SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Ellis* [2012] QCA 182
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (appellant) **v** **ANDREW CLIVE ELLIS** (respondent)
FILE NO/S:	Appeal No 10922 of 2011 SC No 4389 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2012
JUDGES:	Margaret McMurdo P and White JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, White JA and Margaret Wilson AJA concurring as to the orders made, Margaret McMurdo P dissenting
ORDERS:	**1. Appeal allowed.** **2. The order made 25 October 2011 be set aside.** **3. The respondent be detained in custody for an indefinite term for control, care or treatment pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – GENERALLY – where the primary judge made a supervision order under s 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 – where the primary judge thought that it was highly likely that the respondent would breach the supervision order – where the primary judge did not think that the risk that the respondent would commit a serious sexual offence if released on a supervision order was unacceptable – whether the primary judge erred in her construction of s 13(3) of the Act –

whether ss 13, 16 and 20 of the Act ought to be read together – whether the primary judge's findings were insupportable given the psychiatric evidence – whether the primary judge did not take into account the appellant's submissions

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Pt 2, Div 3, Pt 2, Div 5, s 11, s 13, s 16, s 20

Attorney-General (Qld) v Fardon [2011] QCA 155, considered
Attorney-General (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324, considered
Attorney-General (Qld) v WW [2007] QCA 334, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited

COUNSEL: P J Davis SC, with B H P Mumford, for the appellant
J J Allen with J Lodziak for the respondent

SOLICITORS: Crown Solicitor (Brisbane) for the appellant
Legal Aid Queensland for the respondent

[1] **MARGARET McMURDO P:** Unlike my colleagues, I would dismiss the Queensland Attorney-General's appeal from the primary judge's order releasing the respondent (whom she found to be a serious danger to the community in the absence of an order under Pt 2 Div 3 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the Act)) from custody on a supervision order containing the following 36 requirements until 12 January 2017:

"The respondent must:

i be under the supervision of a corrective services officer for the duration of the order;

ii report to a corrective services officer at the Queensland Corrective Services Probation and Parole Office closest to his place of residence between 9am and 4pm on the day of release from custody and at that time advise the officer of the respondent's current name and address;

iii report to, and receive visits from, a corrective services officer at such time and at such frequency as determined by Queensland Corrective Services;

iv notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least two business days before the change happens;

v comply with a curfew direction or monitoring direction;

vi comply with any reasonable direction under section l6B of the Act given to the respondent;

vii comply with any reasonable direction given by a corrective services officer, that is not directly inconsistent with a requirement of this order;

viii not leave or stay out of Queensland without the permission of a corrective services officer;

ix not commit an offence of a sexual nature during the period of the order;

x 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;

xi reside at a place within the State of Queensland as approved by a corrective services officer by way of a suitability assessment;

xii not reside at a place by way of short term accommodation including overnight stays without the permission of the authorised corrective services officer;

xiii seek permission and obtain the approval of an authorised corrective services officer prior to any change of residence;

xiv not commit an indictable offence, whether or not it can be dealt with summarily, during the period of this order;

xv respond truthfully to enquiries by a corrective services officer about his whereabouts and movements;

xvi not have any direct or indirect contact with a victim of his sexual offences;

xvii 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;

xviii not initiate or maintain any supervised or unsupervised contact with any child under 16 years of age, except with the prior written approval of an authorised corrective services officer. The Respondent is required to disclose the terms of this order and details of his convictions for sexual offences to the guardians and caregivers of the children before any such contact can take place. In the interest of ensuring the safety of children, Queensland Corrective Services may disclose to guardians or caregivers and external agencies (e.g. Department of Child Safety) that the Respondent is subject to this supervision order and the terms of this order;

xix seek written permission from a corrective services officer prior to joining, affiliating with or attending the premises of any club, organisation or group in respect of which there are reasonable grounds for believing there is either child membership or child participation;

xx 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;

xxi comply with any recommendations made by a psychiatrist or psychologist with respect to treatment, the expense of which, if any, to be met by Queensland Corrective Services;

xxii permit any medical, psychiatric, psychological or other mental health practitioner to disclose details of treatment, intervention and opinions relevant to the Respondent'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;

xxiii 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;

xxiv develop a risk management plan in consultation with a treating psychologist or psychiatrist and discuss it as directed with an authorised corrective services officer;

xxv develop a substance abuse risk management plan in consultation with a treating psychologist or psychiatrist and discuss it as directed with an authorised corrective services officer;

xxvi abstain from all alcohol;

xxvii abstain from the use of illicit drugs;

xxviii take prescribed medication only as directed by a medical practitioner;

xxix not take prescription medication that has not been prescribed by a medical practitioner;

xxx submit to regular and random alcohol and drug testing as directed by an authorised corrective services officer, the expense of which is to be met by Queensland Corrective Services;

xxxi not visit premises licensed to supply or serve alcohol, without the prior written permission of an authorised corrective services officer;

xxxii not without reasonable excuse be within 100 metres of schools or child care centres without the prior written approval of an authorised corrective services officer;

xxxiii not access schools or child care centres at any time without the prior written approval of an authorised corrective services officer;

xxxiv not visit public parks without the prior written approval of an authorised corrective services officer;

xxxv allow a device, including a telephone or camera, to be randomly examined. If applicable, account details and/or telephone bills are to be provided upon request of an authorised corrective services officer; and

xxxvi advise an authorised corrective services officer of the make, model and phone number of any mobile telephone owned, possessed or regularly utilised within 24 hours of connection or commencement of use and must report any changes to mobile telephone details."

The appellant's contentions

[2] It is notorious that, by the time this appeal was heard, the respondent had allegedly breached this supervision order by committing a sexual offence and was arrested on a warrant issued under s 20 of the Act.[1] Senior counsel for the appellant, Mr Davis SC correctly stated at the appeal hearing that this Court must determine the present appeal, not with the hindsight that has come with his arrest, but on the material before the primary judge. He conceded that, even if the appellant were unsuccessful, the respondent could not now be released unless he satisfied a judge on the balance of probabilities that, despite his contravention or likely contravention, the adequate protection of the community could be ensured by the order, either as existing or as amended.[2] Mr Davis stated that the appellant nevertheless considered there was utility in pursuing this appeal.

[3] In his oral submissions, Mr Davis raised three issues. First, he contended that as a matter of law, a prisoner cannot be released on a supervision order under the Act where the court has found that a breach of the order is likely. Second, he contended that it was an unreasonable exercise of discretion for the judge to release the respondent on a supervision order after finding that he was unlikely to comply with it. These two contentions were covered by the first ground of appeal (that the judge erred in applying the test imposed by s 13 of the Act[3]). Mr Davis described the first contention as his "major ground of complaint". Mr Davis's third contention encompassed the second ground of appeal (that the judge's findings were against the weight of the psychiatric evidence). He contended that the judge erred in finding that, although it was likely the respondent would breach the supervision order, there would be a time lag between him committing a non-sexual offence and a sexual offence so that his sexual offending could be anticipated and curtailed. Mr Davis did not pursue, in either his written or oral contentions, the third ground of appeal (that the judge did not take into account the Attorney-General's submissions).

The relevant provisions of the Act

[4] Although lengthy extracts from this problematic Act have been previously set out in the myriad decisions of this Court which concern it, I will include apposite extracts from the Act so that my reasons can be understood without resort to other material.

[5] Relevant to this appeal the Act provides:

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1 Set out at [5] of these reasons.

2 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 22 (the Act), set out at [5] of these reasons.

3 Set out at [5] of these reasons.

"**Part 1 Preliminary**

…

3 Objects of this Act

The objects of this Act are—

(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and

(b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

…

Part 2 Continuing detention or supervision

Division 1 Application for orders

…

5 Attorney-General may apply for orders

(1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.

…

(6) In this section—
prisoner means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section.

…

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—

(aa) any report produced under section 8A;

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

(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;

(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;

(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;

(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

(g) the prisoner's antecedents and criminal history;

(h) the risk that the prisoner will commit another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter.

(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)—

(a) the paramount consideration is to be the need to ensure adequate protection of the community; and

(b) the court must consider whether—

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.

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

…

Division 3B Supervised release to be subject to particular requirements

…

Subdivision 1 Requirements for supervised release

16 Requirements for orders

(1) If the court or a relevant appeal court 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 court or a relevant appeal court; 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

(daa) comply with any reasonable direction under section 16B given to the prisoner; and

(db) comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order; 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 court or a relevant appeal court considers appropriate—

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

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

…

Division 5 Contravention of supervision order or interim supervision order

20 Warrant for released prisoner suspected of contravening a supervision order or interim supervision order

(1) This section applies if a police officer or corrective services officer reasonably suspects a released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the released prisoner's supervision order or interim supervision order.

(2) The officer may, by a complaint to a magistrate, apply for a warrant for the arrest of the released prisoner directed to all police officers and corrective services officers to arrest the released prisoner and bring the released prisoner before the Supreme Court to be dealt with according to law.

(3) The magistrate must issue the warrant, in the approved form, if the magistrate is satisfied the grounds for issuing the warrant exist.

(4) However, the warrant may be issued only if the complaint is under oath.

…

22 Court may make further order

(1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the ***existing order***).

(2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—

(a) if the existing order is a supervision order, rescind it and make a continuing detention order; or

(b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.

…

Schedule Dictionary

Serious sexual offence means an offence of a sexual nature, whether committed in Queensland or outside Queensland—

(a) involving violence; or

(b) against children.

… ." (examples from the Act omitted)

The primary judge's reasons

[6] It is critical to understand the primary judge's reasons, carefully expressed in a thorough 18 page decision,[4] before discussing Mr Davis's contentions.

[7] Her Honour reviewed the background to the case[5] and the circumstances of the respondent's original offending which resulted in the appellant's application for a Pt 2 Div 3 order under s 13.[6] He exposed his penis to a 17 year old female high school student and said, "Do you want to suck me off, babe?" He was persistent, followed her and repeated his offer. He touched her on the buttocks, saying, "I'll spread your legs for you." Shortly afterwards he approached a 13 year old school girl and told her that "she was going to do something for him or he was going to stab her". He pushed her to the ground, pulled down her tracksuit pants, and touched her in the breast area and on the outside of her clothing. He pulled down his pants. She yelled for help, he desisted and left. He admitted his conduct to his father two weeks later and the police were informed. After initial denials, he made detailed admissions to police, stating that he was "off his face" on drugs.[7] The judge then reviewed the respondent's history in prison[8] and the evidence of the three psychiatrists who had examined him for the purpose of the appellant's application: Dr Lawrence,[9] Professor Nurcombe,[10] and Dr Harden.[11]

[8] The judge noted that the respondent's counsel conceded that the respondent was at risk of re-offending generally. He emphasised, however, that the consideration under the Act was whether the respondent was at risk of committing a serious sexual offence and whether that risk was unacceptable. The use of substances was likely to be a precursor to his offending as it was when he committed the offences which brought him under the Act. Counsel contended that, as in *Attorney-General for the State of Queensland v WW*,[12] the respondent's risk of re-offending could be managed by a supervision order with conditions that he attend drug and alcohol counselling and not consume alcohol and drugs. The respondent was unlikely to re-offend without first breaching those aspects of the order and those breaches would be detected. Counsel for the respondent emphasised that the respondent's recent behaviour in prison was related to the detrimental effect of the prison environment. Despite a recent incident where he declined to take part in the High Intensity Sexual Offender Program (HISOP), there was ample evidence of his willingness to

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4 *Attorney-General for the State of Qld v Ellis* [2011] QSC 382.
5 Above, [3]–[6].
6 Set out at [5] of these reasons.
7 *Attorney-General for the State of Qld v Ellis* [2011] QSC 382, [7]–[11].
8 Above, [12]–[17].
9 Above, [19]–[45].
10 Above, [61]–[63].
11 Above, [46]–[60].
12 [2007] QCA 334.

participate in courses to address his re-offending. His two offences under the Act were committed on the same day whilst he was under the influence of substances and did not amount to a pattern of serious sexual offending.[13]

[9] In determining whether the respondent should be subject to a supervision order or a continuing detention order under s 13(5), her Honour reasoned as follows. His original offences were committed whilst under the influence of drugs. The offences attracted a maximum term of three years imprisonment so that they were not at the severe end of the spectrum in terms of sexual offending. He had committed no other sexual offences as an adult and no subsequent sexual offences, although he had exhibited inappropriate sexual behaviour in jail.[14] The evidence did not suggest he was a paedophile or a sexual deviant.[15] The psychiatric evidence was that his risk of sexually offending against a young child was low[16] but he was at risk of committing a sexual offence against a post-pubescent girl. As potential victims would be between 13 and 20, they could include children. Any potential offending was likely to involve violence, but probably at a low level. He was therefore at risk of committing a serious sexual offence but this risk could be reduced if he were subject to conditions which restricted his involvement with young women.[17] The first issue was whether there was an unacceptable risk that he would commit further serious sexual offences involving young women or involving violence or threats of violence. If so the second was, whether this risk be moderated either by conditions under a supervision order so that the risk was not unacceptable, or only by a continuing detention order for treatment, care or control.[18]

[10] The judge was concerned that the respondent had done nothing to address his substance abuse, a major triggering factor in his offending.[19] Nor had he completed the HISOP or commenced the therapy which all three psychiatrists recommended he do before his release from custody. Her Honour accepted the psychiatrists' unanimous view "that if he does not undertake the course in custody he is probably doomed to fail" and considered "that it is highly likely that due to his personality structure he will breach his Supervision order".[20]

[11] Her Honour noted that his plans after release were incomplete. He had offers of support and accommodation from family members, one of whom, concerningly, had young children. More detail was needed but as he would not be released for another three months there was time to attend to this.[21]

[12] The judge accepted the psychiatric evidence that the respondent was "doomed to fail if he is released without completing the HISOP and without commencing the recommended therapy".[22] The judge also accepted the respondent's contention:

> "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

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13 *Attorney-General for the State of Qld v Ellis* [2011] QSC 382, [64]–[69].
14 Above, [75].
15 Above, [76].
16 Above, [77].
17 Above, [78].
18 Above, [79].
19 Above, [80]–[81].
20 Above, [82].
21 Above, [83].
22 Above, [86].

> 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."[23]

[13] Her Honour noted that, while Dr Lawrence and Professor Nurcombe considered that the respondent "would probably have a progression to sexual offending and that he would probably commit other offences prior to committing a sexual offence", Dr Harden disagreed. He considered the respondent's chaotic behaviour may involve sexual offending and that, given his highly emotionally unstable state, with or without intoxication, this would not necessarily occur over a long period of time but could happen within one day.[24] Her Honour accepted that the respondent's unstable personality was as significant a risk to his re-offending as his resort to substances. Undertaking the treatment he required would probably have a destabilising and upsetting influence on him. As Professor Nurcombe explained, he would need help to cope with the feelings that would be engendered by the treatment program.[25]

[14] After correctly quoting the test in s 13(3),[26] her Honour stated she was not satisfied on the evidence:

> "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 … [which] will ameliorate the risk to an acceptable level … because his chaotic behaviour or substance abuse is likely to be detected prior to any sexual re-offending. … [T]he 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 [in about three months time]*."[27] (My emphasis)

[15] The judge noted that in *Attorney-General for the State of Queensland v WW*,[28] the Court of Appeal considered that the relevant risk was at an acceptable level where "the conditions of the Supervision order were such that any offences would be likely to be committed only after a detectable breach of conditions".[29] Her Honour observed that she was entitled to assume the supervision required by a prisoner under a supervision order would be provided: *WW*[30] and *Attorney-General v Francis*.[31] The arrangements to prevent the relevant risk do not have to be "water tight" as otherwise supervision orders would never be made. The question was whether the protection of the community was *adequately* ensured. If supervision of the prisoner was apt to ensure adequate protection having regard to the risk posed to the community, the prisoner should be released on supervision: *Francis*.[32]

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23 Above, [87].
24 Above, [88].
25 Above, [89].
26 Above, [90].
27 Above, [91].
28 [2007] QCA 334, [13]–[16].
29 *Attorney-General for the State of Qld v Ellis* [2011] QSC 382, [93].
30 [2007] QCA 334, [18].
31 [2007] 1 Qd R 369, 404 [37]; [2006] QCA 324, [37].
32 Above, 405 [39].

[16] Her Honour was satisfied that a supervision order would:

> "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 [anyone] who has the care of young women under 16."[33]

[17] The judge emphasised that the respondent had indicated through his counsel that he was prepared to undergo treatment and take part in any course. A Medium Intensity Sexual Offender Program (MISOP) or HISOP should be commenced, depending on what was available.[34] It may be inferred from her Honour's earlier statements[35] that the judge anticipated that he would commence this program well prior to his release from custody in three months time.

[18] Her Honour considered that the proposed requirements of the order addressed many of the concerns and were very restricting. The degree and quality of supervision was critical to ensuring the success of the order.[36] Under s 20, a warrant could issue for his arrest and return to custody if there was a reasonable suspicion that he was likely to contravene, is contravening, or has contravened, a requirement of the order. In finally accepting that an order largely in terms of the proposed draft should be made, her Honour placed emphasis on its requirements that the respondent must comply with any reasonable direction given by a corrective services officer; that he must not commit an offence of a sexual nature, and that he must not commit an indictable offence.[37]

Did the judge err in construing Pt 2 of the Act?

[19] Mr Davis's primary contention is that when ss 13, 16 and 20, all of which are contained in Pt 2 of the Act,[38] are read together it is impermissible for a court to make a supervision order which the judge has found the prisoner is likely to contravene. I apprehend his argument is as follows. The Act is concerned with the adequate protection of the community. Section 16(1) contains the mandatory conditions in a supervision order releasing a prisoner from custody under s 13(2)(b). Section 16(2) provides that the order may contain other requirements which the court considers appropriate. Section 20 concerns the issuing of warrants for prisoners who may contravene or are contravening any requirement of an order. The terms of s 20 draw no distinction between trivial and non-trivial breaches but are concerned with any contravention at all. If a requirement is contained in a supervision order, the adequate protection of the community requires that all those

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33 *Attorney-General for the State of Qld v Ellis* [2011] QSC 382, [96].

34 Above.

35 Above [91], set out at [14] of these reasons.

36 Above, [97] citing *WW*.

37 Above, [98]–[99]. These were included in requirements (vii), (ix) and (xiv) of the final order set out in [1] of these reasons.

38 Relevantly set out at [5] of these reasons.

requirements be met, not just those requirements relating to sexual offending. It follows that a prisoner cannot be released on a supervision order under s 13(5) if the court considers he is likely to breach one or more of its requirements.

[20] For the following reasons I cannot accept that construction of Pt 2. The Act is extraordinary legislation allowing for the indefinite detention in prison of those defined in it as prisoners,[39] after they have completed their sentences and without the commission of further offences. Final orders under Pt 2 Div 3 result in a prisoner's loss[40] or a very significant curtailment of, liberty.[41] Although the High Court of Australia has held the legislation to be lawful,[42] it offends established international human rights recognised by Australia.[43] The Act must be strictly construed in favour of the liberty of the subject unless its terms clearly and unambiguously state otherwise.[44] Final orders can only be made to ensure adequate community protection and continuing control, care or treatment to facilitate rehabilitation[45] and only if the court is satisfied the prisoner is a serious danger to the community in the absence of a final order.[46] It is not in issue in the present case that the respondent was a prisoner under the Act and a serious danger to the community in the terms of s 13(1) in the absence of a final order. The issue for the primary judge was whether he should be subject to a continuing detention order[47] or a supervision order.[48]

[21] The paramount consideration in making that decision is the adequate protection of the community.[49] It is clear from the objects of the Act,[50] the definition of "prisoner"[51] and the terms of s 13, that "adequate protection" means protection from the danger that the prisoner may commit a serious sexual offence as defined.[52] Adequate protection does not mean the prisoner can only be released on supervision if there is no risk to the community. As this Court explained in *Attorney-General v Francis*:[53]

> "… 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

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39 The Act, s 5(6), set out in [5] of these reasons.

40 The Act, s 13(5)(a).

41 The Act, s 13(5)(b).

42 *Fardon v Attorney-General (Qld)* (2004) 225 CLR 575, but see Gummow J's references to the dangers of such legislation at 606–608 [61]–[65].

43 *Fardon v Australia*, Communication No 1629/2007 (10 May 2010) UN Doc CCPR/C/98/D/1629/2007.

44 *Attorney-General v Francis* [2007] 1 Qd R 396, 405 [39]. See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *Coco v The Queen* (1994) 179 CLR 427, 437. See also the discussion in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 75–79.

45 The Act, s 3.

46 The Act, Div 3, s 13(1).

47 The Act, s 13(5)(a).

48 The Act, s 13(5)(b).

49 The Act, s 13(6)(a). Under s 13(6)(b), the court must also consider whether adequate protection of the community can be reasonably and practicably managed by a supervision order and whether the requirements of the supervision order can be reasonably and practicably managed by corrective services officers but nothing turns on this requirement in the present case.

50 The Act, s 3, set out at [5] of these reasons.

51 The Act, s 5(6).

52 The Act, Schedule, dictionary, set out in [5] of these reasons.

53 [2007] 1 Qd R 396, 405 [39].

> preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[22] The primary judge in this case placed some emphasis on *WW*.[54] In that case, the judge at first instance ordered that WW be released on a supervision order, reasoning as follows. The onerous conditions of the proposed order were very restricting. Adherence would depend upon the degree and quality of supervision.[55] The restrictive supervision was apt to alert a supervising corrections officer to any increasing risk of re-offending.[56] WW would not re-offend without first breaching the order; that breach would then be detected. Section 20 provided for the possibility of WW's return to custody if there was a reasonable suspicion he was likely to contravene or had contravened a requirement of the order.[57] He would therefore be likely to be apprehended before committing a serious sexual offence. On appeal, counsel for the Attorney in *WW* submitted, as does Mr Davis in the present case, that the primary judge in *WW* had applied the wrong legal test in the face of evidence that WW would not comply with the conditions of a supervision order.[58] This Court held that the primary judge properly found on the evidence that it was unlikely any serious sexual re-offending would occur before a breach of the order and the detection of that breach. This finding was relevant in applying the appropriate test under the Act.[59]

[23] This Court should follow *WW* unless it is plainly wrong. Mr Davis made clear that he was not submitting that *WW* is wrongly decided. It seems to me, however, that his contention as to the construction of Pt 2 is inconsistent with that taken by this Court in *WW*.

[24] The question for a judge deciding whether a prisoner under the Act should be detained in custody or released on a supervision order is whether the supervision order will adequately protect the community from the risk of the prisoner committing a serious sexual offence. It is not whether the order will adequately protect from the risk of the prisoner committing any offence at all. And nor is it whether the order will adequately protect from the risk of the prisoner breaching any of its requirements. Part 2 Div 5 deals with contraventions of a supervision order (s 20 to s 22). It is clear from its terms that those subject to a Pt 2 Div 3 order who are released on a supervision order must be kept strictly to the requirements of the order. That is why s 20 provides for a warrant to issue for the arrest of a prisoner where a police or corrective services officer merely *suspects* the prisoner is likely to contravene, is contravening or has contravened any requirement whatsoever of the order. Sections 13, 16 and 20 are each in a different division of Pt 2. In construing Pt 2, those sections should be read together and with the other relevant provisions set out in these reasons. The court can make a supervision order under Pt 2 where it is satisfied the community can be adequately protected from the risk the prisoner will commit a serious sexual offence.[60] The terms of the Act do not prohibit such

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54 [2007] QCA 334.
55 Above, [21].
56 Above, [20].
57 Above, [24].
58 *A-G for the State of Queensland v WW* [2007] QCA 334, [15].
59 Above, [28], [30]–[31].
60 It is not suggested in this case that s 13(6)(b) has any relevance.

an order where the court considers the prisoner may breach one or more of its requirements in circumstances where the breach is likely to be detected by supervising officers and the prisoner arrested under s 20 before the prisoner commits any serious sexual offence. This follows from the proper construction of the relevant terms of the Act and from the approach taken by this Court in *WW*.

[25] It follows that I reject Mr Davis's primary contention in this appeal.

Did the judge err in her fact finding?

[26] Before returning to Mr Davis's second contention, it is logical to deal with his third contention as to the judge's fact-finding. He submits that it was not open to the judge to conclude on the evidence that there was likely to be a time lag between the respondent committing a non-sexual offence and a sexual offence so that his sexual offending would be anticipated and curtailed, thereby ensuring the adequate protection of the community.

[27] I consider that Mr Davis may have misconstrued her Honour's reasoning. A critical step in the reasoning was that the respondent would complete a MISOP or HISOP and begin a psychological program to address his substance abuse and enhance his distress tolerance prior to his release into the community in about three months time.[61] The respondent had indicated through his counsel that he was prepared to take part in any course or program.[62] The supervision order was to be very restrictive in its requirements.[63] It was to include strict supervision by corrective services officers;[64] total abstinence from drugs and alcohol with random drug and alcohol testing;[65] no unsupervised access to women under 16 years; no residing with anyone who had the care of women under 16[66] and continued intense psychological, psychiatric and medical help.[67] Her Honour determined that, with his pre-release treatment, under such a carefully structured and restrictive order, the risk to the community of the respondent committing a serious sexual offence was ameliorated to an acceptable level because his chaotic behaviour or substance abuse (and, inferentially, non-sexual offending) was likely to be detected prior to any sexual re-offending.[68] Any reasonable suspicion that he was likely to contravene a requirement of the order could lead to his return to custody.[69]

[28] Professor Nurcombe's evidence provided support for those critical findings of fact. He stated that if the respondent is successful in abstaining from drug abuse, is employed and has undergone appropriate treatment, the risk of re-offending is no more than moderate and perhaps lower than that. The community would be protected and he could be provided with the psychological treatment required to rehabilitate and prevent re-offending. Professor Nurcombe recommended the respondent be transferred to Wolston Correctional Centre where he should enter rehabilitative programs, including HISOP. He would need help with occupation following his release; a relapse prevention plan; and a regular supportive individual

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61 *Attorney-General for the State of Qld v Ellis* [2011] QSC 382, [91], [96].
62 Above, [96].
63 Set out at [1] of these reasons.
64 See the order, i – vii, x – xiii, xvii, xix, xxii, xxiv, xxv, xxx – xxxvi.
65 The order, xxvi – xxxi.
66 The order, xviii.
67 The order, xx – xxv.
68 *Attorney-General for the State of Qld v Ellis* [2011] QSC 382, [91].
69 Above, [98]–[99].

psychotherapeutic relationship. He would respond well to encouragement provided that correctional staff, group and individual therapists and his post-release correctional supervision are coordinated by the one management plan.[70]

[29] In cross-examination, Professor Nurcombe conceded that the chance of the respondent returning to drug use on his release from prison was very high and, if so, his chance of committing sexual offences was greatly increased. Random drug testing would help ascertain if he was taking drugs but would not stop him from taking them. The most likely course was that, if the respondent returned to substance abuse, he would commit a general criminal offence, perhaps of a property nature, and this would be some steps before he was likely to commit a serious sexual offence. There was nothing in his personality or level of understanding that would suggest he was incapable of understanding the conditions of a supervision order. Professor Nurcombe re-affirmed his opinion that the respondent was unlikely to contravene a supervision order by committing a serious sexual offence, despite his personality problems, without reverting first to the use of illicit substances. He emphasised that life in the community would be very stressful for him and he was bound to fail if released on a supervision order unless there was preparation for it whilst in custody. The risk of him committing a serious sexual offence was not likely to be immediate on release.[71]

[30] Dr Lawrence's evidence also provided support for her Honour's findings. Dr Lawrence's clinical assessment was that the likely level of the respondent inflicting violence on others was low, including in the sexual sphere. The use of substances, however, would undoubtedly increase the risk of aggression and violence. She strongly recommended he complete a HISOP and a substance abuse program before discharge. If released, conditions should be imposed with an emphasis on ensuring abstinence from intoxicating substances; regular monitoring for compliance; attending an ongoing sexual offender maintenance program after completing HISOP; attending psychiatric and/or psychological services; and ensuring compliance with recommendations. His prognosis was guarded.[72]

[31] In cross-examination, Dr Lawrence agreed that it was likely that any serious sexual offending would have a precursor of the respondent taking illicit substances; if he were sober, the risk of the commission of serious sexual offences would decrease. The risk would hopefully be reduced by his attending counselling; reporting regularly; and undertaking MISOP and individual psychotherapy. MISOP should be completed whilst in custody and before he enters the less structured community environment. He had offended in the past after being out of jail only a few days once he began to abuse drugs. The same thing could happen again. She confirmed, however, that it was likely he would return to substance abuse before committing another serious sexual offence. If he was subject to random tests and required to abstain from alcohol and drug abuse, had completed MISOP and was engaged in other counselling and individual psychotherapy, the risk of him re-offending would be reduced. It would not be eliminated until he really committed to change.

[32] The unequivocal inference from her Honour's reasoning is that she preferred the evidence of Professor Nurcombe and Dr Lawrence to that of Dr Harden where there was a conflict on the critical issues. There was nothing in this case that obliged her

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70 Appeal book 208–209.
71 Appeal book 26–29.
72 Appeal book 424–426.

Honour to accept one expert opinion over two other expert opinions. It is true that Dr Lawrence agreed the respondent may abuse drugs immediately after leaving prison and then re-offend, perhaps by committing a serious sexual offence, but she added that this risk would be reduced (although not eliminated) if he had completed MISOP and was engaged in other counselling and individual psychotherapy; was subject to random tests; and abstained from alcohol and drugs. My summarised extracts from the evidence of Professor Nurcombe and Dr Lawrence support the primary judge's critical findings. These were that, if the respondent commenced MISOP or HISOP and received counselling and psychotherapy prior to his release from custody, the community would be adequately protected by the restrictive requirements of the proposed supervision order. This was because any breach would precede his commission of serious sexual offences and would be detected. The strict supervision order meant that he would be returned to custody before he committed any serious sexual offence.

[33] Mr Davis's contention, that the facts on which the judge's decision was based are not supported by the evidence, is not made out.

Did the judge err in exercising her discretion to release the respondent on a supervision order?

[34] Mr Davis's second contention is that judge erred in exercising her discretion to release the respondent on a supervision order after finding he was likely to breach its requirements.

[35] The question whether under s 13(5) a judge should order that a prisoner be released on a supervision order rather than be detained in custody is always a difficult one to answer. The question is for the judge to answer, not the psychiatrists who gave evidence. It is impossible for anyone, even the cleverest and most intuitive of judges on the best psychiatric evidence, to accurately predict whether a prisoner will commit a serious sexual offence when released. But the Act does not require judges to make impossibly accurate predictions. It requires judges to determine whether the Attorney has established that the prisoner should not be released from custody on a supervision order because the order could not ensure the community is adequately protected from an unacceptable risk that the prisoner will commit a serious sexual offence. Different conscientious and reasonable judges may well reach different determinations on the very same material. In this case, her Honour thoroughly reviewed all the relevant evidence, made factual findings consistent with that evidence, and considered the relevant statutory provisions and legal principles. Her Honour rightly took into account that the respondent's previous sexual offences were, and those offences that he might commit in the future would probably be, at the lower end of the range of seriousness. Her Honour rightly took into account that he was not a serial recidivist serious sexual offender. Her Honour rightly appreciated that "adequate protection of the community" did not mean the respondent could only be released if his release were risk free.

[36] In determining whether her Honour's exercise of discretion was sound, it is by no means irrelevant that another judge with considerable experience in both the Trial Division and the Court of Appeal, after carefully reviewing the matter, declined to order a stay of her Honour's order pending appeal.[73] His Honour reasoned that the supervision order, if properly implemented by corrective services officers, would

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[73] *Attorney-General for the State of Queensland v Ellis* [2011] QCA 377.

permit the respondent to leave his residence where he was confined and constantly monitored, only to extent his behaviour showed he could be trusted not to re-offend. His Honour considered the risk of the respondent committing a serious sexual offence was too low to justify keeping him in prison pending appeal.[74]

[37] In the present case, the judge was entitled to conclude that, the respondent having commenced a MISOP or HISOP program and appropriate therapy before his release, the restrictive requirements of his supervision order would provide adequate protection to the community from an unacceptable risk that he would commit a serious sexual offence. This was because he would first breach a requirement of his order which would be detected, resulting in his apprehension before he committed any serious sexual offence. I am far from persuaded that, on the evidence before her, the judge erred in exercising her discretion to release the respondent on the restrictive supervision order set out in [1] of these reasons.

[38] It follows that Mr Davis's contention that the judge erred in exercising her discretion to release the respondent on the order set out in [1] of these reasons is not made out.

Conclusion:

[39] For all these reasons, I would dismiss the appeal.

[40] **WHITE JA:** The Attorney-General has appealed an order made in the Trial Division on 25 October 2011 that the respondent be released on a supervision order pursuant to s 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act"). He seeks an order for the continuing detention of the respondent.

[41] The Attorney-General contends that:

- the judge erred in her construction of s 13(3) of the Act;
- the judge's findings were against the weight of the psychiatric evidence;
- the judge did not take into account the Attorney-General's submissions.

[42] When this appeal came on for hearing the respondent was detained in custody for an alleged breach of the supervision order under Pt 2 Div 5 of the Act. He had not sought to be released pending the final hearing and determination of that alleged breach.

Background

[43] The respondent was born in May 1983. He was aged 22 when he committed the sexual offences which formed the basis for the application by the Attorney-General for a continuing detention order which was filed on 24 May 2011. The respondent had a significant prior criminal history for property and some drug and public order offences. He had been charged as a 12 year old with indecent assault and as a 13 year old with aggravated sexual assault.

[44] On 5 June 2006 the respondent was sentenced in the District Court in relation to one count of sexual assault and one count of sexual assault with a circumstance of

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74 Above, [18].

aggravation and a summary offence of wilful exposure. He was given a head sentence of three years imprisonment. When he committed the subject offences the respondent was on a suspended sentence imposed on 12 April 2004 for property and drug offences. The sentencing judge activated the balance of the suspended sentences – five and a half months – which was ordered to be served cumulatively on the three year head sentence. The sentencing judge strongly recommended that appropriate courses be found for the respondent, particularly for anger management, and that a place be found for him in the sexual offenders' unit.

[45] The facts relied upon by the prosecution on sentence as set out in the primary judge's reasons were that just before 7.00 am on 12 August 2005 the first complainant, who was 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 her and said, "do you want to suck me off, babe?" The girl started to walk away but the respondent ran up behind her, stood beside her and offered to walk her to school. He asked, "do you want to suck me off?"[75] The complainant walked away from the respondent but 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 the respondent in an effort to get him to leave and he did so. After an unsuccessful attempt to use the telephone she told a school friend and then a teacher who called police.

[46] Closely following that conduct the respondent approached the second complainant, a 13 year old girl, on her way to school. He approached her and said, "she was going to do something for him or he was going to stab her".[76] The respondent pushed the girl to the ground and pulled down her tracksuit pants. He touched her in the area of her breasts on the outside of her clothing. He pulled down his pants. The complainant yelled out in an effort to draw attention to the situation. The respondent ceased molesting her and left the area.

[47] The respondent admitted his conduct to his father some two weeks after by showing him a newspaper article about the attack. Two days later police were informed and, after initially denying any involvement, the respondent made detailed admissions in an interview. He told police that he was "off his face" on drugs.[77]

[48] While in custody the respondent committed a number of wilful damage offences. Cumulative terms of imprisonment were imposed for those offences which resulted in a full-time discharge date of 12 October 2011. More offences including indecent exposure to a female corrections officer were committed in custody in August 2011. In addition to these offences the respondent had also committed a number of breaches of prison discipline including failing a urine test, failing to supply a specimen, threatening and assaulting other inmates and assaulting a corrective services officer on 8 June 2010. At the time of the hearing in the Trial Division on 19 October 2011 the respondent had a full-time release date of 12 January 2012. All in all, his convictions for offences committed in prison added over three years to the sentences that were imposed in the District Court in August 2006.

[49] The respondent has an extensive history of self-harm in custody.

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75 Reasons [8]; AR 513.
76 Reasons [10]; AR 514.
77 Reasons [11]; AR 514.

[50] The respondent completed the Getting Started – Preparatory Programme on 16 March 2011 and was assessed as suitable for the High Intensity Sexual Offenders Programme (HISOP). The respondent did not undertake the course. Initially he had refused to participate because it would take nine months to complete and when offered a place he had five months left to serve on his sentence. At the hearing below the respondent indicated a willingness to undertake the course.

[51] The primary judge set out a useful time line which it is advantageous to replicate here:

> "June 2005 — Respondent discharged from custody on earlier sentence
>
> 12 August 2005 — Index sexual offences committed
>
> 29 [A]ugust 2005 — Remanded in custody on index offences
>
> 5 June 2006 — Sentenced in the Brisbane District Court
> - Head sentence of 3 years imprisonment
> - 5½ months of suspended sentence activated (cumulative)
>
> …
>
> 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 [prior to the hearing on 19 October 2011]
>
> 12 January 2012 — Current full time release date".[78]

[52] The Attorney-General filed an application pursuant to Pt 2 of the Act on 24 May 2011. Professor Barry Nurcombe prepared a report for the initial application. On 28 June a judge in the Trial Division was satisfied that there were reasonable grounds for believing that the respondent was a serious danger to the community in the absence of an order pursuant to Div 3 of the Act and directed that the respondent undergo examination by two psychiatrists – Dr Joan Lawrence and Dr Scott Harden – who were to prepare reports in accordance with s 11 of the Act.

The psychiatrists' reports

[53] Professor Barry Nurcombe prepared a report dated 26 September 2010 with an addendum dated 7 December 2010. Dr Joan Lawrence prepared a report dated 15 August 2011 and a supplementary report dated 19 August 2011. Dr Scott Harden prepared a report dated 25 September 2011. All three gave oral evidence at the hearing.

[54] The expertise of the psychiatrists was not challenged. They regularly prepare reports and give evidence in relation to matters under the Act. It is thus unnecessary to set out the basis for accepting them as experts in this area.

[55] The psychiatrists each examined the respondent in custody and each set out his background which may be summarised briefly. The respondent was raised in

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78 Reasons [15]; AR 514-515.

a family where there was severe discord and some domestic violence. His father, with whom he had a good relationship, was sentenced to a lengthy prison term for sexual offences against three foster daughters when the respondent was five years old. The respondent recalled seeing his father engaged in sexual intercourse with one of the girls.

[56] The respondent began poly-substance abuse at an early age, made many suicide attempts, expressed hostility towards women – perhaps due to his difficult relations with his mother – had few intimate relationships with females and was not sexually interested in young children or males.

[57] The psychiatrists and those who had tested him earlier classified the respondent as having borderline intelligence with significant anger management issues, social relationship problems and problems with responding to directions. Professor Nurcombe commented that the impression the respondent made was above his intellectual testing results due perhaps to his poor formal education.

Professor Nurcombe

[58] Professor Nurcombe administered a number of actuarial tests with the following results:

- Psychopathy Checklist-Revised:

  "… 20/40, below the cut-off point for a diagnosis of Psychopathic Personality (30/40). He has a moderate level of psychopathic traits (approximately at the average level amongst prisoners as a whole); however, his lack of glibness, manipulativeness, and shallow affect indicates that he does not have a true psychopathic personality."[79]

- STATIC-99 (Revised): a score of 7/12 which classified the respondent with a group of prisoners whose risk of reoffending sexually in five, 10, and 15 years is at least .39, .45, and .52 respectively which indicated a ***high*** level of risk.

- STABLE 2000: a score of 8/12 classifying the respondent with a group of prisoners whose risk of reoffending sexually is ***moderate***.

- The combined score on the STATIC and STABLE tests made the respondent a ***moderate*** risk of sexual reoffending.

- He scored **low** on the Violence Risk Appraisal Guide.

- Vermont Assessment of Sex Offender Risk (VASOR): the respondent scored 73/125 on the re-offence risk scale and 23/125 on the violence scale, which, when combined, classified the respondent with a group of prisoners "whose risk of reoffending in a sexually violent way is ***high***".[80]

[59] Professor Nurcombe considered the respondent's risk for sexual violence and concluded:

> "The most likely risk scenario is that, following release from prison, [the respondent] will revert to substance abuse and again become involved in petty crime in order to fund his drug habit.

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79 AR 206.

80 AR 207.

> The next most likely risk scenario is that, following release from prison, he will revert to drug abuse and stealing to sustain it, become depressed and desperate, and abase himself by exhibiting his genitals to females. If this occurs, there would be little chance that the sexual violence would escalate to a serious or life-threatening level. However, the psychological harm to victims could be problematic. I do not regard the risk of this form of sexual reoffending to be imminent. The major warning signs that reoffending might occur would be unemployment, a reversion to drug abuse, and a state of psychological depression. In such circumstances, the sexual violence would be likely to occur on more than one occasion. The risk for such sexual violence is chronic."[81]

[60] In summary, Professor Nurcombe concluded that if, following release from prison, the respondent was unemployed and reverted to substance abuse "the risk of reoffending is ***high***."[82] If on the other hand he was successful in abstaining from drug abuse and if he was employed and had undergone appropriate treatment the risk of reoffending was no more than moderate "and perhaps lower than that".[83] Professor Nurcombe recommended that the respondent should enter a number of programmes offered at the Wolston Correctional Centre including the HISOP and Substance Abuse Treatment Program.

[61] In his supplementary letter dated 7 December 2010, Professor Nurcombe commented briefly on a number of matters contained in a supplementary brief including the respondent's removal from the Sexual Offending Programs Preparatory Program in which the respondent had spat in an officer's face and was charged with assault. As a consequence he was prevented from returning. Professor Nurcombe concluded that the respondent was likely to have experienced heightened emotion regarding the impending disclosure and autobiography to the group.[84]

[62] Professor Nurcombe diagnosed the respondent as suffering from the following disorders: dysthymic disorder; polysubstance dependence (in remission due to incarceration); drug induced psychosis (from history); and antisocial personality disorder.

[63] In his oral evidence Professor Nurcombe was strongly of the opinion that unless the respondent completed the HISOP programme and individual psychotherapy prior to release into the community, his personality was such that he would be at increased risk of recommencing his substance abuse, particularly methylamphetamine and heroin, and the risk of reoffending, "not necessarily sexually"[85] would be high. If he did not recommence substance abuse then the risk would be no more than moderate. The most likely victims of his sexual offending would be attractive young women between 13 and 20. Professor Nurcombe did not think that random testing would stop the respondent from taking drugs were he to be released in the community. He did not think that the risk of committing a serious sexual offence was likely to be immediate on release. The respondent's emotionally labile status

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81 AR 208.
82 AR 208.
83 AR 209.
84 AR 243.
85 AR 23.

would likely lead him to substance abuse. If that occurred there would be property breaches to obtain funds to buy drugs, escalating to some sexual offending. Professor Nurcombe opined that that escalation could occur quite quickly - on the previous occasion 15 days after discharge the respondent had progressed to serious substance abuse then to sexual offending. Professor Nurcombe doubted that the period of unravelling would be less than 15 days.

Dr Joan Lawrence

[64] Dr Lawrence administered actuarial tests to the respondent. The respondent's score of 26 on the psychopathy test did not meet the cut off for psychopathy at 30 but it was significantly elevated and reflected the respondent's anti-social activities from an early age and other aspects of his personality. Dr Lawrence regarded his risk for the future as being high in as much as his plans lacked feasibility, he would be exposed to destabilising factors including drugs on release, and lacked personal support; he had not been compliant with remediation attempts and his level of stress and inability to cope were high. The administration of the STATIC-99 test placed him in the high risk category.

[65] Dr Lawrence concluded that the respondent suffered from an Anti-social Personality Disorder and Borderline Personality Disorder. She did not believe he was a sexual predator and thought that the nature of his sexual offending was "undoubtedly due to the effect of the extensive poly-substances that he had been using over a long period …".[86] His ambivalent attitude towards women was reflected in his sexual relationships and offending. When sober those difficulties might be contained but,

> "the use of substances will disinhibit him and significantly increase the risk of re-offending sexually as well as in other ways."[87]

Dr Lawrence considered that the respondent's past behaviour of repeated breaches of supervisory conditions as well as his on-going breaches in prison indicated a high risk of re-offending and likely breaches of any supervision order should he be released on conditions. She concluded:

> "Whilst the actuarial assessments suggest a high risk of violence, my clinical assessment would be that the risk of violence might be high but the level of violence inflicted on others is likely to be low to others, including in the sexual sphere. However, the use of substances will undoubtedly increase the risk of aggression and violence in the overall picture."[88]

Dr Lawrence strongly recommended that the respondent be required to complete a HISOP and a substance abuse programme before discharge from prison.

[66] In her supplementary report of 19 August 2011 Dr Lawrence commented that the respondent was:

> "unreliable, intermittently non-compliant and unlikely to persist for any length of time in behaviours or programs that might assist him in his personality difficulties."[89]

She considered that he remained at risk of reverting to poly-substance abuse and dependence upon release.

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86 AR 423.
87 AR 424.
88 AR 424.
89 AR 458.

[67] In her oral evidence Dr Lawrence said that:

> "My opinion is that the risk of him re-offending sexually compared with the risk of him re-offending in some other way is moderate, that is, there is a high risk of re-offending against property or some other form of [anti-social activity]. I think that's very high, really.
>
> … I think the risk of sexually re-offending is of a more moderate kind. For me the likely physical damage that could ensue from the sexual offending would be relatively mild to moderate, but because psychological harm can happen to any victim or person that is sexually assaulted in some way, but I guess what I'm saying I think the type of victim would like – most likely be a young girl or woman, not a child, [she] would be female, but it could be, as his victims were, 13-year-olds, 17-year-olds … I think it is unlikely that there would be some more serious rape-type situation."[90]

Dr Lawrence thought that such offending would be impulsive and would be most likely to occur if the respondent had been using or abusing substances.

[68] In cross-examination Dr Lawrence was asked if taking illicit substances would be a likely precursor to a serious sexual offence being committed by the respondent. She said:

> "I think that is one particular factor that is likely to increase the risk. … If he was sober than [sic] that particular risk will be limited – will decrease."[91]

[69] Dr Lawrence was firm that any sexual offender treatment programme should be completed in the prison because the respondent would be more likely to attend in a structured environment than after release, even on a supervision order. She disagreed with the proposition that the respondent's anti-social and criminal conduct in prison was due to his resentment of authority and that in a less structured environment he may do better. The following exchange, important for the outcome below, occurred:

> "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 [sic] 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."[92]

[70] Counsel suggested that the respondent was likely to be subjected to random substance testing which would prevent that descent into risky conduct.

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90 AR 7.
91 AR 15-16.
92 AR 17.

Dr Lawrence observed that he could have a clean test one day and start using prohibited drugs immediately following and he would be at risk of engaging in illicit conduct. It was suggested to Dr Lawrence that if the respondent was attending sexual offender rehabilitation programmes, other counselling and individual psychotherapy in the community there would be ample opportunity for others who were assisting him to observe his behaviour and to report on any perceived or actual contraventions. Dr Lawrence agreed that all of these conditions would help, if they were followed, to reduce the risk but that they could not eliminate the risk unless the respondent was committed to change.

Dr Scott Harden

[71] Dr Harden concluded that the respondent had 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. He commented, as had Dr Lawrence, that "[t]his behaviour has persisted to an unusual extent in the structured environment of prison."[93]

[72] Dr Harden administered actuarial tests which led him, together with his clinical observations, to conclude that the respondent's risk of sexual reoffending was high if released into the community without appropriate monitoring support and therapeutic intervention. That risk would be reduced if the respondent were first to undertake the HISOP and begin a psychological programme to address his substance abuse prior to release into the community. It was critical to have individual therapy targeted at the features of the respondent's borderline personality disorder.

[73] Dr Harden considered that any re-offending would be an impulsive offence against a post-pubertal female while intoxicated with substances. The physical harm to the victim would be relatively low but potentially high in psychological harm.

[74] In response to a question in cross-examination about the extent to which a supervision order would reduce the overall risk that the respondent posed to the community in terms of serious sexual offending as opposed to general offending he responded:

> "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 … this … could happen quite quickly. … 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."[94]

Each of the psychiatrists considered that the respondent's relapse prevention plan was poorly thought out.

Primary judge's approach

[75] The primary judge set out at some length the opinions of the three psychiatrists. Her Honour concluded that the respondent fell within the definition of s 13(2) of the

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93 AR 476.

94 AR 38.

Act as a person who is a serious danger to the community, in that he would commit a serious sexual offence if he were released from custody without a supervision order being made. She noted the principal plank in the respondent's submission that the highest risk of offending, if the respondent were released under a supervision order, was that of substance abuse and property offences and not serious sexual offending - the object of the Act. The issue, the primary judge said, was whether the risk, understood in that way, was "unacceptable".[95]

[76] Her Honour accepted that it was "of concern" that the respondent had done nothing to address his substance abuse whilst in custody since the evidence revealed it was the major triggering factor for sexual offending. Nor, in the six years the respondent had been in prison had he completed any other courses apart from the Getting Started Preparatory Program for Sex Offenders. She observed that Dr Harden considered the respondent to have very high treatment needs and that the respondent's non-compliant conduct while in a custodial setting did not engender confidence as to his future conduct in the community. Her Honour noted that all three psychiatrists indicated that the respondent should do a therapeutic relationship course in custody because it would be challenging for him and he would need to be in therapy to manage the emotions which would be brought about by the course content. There was evidence that such therapy could be provided in the community.

[77] Her Honour said:

> "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."[96]

[78] Her Honour made the following observation:

> "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."[97]

Her Honour accepted 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."[98]

[79] Her Honour noted that Dr Lawrence and Professor Nurcombe believed that there would be a progression to sexual offending but Dr Harden thought that the respondent's chaotic behaviour may involve sexual offending. Her Honour

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95 Reasons [79]; AR 525.
96 Reasons [82]; AR 525.
97 Reasons [86]; AR 526.
98 Reasons [87]; AR 526.

accepted that the respondent's unstable personality was as much a risk as resort to substances as reflected by his behaviour in prison. Her Honour then concluded:

> "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."[99]

[80] After quoting extensively from *Attorney-General (Qld) v WW*[100], her Honour concluded that the present risk was at an acceptable level because the conditions of the supervision order were such that any (sexual) offences would be likely committed only after a detectable breach of conditions. Her Honour also noted from *Attorney-General (Qld) v Francis*[101] that the Act assumed that supervision would be available to a released prisoner. A court should not conclude that the supervision would not be sufficient absent evidence to support a contention that it was impracticable.

[81] Those considerations led her Honour to this conclusion:

> "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."[102]

[82] The Attorney-General submits that the primary judge's process of reasoning was flawed because it involved accepting, on the evidence of the psychiatrists and his criminal and imprisonment history, that the respondent was highly likely, if not certain, to breach the conditions of the supervision order by substance abuse (or as a consequence of his chaotic behaviour) but that the breach would be detected before he could proceed to commit a serious sexual offence. The Attorney-General contends that ss 13, 16 and 20 of the Act must be read together and that all the conditions of any supervision order go to ensuring the adequate protection of the community.

Discussion

[83] Sections 16 and 20 are in different divisions of Pt 2 to s 13 which is in Div 3, nonetheless, the whole of Pt 2 relates to continuing detention or supervision orders

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99 Reasons [91]; AR 526-527.
100 [2007] QCA 334.
101 [2006] QCA 324.
102 Reasons [96]; AR 529.

and they should be read together.[103] Section 16 imposes some mandatory conditions which must be in every supervision order. They are general and directed towards the adequate protection of the community or for the prisoner's rehabilitation, care and treatment. Section 20 enables a police officer or corrective services officer to apply for a warrant for the arrest of the released prisoner if that person reasonably suspects the released prisoner is likely to contravene (or has contravened) *any* requirement of the supervision order.

[84] The primary judge gave particular weight to the reasoning in *WW*. That prisoner was a 66 year old man with a long and serious history of sexual offending against children. He had discontinued participation in a sex offenders' course in custody and demonstrated neither insight nor remorse. He had been released on a supervision order with numerous stringent conditions. His *modus operandi* was to groom young girls. As the trial judge observed in *WW*:

> "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."[104]

[85] The expert opinion was that there was "an appreciable risk of re-offending". Jerrard JA said:

> "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."[105]

In considering whether vigilance by the authorities was adequate to ensure the conditions imposed by the supervision order were complied with, Jerrard JA, with whom Holmes JA and Jones J agreed, referred to the following statements in *Francis*:

> "… 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.
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> … If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statutes which authorises [sic] such constraint."[106]

[86] It was conceded by counsel for the Attorney-General in *WW* that because the prisoner was likely to be argumentative about the conditions imposed and how they

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103 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355.

104 Quoted in the Court of Appeal judgment at [13] per Jerrard JA.

105 At [16].

106 Quoted at [18]-[19].

could be applied, the authorities were thus likely to be forewarned of any intended disobedience.[107]

[87] As Holmes JA noted in her concurring judgment:

> "Great emphasis was placed on his Honour's conclusion that it was unlikely that any re-offending would occur without, first, a breach of the order and its detection. That passage did not, as the appellant endeavoured to argue, purport to impose some additional tests; it was a finding properly made on the evidence and relevant in applying the test under the Act."

[88] That observation serves to remind that general propositions in decisions must be considered with the facts of the particular case in mind. In *WW*, the way in which the prisoner offended involved a prolonged period of getting to know his intended young victim. His offending was not impetuous nor fuelled by chemical substances. The level of vigilance which the supervising officers maintain, as recorded in the many cases under the Act reviewed in this court demonstrate, would readily reveal where the prisoner in *WW* was spending time. That is not this case where the evidence is all one way:

- The risk of sexually offending if released without completing a HISOP and substance abuse programme in custody and other therapies was high.
- The offending would be impulsive because of the respondent's unstable personality as well as his addiction to substances.
- His attitude to authority as seen in his non-compliant prison conduct did not suggest that adherence to the conditions of a supervision order would be paramount.

[89] This latter point together with the respondent's impulsivity leading to his sexual offending make apt the observations of the Chief Justice in *Attorney-General (Qld) v Fardon*:[108]

> "While in some respects the respondent has adhered to important conditions, such as abstention from alcohol and illicit drugs, returning negative results on random testing, it is his present unwillingness fully to commit to the supervision regime, manifested in his disregarding and circumventing it, which precluded the conclusion that releasing him under a supervision order would ensure adequate community protection. It was not reasonably open, on all of this evidence, to conclude that a supervision order would be "efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences" (*Attorney-General for the State of Queensland v Fardon* [2011] QCA 111 per Chesterman JA at para 29)."

[90] The primary judge, with respect, relied too heavily on statements in *Francis* and *WW* quoted above without, it seems, considering that *this* respondent would not be restrained from breaching the conditions of the order by its imposition and there

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107 At [24].

108 [2011] QCA 155 at [28].

was no supervision that was realistic, after release from prison which would, in practical terms, be able to prevent the next highly likely step of committing a serious sexual offence.

[91] It would be a strange result if a person could be released under a supervision order when all the evidence pointed to the high likelihood that it would be breached in its important conditions virtually as soon as the prisoner was released. The "presumptions" referred to in *Francis* and *WW* must be read in light of the circumstances of those cases that the supervision of those prisoners would be adequate to address the risk and reduce it to an acceptable level.

[92] The primary judge did not overlook the expert evidence. She was fully cognisant of it; and she did not fail to take into account the submissions of the Attorney-General. The error lay in concluding that a supervision order would be effective to ensure adequate protection of the community by preventing the opportunity to commit a serious sexual offence when all the evidence demonstrated it would not; and, in giving too much weight in reaching that conclusion to statements of principle in *Francis* and *WW* without taking account of the factual circumstances behind those decisions.

[93] I would make the following orders:

1. Appeal allowed.

2. The order made 25 October 2011 be set aside.

3. The respondent be detained in custody for an indefinite term for control, care or treatment pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003.

[94] **MARGARET WILSON AJA:** The appeal should be allowed for the reasons given by White JA.