SUPREME COURT OF QUEENSLAND

CITATION:	*Turnbull v Attorney-General (Qld)* [2015] QCA 54
PARTIES:	**GARY UNE TURNBULL** (appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 6396 of 2014 SC No 3675 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2015
JUDGES:	Morrison and Philippides JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL GENERAL PRINCIPLES – INTERFERENCE WITH THE JUDGE'S FINDINGS OF FACT – PROOF AND EVIDENCE – where the appellant was convicted in 2002 for 10 counts, which consisted of one attempted rape and three counts of rape – where the appellant was originally sentenced concurrently to 16, 20 and 20 years for the three rapes – where in 2013 the appellant was granted an extension of time to appeal against sentence and the sentences were reduced to 10, 13 and 13 years respectively – where, as a result, the sentence was reduced by seven years and the appellant was to be released in six months – where it had been identified that the appellant undergo the High Intensity Sexual Offender Program – where this program takes more than six months – where the appellant was not able to complete the program earlier in his sentence as it was only offered immediately prior to release – where the appellant had not completed this program – where the Attorney-General made an application under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld)

for the appellant's continuing detention – where an order was made declaring the appellant a Dangerous Prisoner requiring continuing detention – whether in making that order the primary judge erred in accepting the evidence of the psychiatrists – where the psychiatrists' use of certain actuarial instruments was questioned – whether there was acceptable, cogent evidence that the appellant was a serious danger to the community under s 13(1) of the Act – whether in order to access the true risk of the appellant he had to undergo the High Intensity Sexual Offender Program – whether the appellant should have been released under a supervision order

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Division 3, s 13

Attorney-General (Qld) v Turnbull [2014] QSC 132, related
R v Turnbull [2013] QCA 374, related

COUNSEL: A M Nelson for the appellant
P Davis QC, with M Maloney, for the respondent

SOLICITORS: Alexander Law for the appellant
Crown Law for the respondent

[1] **MORRISON JA:** In 1998 and 2001 Mr Turnbull committed a series of 10 sexual assaults, including one offence of attempted rape and three counts of rape. All of the assaults were against women who were complete strangers to him.

[2] The first two offences in 1998 were against a woman he followed from a railway station. He placed his arm around her throat and brushed his hand against her breast. She screamed and struggled and was knocked to the ground.

[3] In January, May and June 2001 Mr Turnbull attacked three more women:

- The first in January involved an assault, threats and attempted rape. Mr Turnbull only stopped when disturbed, leaving the victim with scratches and abrasions.
- The second in May involved a violent assault, threats to kill and rape. Mr Turnbull attacked the victim from behind, knocked her to the ground, and rammed her head into a wall. She suffered a black eye, lacerations, bruises and abrasions to various parts of her body.
- The third in June involved a severe and violent assault after Mr Turnbull followed a woman from the railway station into nearby parkland. He knocked her to the ground, held a piece of wood on her throat, threatened to kill her, before hitting her a number of times and dragging her into bushes. The assault broke the victim's jaw, and Mr Turnbull forced her to masturbate herself and him, and fellate him. She was raped. The victim suffered extensive injuries to her head, face and other parts of the body.[1]

[1] A more complete synopsis of the nature of the offences appears in paragraphs [5]-[11] of the reasons of the learned primary judge: *Attorney-General (Qld) v Turnbull* [2014] QSC 132. It was not suggested that that the synopsis was inaccurate. That permits me to be brief in my own synopsis.

[4] Mr Turnbull pleaded guilty to all offences and was convicted and sentenced on 7 June 2002. He received sentences of imprisonment for three to 12 years on the assault charges, and 10 to 13 years on the rape charges.[2]

[5] Mr Turnbull's full-time release date was 14 June 2014.[3] On 13 June 2014 an order was made for his continuing detention under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). The learned primary judge accepted the evidence of three psychiatrists, who considered that Mr Turnbull was a serious risk to the community in the absence of an order under the Act. They assessed the risk of reoffending as moderate, and said that Mr Turnbull should undergo the High Intensity Sexual Offender Program (**HISOP**) before they could assess the true risk he posed on release and whether that risk could be managed under a supervision order.

[6] Mr Turnbull seeks to challenge that order. The issues raised by his appeal are:

(1) Did the primary judge err in accepting the evidence of the psychiatrists?

(2) Was there was acceptable, cogent evidence that Mr Turnbull was a serious danger to the community under s 13(1) of the Act?

(3) Was it relevant, and should the primary judge have accepted, that in order to assess the true risk Mr Turnbull should undergo the High Intensity Sexual Offender Program?

(4) Should Mr Turnbull have been released under a supervision order?

[7] Issues 3 and 4 must be treated as alternative to issues 1 and 2. Though this was not clear from the notice of appeal,[4] it must be so, for the following reasons. A supervision order can only be made under s 13(5) of the Act if the court is satisfied under ss 13(1) and (2) that the offender is a serious danger to the community in the absence of such an order, because there is an unacceptable risk of committing a serious sexual offence. Therefore issues 3 and 4 proceed on the basis that the court has reached that state of satisfaction. By contrast issues 1 and 2 seek a finding that the court could not reach that state of satisfaction, with the consequence that Mr Turnbull would be released without any order under Div 3 of the Act.[5]

[8] Issues 1 and 2 will be dealt with together, as will issues 3 and 4.

Did the primary judge err in accepting the evidence of the psychiatrists?

[9] As developed on the appeal, Mr Turnbull's main contention was that the learned primary judge should not have accepted the evidence of three expert psychiatrists, because their opinions had been formed, at least in a significant part, by the use of

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2 The original sentences on the three rape charges were 16, 20 and 20 years; these were reduced on appeal to 10, 13 and 13 years: *R v Turnbull* [2013] QCA 374.

3 *R v Turnbull* [2013] QCA 374 was delivered on 13 December 2013, and effectively reduced the release date from 14 June 2021 to 14 June 2014.

4 Or Mr Turnbull's outline of submissions, which confined itself to contentions that he should have been released on a supervision order under s 13(5)(b) of the Act: see the amended outline dated 6 November 2014, paragraphs 2, 10, 129 and 130.

5 Further, the notice of appeal also set out the orders sought. Orders 2 and 3 were that the decision of the learned primary judge be set aside, and "the application for a Division 3 order is dismissed": AB 1906. Alternative relief was then sought in order number 4, for release under a supervision order with conditions.

outdated and inaccurate actuarial instruments, and interpreted with similarly outdated statistics on the recidivism rates.[6]

[10] For the reasons which follow, this contention cannot be accepted. A review of the expert evidence is required to demonstrate why that is so.

[11] All three experts (Dr Grant, Professor Nurcombe and Dr Aboud):

(a) had extensive experience and qualifications in psychiatric assessment, and gave evidence by written reports[7] and oral evidence;

(b) detailed their use of the various actuarial instruments;

(c) acknowledged the historical development of the instruments and that there were differing views as to their utility;

(d) acknowledged their limitations in terms of the type of samples used to develop the instruments; this included that the samples were based on group estimates, not standardised for Australian populations, nor for indigenous populations;[8]

(e) said that the instruments were used as a part of the assessment of the risk posed by Mr Turnbull.

[12] All three experts were agreed as to the appropriate way to assess the risk. It was to combine clinical judgment, based on an interview and a review of records, with use of the actuarial instruments, to produce a structured clinical judgment.[9] That judgment was not based solely or even mainly on the use of actuarial instruments. Dr Grant described it as a "complex and multi-factorial assessment" utilising material in relation to the offending history, transcripts and other material from the trial, prison records, a standard psychiatric assessment by interview, and the application of instruments.

[13] Most importantly for this issue, all three experts said that their assessment of Mr Turnbull's risk category would not change if the actuarial aspect was carried out using more recent editions of those instruments, or if various different individual figures were applied to some of the scores.[10] That evidence was maintained by each of them during cross-examination.

[14] The evidence reviewed above shows that none of the expert psychiatrists based his opinion only on actuarial statistics, but upon a combined use of them with clinical judgment. All experts said that neither the use of the more recent versions of the actuarial instruments, nor suggested changes in individual scores, made any difference to their overall assessment of the risk.

[15] In my view there is no substance to the contention that the expert psychiatrists' evidence lacked cogency or was in some way affected by their use of the actuarial instruments. Each of them accepted that there was controversy surrounding their introduction, and continuing controversy as to their accuracy, and applicability beyond the samples used to establish them. However, all of the expert psychiatrists agreed that combined approach was required, utilising clinical assessment and the use of the

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6 Amended outline, paragraph 127.

7 Dr Grant at AB 81; Professor Nurcombe at AB 128; Dr Aboud at AB 190.

8 Relevant as Mr Turnbull is an indigenous person.

9 Dr Grant at AB 11, 25; Professor Nurcombe at AB 148; Dr Aboud at AB 52.

10 Dr Grant at AB 19, 21-23 and 24; Professor Nurcombe at AB 39, 40, 43 and 80; Dr Aboud at AB 46, 50.

actuarial instruments. This is the approach they all took. To the extent that they accepted that some figures might alter depending upon a different interpretation of factors, all of the expert psychiatrists said that the changes did not affect their overall assessment of risk.

[16] The learned primary judge was entitled to rely upon the expert evidence of the psychiatrists. It should not have been rejected or diminished for the reasons advanced by Mr Turnbull.

Was there acceptable, cogent evidence that Mr Turnbull was a serious danger to the community under s 13(1) of the Act?

[17] For the reasons expressed above the expert evidence was acceptable, cogent evidence which provided a solid foundation for the conclusion expressed by the learned primary judge in paragraph [36] of his reasons:

> "[36] I accept the evidence of Dr Grant, Professor Nurcombe and Dr Aboud. I am satisfied, based on that evidence, that [Mr Turnbull] represents a serious danger to the community in that there is an unacceptable risk he will commit a serious sexual offence in the future. Without the benefit of a proper assessment following completion of the high intensity sexual offenders treatment program, there are no conditions which could be imposed which would satisfy me that unacceptable risk of committing further sexual offences could be rendered acceptable. The triggers for the escalating sexual violence must be identified before any consideration can be made as to whether any conditions can be formulated which would make the risk of sexual reoffending no longer unacceptable."[11]

Was it relevant, and should the primary judge have accepted, that in order to assess the true risk Mr Turnbull should undergo the High Intensity Sexual Offender Program?

[18] As it happened Mr Turnbull has not undergone the HISOP, even though he was willing to do so, and had been assessed by the prison psychologist, Mr Phelan, as requiring it. Ironically that came about because of Mr Turnbull's success on his appeal against sentence.[12] As a result of that appeal Mr Turnbull's full-time release date was reduced by seven years, and the new date was only six months from when the decision was handed down. The HISOP is only offered closer to the release date, and the six months remaining before release did not leave enough time to undertake it.

[19] As developed on appeal the contention was that the learned primary judge should have rejected the expert psychiatrists' evidence, that Mr Turnbull should undergo a HISOP before being considered for release, because, properly understood, the expert psychiatrists wanted him to complete a HISOP "so they could find out if he was a higher risk than they currently believe him to be."[13] It was contended that this approach did not meet the test applicable under s 13(1), which required the court to be satisfied that the offender **is** a serious risk, not that he **might be** a serious risk.

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11 [2014] QSC 132 at [36].

12 *R v Turnbull* [2013] QCA 374.

13 Amended outline, paragraph 128.

[20] Related contentions were that:

- the experts' assessment of the risk had to be based on things they knew about Mr Turnbull, not things they didn't know, as that would be to rely on the absence of evidence; and
- because the experts had assessed the risk as moderate, and that there was no imminent risk of re-offending, neither they nor the court speculate as to what the position might be if the HISOP was undertaken.

The experts' evidence as to the impact of the HISOP on risk

Dr Grant

[21] Dr Grant's evidence was that the information obtained from undergoing the HISOP would assist in assessing Mr Turnbull's profile of risk, improve Mr Turnbull's insights into past motivations, and assist in formulating an accurate supervision order.[14] He concluded that "the nature and severity of the serial sex offences, with such high risk to the victims and a relative paucity of understanding of precise motivations, might mean that the risk is still unacceptably high under certain circumstances". He said that the risk assessment was somewhat difficult and "would be enhanced by the completion of a High Intensity Sexual Offender Treatment Program". It was his view that Mr Turnbull's release date should be deferred until he had satisfactorily completed the HISOP.[15]

Professor Nurcombe

[22] Professor Nurcombe's assessment of the risk as moderate nonetheless emphasised the danger of Mr Turnbull re-offending, which was likely to involve a physical attack on, and rape of, an adult woman. In doing so, Mr Turnbull would likely be discharging tensions related to difficulties in a personal relationship and stemming ultimately from unresolved conflict concerning his own childhood sexual abuse. Professor Nurcombe concluded that the psychological and physical harm to the victims would be marked, and that there was a chance that the sexual violence could escalate to a life threatening level, but non-intentionally. The warning signs that could signal that the risk was increasing or imminent would be a break up in a personal relationship and reversion to the use of alcohol and illicit drugs.[16]

[23] Professor Nurcombe noted factors which would indicate "the need for caution" in respect of re-offending, namely that:[17]

- the offences were very serious;
- Mr Turnbull may have a sexual deviation (sadism);
- Mr Turnbull had very serious substance use problems at the time of the offences and had not recently had therapy for them;

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14 AB 100-101.
15 AB 100-101.
16 Professor Nurcombe's report, paragraph 65, AB 142.
17 AB 142.

- the urine and testing regime had indicated use of one form of opiate, and he had sometimes refused to provide urine for drug testing;
- Mr Turnbull had not articulated a comprehensive relapse prevention plan; and
- Mr Turnbull "has not been exposed to the Sex Offender Treatment Program".[18]

[24] Professor Nurcombe's report expressed the opinion that Mr Turnbull should complete the High Intensity Sexual Offender Treatment Program prior to release.[19] In his evidence Professor Nurcombe said he would see the risks involving Mr Turnbull's release as being much higher if he was released without undertaking the HISOP, than if he had undertaken that program.[20] In that respect Professor Nurcombe pointed out that the HISOP was only available to persons in custody, and the program itself had its own risk factors for the person undergoing the program, namely that it would produce periods of great emotional turmoil to Mr Turnbull.[21]

[25] Professor Nurcombe also said that he could not say whether Mr Turnbull had a sexual deviance or not. His concern was that if Mr Turnbull had a sexual deviance "it would be of the nature of sexual sadism, which is a condition in which the individual gets sexual satisfaction from hurting, degrading or humiliating people",[22] and that issue needed to be examined directly in therapy.

[26] He then addressed the significance of the nature of Mr Turnbull's attacks, namely involving the pursuit and assault of strangers. He said that one didn't know if Mr Turnbull planned the attacks, or whether they were impulsive, but they indicated a "wellspring of anger against women generally". That anger was expressed in sexual attacks and the reasons for the attacks had to be examined.[23]

[27] He was then asked by the learned primary judge about the relevance of the unknown factors, such as sexual deviance. He said that it was under stress, particularly a relationship breakdown which, in this case, would probably be mixed up with using drugs and alcohol again, that a latent deviation becomes expressed.[24] He said that in that situation the real risk is the unknown, namely whether any sexual deviance, or wellspring of anger against women, will then come to the fore.[25]

[28] Professor Nurcombe also said that he agreed with Dr Grant's opinion that it was important for Mr Turnbull to do the HISOP before release, so it would inform as to what supervision conditions would be best to try to identify the risk factors.[26]

Dr Aboud

[29] Dr Aboud assessed the overall risk level as moderate, and in the course of his conclusions expressed his opinion that Mr Turnbull's risk of sexual reoffending will

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18 AB 142.
19 Professor Nurcombe's report, paragraph 68, AB 142-143.
20 AB 38.
21 AB 39.
22 AB 41.
23 AB 42.
24 AB 44.
25 AB 44.
26 AB 44-45.

only be reduced by successfully participating in a sexual offender's program.[27] Upon successful completion of these programs Dr Aboud would consider the risk likely to have reduced to below moderate, subject to assessment.[28] Part of his concern was that Mr Turnbull might destabilise if he encountered difficulties in a proposed personal relationship outside prison, and there was a significant risk of relapsing into a pattern of maladaptive alcohol and substance misuse, which was untested outside of a closed prison environment.[29]

[30] Dr Aboud gave oral evidence, after having heard the evidence of Dr Grant and Professor Nurcombe. His evidence was that Mr Turnbull should successfully complete a sex offender treatment program prior to release, and that program should be the HISOP, available only in prison.[30] In relation to the need to do the program he said that Mr Turnbull's key risk factors were: his vulnerability to using drugs and alcohol and the disinhibiting effects they may have on his cognition and self-control behaviour; relationship instability; and also be latent anger that might relate to childhood difficulties, in particular with his relationship to his mother. He said: "I feel that there are elements of this that are somewhat unexplored".[31]

[31] Dr Aboud was directed to the evidence of Dr Grant and Professor Nurcombe, to the effect that undergoing such a program "may well inform on what conditions ought to be imposed in a supervision order".[32] Dr Aboud said he entirely agreed with them. He was concerned that the severity and nature of Mr Turnbull's offending was such that his level of violence and the serial nature indicates that he is a more complex and potentially serious offender, and, for the reasons expressed by Dr Grant and Professor Nurcombe, Mr Turnbull would warrant the most intensive program that's available.[33]

[32] Dr Aboud was then asked if those reasons were to find out what risk Mr Turnbull posed, and he responded in this way:

> "Partly to better understand what risk he poses and partly because he in fact would naturally fit with the severity of offender that would be incorporated into such programs. That is to say …[the] high intensity sex offender program was created for people who have offended – that certain aspects of their … offending would be considered more serious. So just to be clear, what I'm saying is that his overarching risk is moderate but risk can be understood in terms of a number of foundation stones. One foundation [stone] is likelihood of reoffending and I would say that his likelihood of reoffending is – is actually about moderate. Then there is imminence and the imminence I would have categorised as – as low. But then there is nature and severity and taken together they can be gauged on past behaviour and his past behaviour was of [an] escalating level of frequency and severity with employing weapon use and serious injury to the victim escalating. So the nature and severity would be on the higher end of the risk spectrum. So looking at that

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27 Dr Aboud was referring not only to the sexual offender treatment program but other programs dealing with substance abuse, anger management and the like.

28 AB 206.

29 AB 206.

30 AB 46.

31 AB 46-47.

32 AB 57.

33 AB 57.

> together that nature and severity … I believe places him with a group of individuals that require the high intensity program."[34]

[33] Dr Aboud also expressed the view that because of the emotionally challenging nature of the sex offender program, he had become increasingly concerned, as a result of hearing the evidence,

> "that Mr Turnbull's offending … is not in fact as well understood as I first thought and that … I would be worried that it might not be a safe enough model for him to be treated in the community with those types of emotional challenges placed upon him".[35]

Discussion

[34] In my view the passages in the experts' evidence referred to above in paragraphs [21] to [33] above compel the conclusion reached by the learned primary judge, namely that Mr Turnbull represented a serious danger to the community within the meaning of s 13(1) of the Act. Given the unanimous view that Mr Turnbull should undergo the HISOP prior to release, the conclusion that Mr Turnbull is a serious danger to the community remains even if he was released under a supervision order. All psychiatrists were of the view that the moderate level sexual offender program was inappropriate, and that without undergoing the HISOP there was insufficient information to identify the true triggers behind Mr Turnbull's offending. Without knowing those triggers there could not be a proper assessment of the risk factors leading to the structuring of any conditions for a supervision order.

[35] Once the learned primary judge reached the conclusion that Mr Turnbull came within the provisions of s 13(1) of the Act, he was required to consider whether either a continuing detention order or a supervision order should be made: s 13(5) of the Act. In considering whether to make such an order, s 13(6) required[36] consideration of the two factors: first, that the paramount consideration was the need to ensure adequate protection of the community; and secondly, consideration of whether adequate protection of the community can be reasonably and practicably managed by a supervision order.

[36] The consideration required under s 13(6)(b)(i) is whether adequate protection of the community can be reasonably and practicably managed by a supervision order. The risk which leads to the need to protect the community is because, under s 13(1) and (2), there is an unacceptable risk that Mr Turnbull will commit a serious sexual offence if released without such an order. The means of providing the protection, and avoiding that risk, is a supervision order. When a court is assessing whether a supervision order can reasonably and practically manage the adequate protection of the community, it is necessarily assessing the protection the order can provide against that risk. Before making the order the court has to reach a positive conclusion that the supervision order will provide the adequate protection.

[37] In my view that exercise involves the court's consideration of what is known, as well as what is unknown, about the risk, as both those matters impact upon the ability of the supervision order to provide adequate protection. Given that the risk will almost always be assessed by psychiatric experts, any unknown element is likely to be the

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34 AB 57.

35 AB 58.

36 The text of s 13(6)(b) commences with "the court **must** consider whether …"; emphasis added.

product of the extent of the assessment of the risk posed by the offender, such as where further assessment of the offender is required before a more definite conclusion can be made as to the risk. For example, the experts may say, as they do here: on the one hand, if the triggers for the risk are use of alcohol and illicit substances, that can be reasonably and practically managed under a supervision order; however, on the other hand, if the triggers are some form of psychopathy, sexual sadism, or even the product of a wellspring of anger directed at women, then the risk cannot be reasonably and practically managed; we do not know enough to say that psychopathy, sexual sadism, or the wellspring of anger, are not the relevant triggers, so we cannot say that the order will provide adequate protection.

[38] The evidence of all the experts expressed the need for Mr Turnbull to do the HISOP before they were prepared to say that the risk to the community could be adequately managed under a supervision order.

Should Mr Turnbull have been released under a supervision order?

[39] Section 13(6)(b)(i) of the Act requires a consideration of whether adequate protection of the community can be reasonably and practicably managed by a supervision order.

[40] In my view the evidence supported only one conclusion as to that. In the absence of Mr Turnbull undergoing the HISOP, one could not conclude that a supervision order could be fashioned which would reasonably and practicably manage the question of adequate protection of the community. The expert evidence was that there are important gaps in the information about Mr Turnbull's motivations and desires, and that more needs to be known before it can be said that his risk is one that can be managed, if that was possible at all. The unknown factors underlying the violent and severe attacks perpetrated by Mr Turnbull prevented, in my view, the conclusion that adequate protection of the community could be ensured under a supervision order.

Conclusion

[41] For the reasons expressed above it has not been demonstrated that was any error on the part of the learned primary judge. I would dismiss the appeal.

[42] **PHILIPPIDES JA:** I agree with the order proposed by Morrison JA for the reasons given by his Honour.

[43] **DOUGLAS J:** The learned trial judge's view that the appellant was a serious danger to the community recognised that, while the psychiatric assessment of the risk of his reoffending was low to moderate, the psychiatrists believed there was insufficient information to identify the true triggers behind his disturbing acts of sexual violence. There was a need to identify those underlying triggers before there could be a proper assessment of the risk factors so as to structure any conditions of a supervision order.[37]

[44] Absent the ability to determine those conditions, the risk that he would commit a serious sexual offence, even if assessed as moderate by the psychiatrists, remained unacceptable; see s 13(2) of the Act. Nor, as Morrison JA discusses at [34] – [40], in the absence of the further information likely to become available if the appellant underwent the HISOP, would the court have been in a position to consider properly whether

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[37] *Attorney-General (Qld) v Turnbull* [2014] QSC 132 at [27].

the adequate protection of the community could be reasonably and practicably managed by a supervision order; see s 13(6)(b)(i) of the Act.

[45] I agree, therefore, with the reasons of Morrison JA and the order proposed by his Honour.