by a very rigid monitoring and random testing regime.
- [82] All the Psychiatrists recommend completion of the HISOP before the respondent is released from custody and also that he commence therapy whilst in custody. I accept the contention that if he does not undertake the course in custody he is probably doomed to fail. I consider that it is highly likely that due to his personality structure he will breach his Supervision order.
- [83] It is also of significance that his plans for release are incomplete although he has offers of support and accommodation from his mother and sister. It is of concern however that his sister does have young children. The plans for release need to have more detail. However he will not be released for another three months and he has time to attend to the details for his release.
- [84] Dr Harden considers that the respondent has very high treatment needs. The respondent's conduct while in the confines of a custodial setting (in particular, wilful exposure to female prison officer, with an undercurrent element of spite) does not engender confidence as to his future conduct in the community. It is important therefore that the respondent commence a therapeutic relationship as soon as possible.
- [85] All three psychiatrists indicate that he should do the course in custody because the course will be very challenging for him and because he will need to be in therapy to "focus on a tolerance of distress and managing emotions and other material that's brought up by the course content". All agree that this is best done in custody. There is evidence that such therapy can be provided in the community.
- [86] All the psychiatrists agree that the respondent is doomed to fail if he is released without completing the HISOP and without commencing the recommended therapy.

The real issue however is will he fail by general offending or substance abuse or will he fail by committing a serious sexual offence as defined. If he fails by the use of substances or other offending behaviour it is argued that the Supervision order will be an adequate protection of the community as he will be detected prior to committing a sexual offence.

[87] Ultimately I accept the argument of counsel for the respondent that it is likely that prior to any sexual re-offending the respondent will either turn to substance use which would be detected given the strict monitoring regime or that his chaotic behaviour will mean that he would commit a property offence or some other type of offence which would mean his behaviour would be detected before he got to the point of sexual re-offending.

[88] Dr Lawrence and Professor Nurcombe consider that he would probably have a progression to sexual offending and that he would probably commit other offences prior to committing a sexual offence. Dr Harden however disagrees indicating that his chaotic behaviour may involve sexual offending. He states:

“No, I actually disagree with my colleagues on this matter. I think he's a very emotionally unstable individual. I think his emotionally state can shift suddenly. I think that heightened emotional - heightened and negative emotional state or intoxication, or both together, place him in a situation where he might be involved in chaotic behaviour which could well involve a sexual offence. I don't think that has to take a long period of time. It could happen within the one day.”

[89] I accept that the respondent's unstable personality is just as much a risk as resort to substances. His personality is unstable as evidenced by his behaviour in prison particularly given he has continued to offend in prison as recently as August 2011 knowing that such behaviour will defer his release and reflect poorly on him in this application. I also accept that the courses he undertakes will probably have a destabilising influence. As Professor Nurcombe stated:

“...it's very likely that in the course of the Sex Offender Treatment Program he's going to become upset. He has an explosive and volatile personality and self-destructive one. He will need help to cope with the feelings that will engendered by the program.”

[90] However the requirements of s 13(3) must be satisfied before a division 3 order is made. The section provides:

“(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;”

[91] On the evidence before me I am not satisfied to a high degree of probability that there is an unacceptable risk that the respondent will commit a serious sexual offence if released subject to the Supervision order proposed. In my view the Supervision order proposed will ameliorate the risk to an acceptable level. I consider that the risk is acceptable because his chaotic behaviour or substance abuse is likely to be detected prior to any sexual re-offending. In my view the risk of sexual re-offending will decrease to an acceptable level if the respondent were to be

released from custody with a high level of compulsory supervision, support and treatment. In particular he needs to begin a psychological program to address his substance abuse and enhance his distress tolerance, prior to release into the community which is scheduled for January 2012.

[92] These particular issues were addressed by the Court of Appeal in *A-G (Qld) v WW* where Jerrard JA stated:

“[13] The learned trial judge concluded that there was an unacceptable risk that WW would commit offences of a sexual nature against children if he was released from custody without a supervision order being made. The learned judge noted that the unanimous view of the psychiatrists and psychologists was that there was an appreciable risk of re-offending. The judge concluded that absent the imposition of appropriate conditions, the risk of WW re-offending was substantial. The judge also recorded that the psychiatrists all agreed that WW’s age, loss of libido, and weakened or lost capacity to sustain an erection reduced, but did not remove, the risk of re-offending. The judge held however that that risk could be reduced substantially by the imposition of appropriate conditions. The learned judge went on:

“The fact that the respondent’s offending has always occurred within his family or after or in consequence of the establishment of a close relationship with a young female over a protracted period suggests that appropriate constraints and supervision will prove effective in minimising the risk of re-offending.”

[14] The judge concluded:

“The psychiatric evidence also suggests that continued treatment will assist in reducing the risk. I am of the view that it is unlikely that the respondent would re-offend without first breaching the order I’m about to make and without the detection of such a breach or breaches. That conclusion strongly supports the making of a supervision order rather than a continuing detention order.”⁷

[15] Counsel for the Attorney, Mr Sofronoff QC, Solicitor-General, submitted in a written argument that in those last two sentences, the learned judge had applied a test not to be found in the Act, and not justified, and applied it in the face of evidence that WW would not comply with conditions, and without evidence that any offences would be likely to be committed only after a detectable breach of conditions. The written submission contended that there was no explanation as to why the learned judge held that re-offending would be preceded by detectable breaches of condition. Further, there was no condition specifically permitting examination of any computer to which WW had access, to see if he had accessed child pornography or communicated with other paedophiles. (I add that the appeal record shows that conditions in those terms were proposed to the learned judge, and not opposed, and it may be that their omission was an oversight).

[16] In support of those criticisms, the appellant referred to WW's repeat offending, and the wide variety of offences committed. The appellant also pointed to WW's refusal to participate co-operatively in any treatment programs, and his general lack of co-operation, including his refusing to be interviewed by at least one of the psychiatrists asked to prepare a report on him for this application. Those submissions reflected an underlying view that the learned judge was not entitled to assume that any ordered supervision would be effective. But the learned judge was entitled to assume that any ordered supervision would be supplied. That was settled by this Court in *A-G (Qld) v Francis* [2006] QCA 324, (discussed below) and accordingly the judge was entitled, if not bound, to proceed on the basis that supervision on conditions specified by the judge would be provided. That meant the only issue was whether there was an unacceptable risk that the ordered supervision would not achieve the purpose of identifying conduct likely to result in re-offending...."

[93] It is clear that in that decision the Court of Appeal considered that the risk was at an acceptable level as the conditions of the Supervision order were such that any offences would be likely to be committed only after a detectable breach of conditions.

[94] It is also abundantly clear that the court should assume that the supervision the respondent requires will be provided. As the Court made clear in *AG v WW*⁶ by reliance on the Courts earlier decision in *A-G (Qld) v Francis*:⁷

"[37] There was no evidence, however, that the resources required of the department to provide effective monitoring of the appellant's compliance with the conditions of supervised release would be so extensive that it would be unreasonable to expect them to be provided, or that the effective provision of such resources would be impracticable. It must be borne in mind that any Supervision order made by the court under the Act must contain, by virtue of s 16(2)(f), a condition for supervision of the prisoner while on supervised release. The Act thus assumes that supervision will be available. The court should not conclude either that it will not be made available or will not be made sufficiently available in the absence of clear evidence to that effect and an explanation as to why its provision is regarded as unreasonable or impracticable. There was no reason to conclude that any necessary supervision by the department could not, or would not, be made available."

[95] It was also established in *A-G (Qld) v Francis* that the Act does not contemplate that arrangements to prevent such a risk must be 'water tight' because otherwise orders under s 13(5)(b) would never be made. The Court held that the question to be asked is whether the protection of the community is *adequately* ensured and 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. Such an order should be

⁶ at [18].

⁷ [2006] QCA 324,

preferred because “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 statutes which authorises such constraint.”

- [96] In the circumstances I am satisfied that a Supervision order will adequately address the risk posed if there is a combination of orders which ensure a substance abuse program is commenced, a therapeutic relationship is commenced as soon as possible in detention and then continued on his release into the community. There must also be a total abstinence from all drugs and alcohol. There should also be very strict monitoring in place as well as random drug and alcohol testing given that his greatest risk is in a situation where he is poorly supervised. He must also not have any unsupervised access with any young women under the age of 16 years. He should also not reside with any one who has the care of young women under 16. Counsel for the respondent has indicated that the respondent is prepared to undergo and take part in any course. A MISOP or HISOP course should be commenced depending on what is available.
- [97] There is no doubt that the conditions proposed in the draft Supervision order address many of those issues. As Jerrard JA indicated in *A-G (Qld) v WW*, “They are very restricting conditions if adhered to. Whether they are will depend upon the degree and quality of supervision.”
- [98] In particular I note that s 20 of the Act provides that a warrant may issue for the respondent’s arrest and possible return to custody if there is a reasonable suspicion he “is likely to contravene, is contravening, or has contravened, a requirement of the released prisoner’s supervision order”. It must also be remembered that one of the proposed conditions is condition (viii) which requires that the respondent must comply with reasonable directions of a corrective services officer. Furthermore the proposed condition (x) provides that he must not commit an offence of a sexual nature and (xvi) specifies that the respondent must not commit an indictable offence.
- [99] I consider that there should be an order generally in terms of the draft proposed.