SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Williams* [2014] QSC 192
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **STEPHEN WILLIAMS** (respondent)
FILE NO/S:	BS3592/10
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	18 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2013
JUDGE:	Jackson J
ORDERS:	**The orders of the Court are:** **1. It is declared that ss 21 and 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) are not inconsistent with s 474.19 of the *Criminal Code Act* 1995 (Cth).** **2. The application filed by the respondent on 20 September 2013 is dismissed.** **3. The further hearing of the application filed on 23 November 2011 is adjourned to 24 November 2014.** **4. The costs of the application filed by the respondent on 20 September 2013 including the hearing on 4 December 2013 are reserved.**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS – GENERALLY – where the respondent was alleged to have contravened a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the respondent was detained under an interim order pending hearing of the contravention application - where the facts constituting the alleged contravention also amounted to an offence under the *Criminal Code Act* 1995 (Cth) – where the respondent was convicted and sentenced for the Commonwealth offence – where the respondent was eligible for release on parole under the applicable Commonwealth sentencing laws – where the

respondent was kept in custody under the interim order, pending the outcome of the State contravention proceedings – whether the power to detain the respondent in custody pending the outcome of the contravention proceedings and the power to make a continuing detention order or further supervision order are inconsistent with the Commonwealth laws

Commonwealth Constitution, s 109
Criminal Code Act 1995 (Qld), s 474.19
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 20, s 21, s 22

Attorney-General (Qld) v Francis (2008) 187 A Crim R 124, cited
Buckman v The Queen [2013] NSWCCA 258, cited
Dickson v The Queen (2010) 241 CLR 491, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575, cited
Hume v Palmer (1926) 38 CLR 441, referred to
McWaters v Day (1989) 168 CLR 289, cited
Momcilovic v The Queen (2011) 245 CLR 1, cited
R v Credit Tribunal: ex parte General Motors Acceptance Corporation (1977) 137 CLR 545, cited
R v Loewenthal: ex parte Blacklock (1974) 131 CLR 338, cited
R v Winneke; ex parte Gallagher (1982) 152 CLR 211, cited
Telstra Corporation v Worthing (1999) 197 CLR 61, referred to
Victoria v The Commonwealth (1937) 58 CLR 618, cited

COUNSEL: J Sharp for the applicant
J Fenton for the respondent

SOLICITORS: GR Cooper, Crown Law for the applicant
Fisher Dore Lawyers for the respondent

[1] **Jackson J:** The application by the Attorney-General is for orders, pursuant to s 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the DPSOA"), that the Court rescind the supervision order made on 12 July 2010 ("the supervision order") and order that the respondent be detained in custody for an indefinite term for care, control or treatment or that, pursuant to s 22(7) of the DPSOA, the Court amend the supervision order.

[2] The respondent cross-applies for an order that the application be dismissed and a declaration that the respondent "is set free" subject to the conditions of the supervision order. The ground of the application for dismissal and consequential declaration is that "the law of the State", meaning s 21 and s 22 of the DPSOA, is inconsistent with s 474.19 of the *Criminal Code Act* 1995 (Cth) in its application to the facts of the present case, so that by s 109 of the Constitution the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

[3] On 15 September 2006, the respondent was sentenced to a term of imprisonment of four years for an offence of rape and a term of imprisonment of 12 months for an

offence of indecent treatment. The offences were committed against a ten year old girl.

[4] On 12 July 2010, Mullins J made a supervision order under s 13(5)(b) of the DPSOA. The supervision order took effect on 16 July 2010. The supervision order included two conditions ("the pornography conditions") that the respondent:

> "…(xxxviii) not collect or retain any material that contains images of children, except images of his own children, and dispose of such material if directed to do so by an authorised Corrective Services officer;… [and]
>
> (xlii) not access pornographic images that display photographs or images of children on a computer, the internet or any other format..."

[5] On 19 November 2011, the respondent's laptop and two mobile phones were seized.

[6] On 21 November 2011, the respondent was arrested under a warrant issued pursuant to s 20 of the DPSOA, for a suspected contravention of the pornography conditions.

[7] On 23 November 2011, the applicant filed the application under s 22 of the DPSOA ("the s 22 application") alleging contraventions of the pornography conditions.

[8] On 23 November 2011, under s 21 of the DPSOA, the Court ordered that the respondent be detained in custody until the final decision of the Court on the s 22 application ("the interim order").

[9] On 4 December 2012, the respondent was convicted of the offence under s 474.19 of the *Criminal Code Act* 1995 (Cth) of using a carriage service to access child pornography material. He was sentenced to a term of imprisonment of two years and six months with a further order that, upon giving security by recognizance in the sum of $2,000, he be released after serving nine months, conditioned upon his being of good behaviour for a period of four years.

[10] Under the terms of that order, the respondent might have been released on 4 September 2013 upon giving the security required. The respondent was not then released. He continues to be detained in custody pursuant to the interim order, until the final decision of the Court on the s 22 application.

[11] The respondent contends that the continuing operation of the interim order and the power under s 22 to make a further order are a law of the State for the purposes of s 109 of the Commonwealth Constitution. He also submits that s 474.19 and his conviction and sentence on 4 December 2012 are a law of the Commonwealth for the purposes of s 109 of the Constitution.

[12] The respondent's submission is that the law of the State is inconsistent with the law of the Commonwealth within the meaning of s 109 of the Constitution because:

(a) "[t]he operation of the law of the Commonwealth and the law of the State are directly inconsistent because the chief executive, Queensland Corrective Services [sic] cannot obey both laws simultaneously";

(b) "[t]he operation of the law of the Commonwealth in relation to the child pornography material required the release of the respondent from custody on 4 September 2013";

(c) "[t]he operation of the law of the State in relation to the child pornography material required the respondent remain in custody until the outcome of the alleged contraventions in relation of the child pornography material was known";

(d) breach of the condition that the respondent be of good behaviour would engage s 20A(5)(c)(i) of the *Crimes Act* 1914 (Cth); and

(e) the law of the Commonwealth therefore covers the field in relation to protection of the community from the respondent when released and there is no scope for operation of the law of the State.

[13] The respondent's outline of argument developed a submission as to "direct inconsistency" by reference to the well known test whether the law of the State would "alter, impair or detract from" the operation of the law of the Commonwealth law by way of "operational inconsistency". The respondent's submissions did not develop any contention based on "indirect inconsistency" or any concept of covering the field.

DPSOA

[14] The provisions and operation of the DPSOA are discussed in detail in a number of cases. It is unnecessary to do so fully in order to decide the present application. It is sufficient to note a few provisions of significance. First, under s 3, the objects of the Act are to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community and to provide continuing control, care or treatment of the particular class of prisoner to facilitate their rehabilitation.

[15] Second, under s 5, the Attorney-General may apply to the Court for an order or orders under s 8 and a Div 3 order in relation to a prisoner. Under s 8, if the Court is satisfied there are reasonable grounds for believing that the prisoner is a serious danger to the community in the absence of a Div 3 order, the Court must set a date for the hearing of the application for a Div 3 order. Under s 13, (which is in Div 3) if the Court is satisfied the prisoner is a serious danger to the community in the absence of a Div 3 order, the Court may order the prisoner be detained in custody for an indefinite term for control, care or treatment (a continuing detention order) or that the prisoner be released from custody subject to the requirements it considers appropriate that is stated in the order (a supervision order). Either a continuing detention order or a supervision order can operate after the prisoner's release date.

[16] There are requirements that must be satisfied before a Div 3 order may be made. First, a prisoner is a serious danger to the community only if there is an unacceptable risk that the prisoner will commit a serious sexual offence if the prisoner is released from custody or if the prisoner is released from custody without a supervision order being made. Second, in deciding whether to make a Div 3 order, the paramount consideration is the need to ensure adequate protection of the community and the Court must consider whether adequate protection of the

community can be reasonably and practicably managed by a supervision order. Third, if the Court makes a supervision order, the order must state the period for which it is to have effect which cannot end before five years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later.

[17] The purposes of ss 20, 21 and 22 of the DPSOA were analysed in *Attorney-General (Qld) v Francis*[1] by Muir JA, who referred to the reasons of Callinan and Heydon JJ in *Fardon v Attorney-General (Qld)*[2] and said:

> "Their Honours then proceeded to consider whether the detention for which the Act provided was to be characterised as punitive. In that regard, they said:
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> > 'Several features of the Act indicate that the purpose of the detention in question is to protect the community and not to punish. Its objects are stated to be to ensure protection of the community and to facilitate rehabilitation. The focus of the inquiry in determining whether to make an order under ss 8 or 13 is on whether the prisoner is a serious danger, or an unacceptable risk to the community. Annual reviews of continuing detention orders are obligatory.
> >
> > In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorizing involuntary detention in the interests of public safety. Its proper characterization is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes.'(Footnotes deleted.)
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> The provisions of ss 20, 21 and 22 are ancillary to the power to order detention under ss 8 and 13. It is thus unlikely that the nature of detention contemplated by ss 20, 21 and 22 should be categorised differently from that provided for under s 8 or s 13. The considerations discussed in [49] hereof also indicate that detention under s 21 has a non-punitive purpose.
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> As has been discussed already, the nature of the detention for which s 21 provides is similar to that provided for in the *Justices Act* and the *Bail Act*. Its temporary duration, pending a determination on the merits under s 22 or release under s 21(3) pending final decision, further identifies its character as non-punitive. Even if such detention

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1 [2008] QCA 243; (2008) 187 A Crim R 124, 138 [49].

2 (2004) 223 CLR 575, 650-652.

> were to be categorised as punitive it would not follow, necessarily, that the exercise by the Court of the powers conferred by s 21 would impugn the Court's institutional integrity." (citations omitted)

[18] Under s 22(1) of the DPSOA, the consequence of any contravention of the pornography conditions is that the following subsections of s 22 apply. Under s 22(2), unless the respondent satisfies the Court on the balance of probabilities that adequate protection of the community can, despite the contravention, be ensured by the existing order as amended under subsection (7), the Court must rescind the supervision order and make a continuing detention order. Alternatively, under subsection (7), if the respondent satisfies the Court on the balance of probabilities that the adequate protection of the community can, despite the contravention of the existing order, be ensured by a supervision order, the Court may or must amend the existing order in relevant respects. In either event, the other provisions of the DPSOA will then operate in relation to the respondent, according to their terms.

Section 474.19

[19] Section 474.19 provides, in part:

> "A person is guilty of an offence if:
> (a) the person:
> (i) accesses material… and
> (aa) the person does so using a carriage service; and
> (b) the material is child pornography material.
>
> Penalty: Imprisonment for 15 years."

[20] The purpose of the section is revealed by its operation. It is intended to prohibit the use of a carriage service to access child pornography material. The elements are that there is use of a carriage service, that there is access to material and that the material is child pornography material. Relevantly, the law, as a law of the Commonwealth, comprises those elements as well as the penalty of imprisonment of 15 years.

[21] The respondent's alleged contraventions of the pornography conditions are based on the same factual substratum as the acts which constituted his offence under s 474.19. Of course, s 474.19 required the use of a carriage service as an element. That was not a required element of a contravention of either condition (xxxvii) or (xlii).

[22] The remedial consequence of the respondent's offence under s 474.19 was the imposition of a term of imprisonment including provision that part of the term be served in the community after serving nine months conditioned on continuing good behaviour for a period of four years.

Direct inconsistency

[23] The contrast between the operations of the law of the State and the law of the Commonwealth is apparent from that brief description.

[24] The respondent's contention is that the effect of the law of the Commonwealth, including the sentence imposed by the District Court upon conviction, was that the respondent ought to have been released, on giving security, on 4 September 2013 and that he was not so released "in defiance of the law of the Commonwealth". He submits that in applying to the same facts and circumstances about access to child pornography material on the respondent's laptop computer, the law of the State and the law of the Commonwealth arrive at different results. He further submits that the operation of the law of the Commonwealth requires that the respondent be set free, whereas the law of the State requires that the respondent be held indefinitely until hearing of the s 22 application in relation to the those same facts. This is said to amount to "direct inconsistency" between the law of the State and the law of the Commonwealth.

[25] The distinction between "direct" and "indirect" inconsistency for the purposes of s 109 of the Constitution was accepted as valid by the High Court in *R v Credit Tribunal: ex parte General Motors Acceptance Corporation*.[3] So said Heydon J in *Momcilovic v The Queen*.[4] The utility of the distinction was also recognised in the judgment of Crennan and Kiefel JJ in *Momcilovic*.[5] Yet it can be said fairly that some of the other judges appear to have steered away from the distinction in *Momcilovic*.

[26] There is no dispute that in assessing the question of inconsistency under s 109 in respect of overlapping or potentially overlapping Commonwealth and State laws, the statement of principle by Dixon J in *Victoria v The Commonwealth*, which is often associated with the description "direct inconsistency", has been taken up in joint reasons of the whole court of the High Court on more than one recent occasion.[6] That statement was:

> "When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid."[7]

[27] In the context of laws operating upon the exercise of a judicial power at the stage of sentencing after conviction or by a final order made after the hearing of an application, the relevant category of inconsistency is also referred as "operational inconsistency".[8]

[28] As can be seen from the above, the respondent's submissions focus on the remedial effect of the exercise of judicial power upon conviction and sentence for an offence under s 474.19, on the one hand, and on the making of orders under ss 21 and 22 of the DPSOA, on the other hand.

[29] Although the respondent's submissions focus on the inconsistency of remedies or orders under the two laws, in my view they are not laws which deal with the same subject matter at all. Section 474.19 creates a criminal offence concerned with the

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3 (1977) 137 CLR 545.
4 (2011) 245 CLR 1, 189 [475].
5 (2011) 245 CLR 1, 232-234 [627]-[633].
6 *Dickson v The Queen* (2010) 241 CLR 491, 502 [13]; *Telstra Corporation v Worthing* (1999) 197 CLR 61, 76-77 [28].
7 *Victoria v The Commonwealth* (1937) 58 CLR 618, 630.
8 *Momcilovic v The Queen* (2011) 245 CLR 1, 113-114 [251].

use of a carriage service for the purpose of accessing child pornography. Offences prohibiting possession of or supply of child pornography are well known to the criminal law. They operate directly to punish offenders and indirectly to deter would-be offenders from possessing and or supplying child pornography material, as well as indirectly to protect community by the liability to punishment or the punishment imposed for that conduct.

[30] On the other hand, ss 21 and 22 operate in a "non-punitive" fashion to directly "protect" the community. They are not concerned with punishing the respondent as contravenor. Indeed, separate provision is made that a contravention of a condition of a supervision order is an offence, under s 43AA of the DPSOA. The purpose of an order or orders made under ss 21 and 22 is purely protective, whether the outcome is the making of a continuing detention order or an amended supervision order. Although in the circumstances of this case, the law of the Commonwealth and the law of the State both operate in relation to the same facts, that does not mean that they are concerned with the same thing or intended to achieve the same purpose and are thereby potentially inconsistent because different remedies are provided for.

[31] But even if that consideration were not enough to conclude that the two laws are not inconsistent, the respondent's focus on the different remedial operation of the two laws as the basis of inconsistency must fail, in my view. A convenient starting point is that inconsistency under s 109 of the Constitution does not follow simply from the circumstance that there are State and Commonwealth offences covering the same subject matter. As Mason J said in *R v Winneke; ex parte Gallagher*:[9]

> "It is, of course, commonplace that the doing of a single act may involve the actor in the commission of more than one criminal offence. Moreover, it may amount to an offence against a law of the Commonwealth and a law of a State. So much at least is recognized by s. 30(2) of the *Acts Interpretation Act* 1901 (Cth), as amended, and s. 11 of the *Crimes Act* 1914 (Cth) which are designed to ensure that in such a case the offender will not be punished twice where he has first been punished under State law. These two provisions proceed in accordance with the principle that there is no prima facie presumption that a Commonwealth statute, by making it an offence to do a particular act, evinces an intention to deal with that act to the exclusion of any other law."

[32] The question whether a Commonwealth law does evince an intention to deal with an act constituting an offence to the exclusion of any other law can be difficult to determine. The decided cases offer no easy formula for when the answer to that question will be "yes". For example, in *Hume v Palmer*[10] it was held that the rules prescribed by the Commonwealth law and the State law respectively for the prevention of collisions between ships were substantially identical, but the penalties imposed for their contravention differed. It was found that the law of the State was inconsistent with the law of the Commonwealth.[11] Similarly, in *The Queen v Loewenthal: ex parte Blacklock*[12] it was held that the law of the State making it an

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9 (1982) 152 CLR 211, 347.
10 (1926) 38 CLR 441.
11 (1926) 38 CLR 441, 448, 450-451 and 461-462.
12 (1974) 131 CLR 338.

offence for any person to wilfully and unlawfully destroy or damage any property was inconsistent with the law of the Commonwealth that any person who wilfully and unlawfully destroys or damages any property whether real or personal belonging to the Commonwealth is guilty of an offence. The penalties for the two offences were different. It was held that the law of the Commonwealth "provides a common rule to or from which the legislation of a State can neither add nor subtract"[13] and that the "difference in the penalties prescribed for conduct which is prohibited … has been held to give rise to inconsistency between those laws … at least when it appears that the Commonwealth statute by prescribing the rule to be observed evinces an intention to cover the subject matter[14] to the exclusion of any other law".[15]

[33] However, in *Momcilovic* the reasons of a number of the Judges discounted any principle that different penalties as between otherwise similar laws of the State and Commonwealth is enough, per se, to render inconsistency under s 109. Heydon J was of the view that a "right" to have the sentence for an offence determined in accordance with Commonwealth law and sentencing principles is not a right conferred by the Commonwealth law which the State law can be said to have altered impaired or detracted from.[16] Gummow J observed that there were many cases where potential operational inconsistency between penalty provisions for similar offences might be removed by other factors.[17] Crennan and Kiefel JJ recognised that differing penalties in respect of essentially the same conduct may not be inconsistent.[18]

[34] Another class of case concerns the concurrent operation of a law of the State and the law of the Commonwealth, each creating a criminal offence, where the scope of the prohibition differs. Thus, in *Dickson v The Queen*[19] it was held that there was inconsistency when the law of the Commonwealth created significant "areas of liberty designedly left [and which should not be closed up]".[20]

[35] The question of the proper construction of the law of the Commonwealth, as conferring an "area of liberty" depends on the context.[21] So, on the other hand, in *McWaters v Day*[22] the law of the Commonwealth applying to members of the Defence Force driving whilst under the influence of intoxicating liquor required that the influence be "to such an extent as to be incapable of having proper control of the vehicle". The law of the State made it an offence to drive a motor vehicle whilst under the influence of liquor. It was held that it was difficult to construe the law of the Commonwealth as conferring a liberty on a drunken Defence member to drive a vehicle on service land provided he or she was still capable of controlling the vehicle.[23] Thus there was no inconsistency.

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13 (1974) 131 CLR 338, 342.

14 I note that Heydon J, in *Momcilovic*, would have treated this passage as indirect inconsistency, rather than direct inconsistency: (2011) 245 CLR 1, 191 [480].

15 (1974) 131 CLR 338, 346-347.

16 (2011) 245 CLR 1, 191 [480].

17 (2011) 245 CLR 1, 114-115 [251]-[256].

18 (2011) 245 CLR 1, 236-237 [644]-[645].

19 (2010) 241 CLR 491.

20 (2010) 241 CLR 491, 505 [25].

21 See *Buckman v The Queen* [2013] NSWCCA 258.

22 (1989) 168 CLR 289.

23 See *Dickson v The Queen* (2010) 241 CLR 491, 506 [29].

Conclusion

[36] In the present case, even if s 21 and s 22 and under them the interim order and orders which might be made on the s 22 application could be seen to be covering the same subject matter as s 474.19, in my view it is impossible to accept that s 474.19 should be construed on the footing that the penalty imposed upon a conviction and sentence for an offence under that section is intended to leave something in the nature of an "area of liberty", such that the operation of s 21 or s 22 of the DPSOA and orders made under them are inconsistent as a matter of direct inconsistency and operational inconsistency.

[37] On the contrary, in my view, the two "laws" are not concerned with the same thing at all. Second, the interim order was made for a non-punitive and protective purpose pending a final decision on the s 22 application. It does not operate as a further or different punishment for conduct constituting an offence under s 474.19. Third, any order which might be made on the final hearing of the s 22 application will also be non-punitive and protective in nature. It would not constitute a further or different punishment for an offence under s 474.19. There is no inconsistency under s 109 of the Constitution.

[38] In the circumstances, it is appropriate to declare that there is no inconsistency. The respondent's application that the s 22 application be dismissed should be dismissed.