

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General (Qld) v Mitchell* [2015] QSC 121

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
GREGORY JOHN MITCHELL
(respondent)

FILE NO: BS 1974 of 2012

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 11 May 2015

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2015; further written submissions 9 and 10 April 2015

JUDGE: Burns J

ORDER: **That, pursuant to s 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act 2003*, Gregory John Mitchell be released from custody subject to a supervision order in the terms appearing in the Schedule to these reasons**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY– where there is an application pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* – whether the respondent is a serious danger to the community in the absence of a Division 3 order – where the court may order a continuing detention order or a supervision order pursuant to s 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* – whether a supervision order would ensure the adequate protection of the community pursuant to s 13(6) of the *Dangerous Prisoners (Sexual Offenders) Act 2003*

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 3, s 5, s 8, s 13, s 16

Attorney-General (Qld) v Beattie [2007] QCA 96
Attorney-General (Qld) v Francis [2007] 1 Qd R 396
Attorney-General (Qld) v Sutherland [2006] QSC 268

COUNSEL: J B Rolls for the applicant
M C Chowdhury for the respondent

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the respondent

- [1] By this application, the Attorney-General sought orders pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (“the Act”), the effect of which would be to detain the respondent, Mr Mitchell, in custody for an indefinite term for care, treatment or control. Counsel for the Attorney-General has conceded, however, that the evidence “favours the respondent’s release upon conditions”¹ and, for that reason, seeks the making of a supervision order. To that end, the court was furnished with a draft supervision order containing a number of proposed conditions.²
- [2] For Mr Mitchell, it was submitted that he is not a person to whom the Act applies because he is not a serious danger to the community in the absence of a Division 3 order. In particular, and although it appears to have been accepted by his counsel that Mr Mitchell would benefit from the structure, supervision and financial support that the making of a supervision order would provide to him,³ it was submitted that the Attorney-General has “not discharged [his] onus that the respondent is an unacceptable risk that he will commit a serious sexual offence if he is released from custody without a supervision order being made”.⁴ Further, it was submitted that, if the court is satisfied that the Attorney-General has discharged his onus in that regard with the result that a supervision order is made, not all of the conditions contained in the draft supervision order were appropriate or necessary.
- [3] In light of the concession made on behalf of the Attorney-General, the principal issue for determination is whether there is an unacceptable risk that Mr Mitchell will commit a serious sexual offence if he is released from custody without a supervision order being made.

Background

- [4] Mr Mitchell is an indigenous man aged 50 years, having been born in Rockhampton on 12 February 1965. His father was a stockman and died when Mr Mitchell was very young. His mother died in February of this year. Mr Mitchell has seven siblings and was particularly close to his two older brothers. One was a “mentor” to him, but the other was somewhat of an unstable influence. Mr Mitchell has seven children from a number of different relationships. They are aged between one and 23 years. He currently has the sole care of his three youngest children.

Criminal history

- [5] Mr Mitchell has an adult criminal history stretching back to 1982.⁵ Leaving aside from the index offences, his previous convictions are largely made up by property offences as well as a number of offences of violence, the most serious of which was

¹ Applicant’s submissions (Exhibit MFI A); paragraph 1.

² Exhibit MFI C.

³ See the premise for the questions put to Dr Beech at T. 1-29.

⁴ Outline of argument on behalf of the respondent (Exhibit MFI B); paragraph 24.

⁵ See affidavit of Carolyn Murphy sworn on 27 March 2015 (page 3).

an assault occasioning grievous bodily harm on 29 November 1991 for which Mr Mitchell received a sentence of four years' imprisonment.⁶

- [6] The index offences were committed during one episode of offending on 20 September 1996. Mr Mitchell and his co-accuseds – Mark Mason and Stanley Saunders – later stood trial in the District Court at Rockhampton for their roles in these crimes. On 21 August 1997, Mr Mitchell was convicted of four counts of rape, one count of assault occasioning bodily harm in company and eight counts of indecent assault, each with a circumstance of aggravation. He was sentenced to several concurrent terms of imprisonment, with the overall result being an effective head sentence of 15 years' imprisonment. The head sentences for Mason and Saunders were 14 years and 12 years respectively.
- [7] Mr Mitchell was also declared by the court to be a serious violent offender but this declaration was subsequently set aside by the Court of Appeal because the offences for which Mr Mitchell was convicted were committed prior to the 1997 amendments to the *Penalties and Sentences Act 1992* which introduced Part 9A.⁷
- [8] The offending was callous, demeaning and brutal. The circumstances were summarised by Davies JA in the Court of Appeal as follows:

“The complainant knew [Mr Mitchell] and his co-offenders. On the evening of 19 September 1996 and the early hours of the following morning she was drinking with some people including those three at a number of nightclubs in Rockhampton. In the early hours of 20 September, her boyfriend, a man called John Stephens, was arrested for drink driving and she told some people early that morning that she was going to the watch-house to see him.

[Mr Mitchell] offered to drive her and she got into Mitchell's car with Mitchell and the other two co-offenders, Saunders and Mason. The complainant invited another person to join her but Mitchell said, ‘Don't worry about him, we will take you around and that.’

She was not driven to the watch-house. The car was, first of all, driven to a Mobil service station. The complainant said she felt uneasy at that point and went to the ladies toilet. When she came out, the car had been driven around to the vicinity of the toilet and she was then, in effect, manhandled back to the car.

When the car was then driven away, [Mr Mitchell] before this Court, told the complainant that ‘they were going to fuck me all night and all day’. They were her words. Saunders made similar statements and Mason was apparently laughing at this. At one point, the complainant tried to get out of the car but she was prevented from doing so by [Mr Mitchell].

They drove out of town to a reasonably remote location where [Mr Mitchell] pulled the complainant from the car and told her to remove her clothes. She did not do so; [Mr Mitchell] hit her in the mouth splitting her lip and causing it to bleed. He then grabbed her by the hair and all

⁶ Mr Mitchell's criminal history is set out in a schedule incorporated in paragraph 11 of the applicant's submissions (Exhibit MFI A).

⁷ See *R v Mitchell* [1998] QCA 31, at page 9 per Davies JA. And see, *R v Mason and Saunders* [1998] 2 Qd R 186.

three demanded that she remove her clothes. He commenced hitting her across the head. She eventually removed her clothes and [Mr Mitchell] forced her to the ground. He had sexual intercourse with her, that being the second count of those I have already related.

What then happened was that the others took turns to have intercourse with her and, after the second of the others had done so, [Mr Mitchell] grabbed her by the hair, and pushed her face down on the bonnet of the car. He then inserted his penis in the complainant's anus, that being count 4.

At the same time the others were attempting to assault her, Mason was attempting to force his penis into her mouth and Mitchell was pushing her head towards Mason's penis. Another car came along and Mitchell pushed the complainant to the ground and jumped on top of her. He said to her, 'Don't try to do anything or say anything or do anything to get away.'

After the car had gone he placed the complainant on her back on the bonnet and put his penis inside her anus again; that was count 6. The others were similarly assaulting her by, in one case, putting a penis into her mouth and the other by forcing her to masturbate him.

At this stage the complainant was crying loudly and she was again threatened, this time by Saunders. Mason then had sexual intercourse with her whilst [Mr Mitchell] forced her to suck his penis. As other cars drove past she was thrown to the ground and on each occasion [Mr Mitchell] told her that he would kill her if she did anything.

At one point he was choking her and he was restrained by the others. He said, after being restrained, 'I don't believe how psycho I get sometimes.' This course of conduct continued with the others assaulting and having sexual intercourse with her. They then returned towards the city in the car, Mitchell forcing the complainant to suck his penis. They then went back to Mitchell's flat, picking up another female on the way. The complainant had been threatened by Mitchell not to say anything.

They then went back to the flat and Mitchell took the complainant into his bedroom. He made the complainant suck his penis again, that being count 12, and sodomised her again. He then fell asleep and she made her escape.

She was examined by a doctor on 20 September and the doctor noted a number of injuries: a cut on the top of the lip and inside the bottom lip; bruises on both breasts, on the right buttocks, on the lower back; scratches on both knees and scratch marks on her back; tenderness in the vaginal opening; two small lacerations on the cervix which were bleeding; and tenderness upon digital examination of the anus. Some samples and swabs were taken."⁸

[9] On 15 May 2007, Mr Mitchell was released on parole. Since then, he has been in and out of custody in consequence of breaching conditions of his parole, including the return of positive drug tests and the commission of criminal offences (including assault, unlawful supply of a weapon and receiving stolen property). All told, until his full time release date was reached on 16 March 2012, Mr Mitchell was in the

⁸ *Mitchell* at pages 3-6.

community on parole between 15 May 2007 and 24 April 2008, between 6 February 2009 and 28 April 2009, between 30 September 2009 and 16 August 2010, between 12 October 2010 and 8 January 2011 and between 18 April 2011 and 22 May 2011 – taken together, a period in excess of two years.

- [10] On 2 March 2012, the Originating Application herein was filed. On 14 March 2012, Mullins J made an interim supervision order in favour of Mr Mitchell pursuant to s 8(2)(b)(i) of the Act, although Mr Mitchell remained in custody because, it seems, he was being held on remand with respect to offences in relation to which he was charged on 13 October 2011. The court subsequently extended the operational period of the interim supervision order on a number of occasions and, on 28 May 2013, Byrne SJA extended its operation “until further order”.
- [11] As just mentioned, on 13 October 2011 Mr Mitchell was charged with a number of criminal offences. They were not dealt with in any final sense until 11 March 2014. On that date, Mr Mitchell entered a plea of guilty in the District Court at Rockhampton to one count of assault occasioning bodily harm in satisfaction of the indictment.
- [12] The circumstances of that offending may be stated briefly. Mr Mitchell’s former partner purchased some “speed” from the complainant and, after consuming it, became ill. On 25 September 2011, she visited Mr Mitchell in custody and complained to him. Mr Mitchell then played a role in arranging from the prison for the complainant to be assaulted.
- [13] On 4 October 2011, the complainant was picked up from his home by three persons (one of whom was armed) and driven to Gracemere. There he was kicked, stomped on and struck with a baseball bat. He sustained fractures to his hands, jaw and eye sockets, with the socket injuries requiring surgery.
- [14] For his part in this offending, Mr Mitchell pleaded guilty to one count of assault occasioning bodily harm. It is likely that the basis for his plea was that he had not counselled an assault to the degree that actually took place given that the charges originally preferred against him (torture and assault occasioning grievous bodily harm) were not proceeded with by the prosecution in favour of the lesser charge to which I have referred. Nevertheless, Smith DCJ sentenced Mr Mitchell to imprisonment for a period of 30 months. His Honour declared the period during which Mr Mitchell had been held solely on remand⁹ to be imprisonment served under that sentence and ordered that he be immediately released on parole.
- [15] Mr Mitchell was accordingly released on parole on 11 March 2014 pursuant to the terms of the interim supervision order originally made by Mullins J on 14 March 2012 and more recently extended in its operation on 28 May 2013 by Byrne SJA. Apart from one period of 28 days when Mr Mitchell was returned to custody because of a positive test for amphetamines,¹⁰ and the feature that he is no longer on parole because the full time release date under the sentence imposed on 11 March 2014 has long since passed, that remains the position to this day.

⁹ Since 17 March 2012; being 724 days.

¹⁰ Mr Mitchell was returned to custody on 21 August 2014 and released again on 17 September 2014. See affidavit of Francis Lippett sworn on 29 October 2014 (page 8) and affidavit of Roberta Embrey affirmed on 29 October 2014 (page 22). The findings of the urinalysis are summarised in the court brief exhibited to the affidavit of Carolyn Murphy sworn on 27 March 2015 (page 8).

- [16] When considering Mr Mitchell's criminal history, it is important to keep in mind that, apart from the offences committed by Mr Mitchell on 20 September 1996, he had never before – and has never since – been convicted of an offence of a sexual nature, let alone one that was a violent sexual offence.

Drug and alcohol history

- [17] Mr Mitchell reportedly began drinking alcohol at a young age and, within a few short years, was a heavy drinker of beer and spirits. This appears to have remained the position with Mr Mitchell until he was taken into custody with respect to the index offences in 1996. At the time of the index offences, he was aged 31, and heavily affected by alcohol. He has not consumed alcohol since then.
- [18] So far as illicit drugs are concerned, Mr Mitchell smoked marijuana from the age of 13, usually while drinking. He would do so on almost a daily basis. As he got older, he occasionally used LSD and mushrooms.
- [19] When on parole Mr Mitchell began a relationship with a woman. She already had four children and the relationship produced the three children currently in Mr Mitchell's care. She was reported to have suffered from severe post-natal depression with the consequence that Mr Mitchell found himself to be not only working to support the family, but increasingly required to look after the children and attend to the upkeep of their home. It was around this time, and while under these stressors, that Mr Mitchell commenced using amphetamines. At one point, he was administering the drug intravenously, two or three times each week. His use of this drug was ultimately detected through positive drug tests, the most recent of which saw Mr Mitchell returned to custody on 28 August 2014 for a period of 28 days.¹¹ No breach proceedings were commenced with respect to the interim supervision order.

Medical history

- [20] In November 2010, Mr Mitchell suffered a coronary artery blockage and had a stent inserted. No other physical or mental health issues of significance have been reported.

Participation in rehabilitation programs

- [21] Mr Mitchell completed the following courses and programs while in custody:
- (a) Aboriginal and Torres Strait Islander Studies: Self Identity Module (TAFE) – 1997;
 - (b) Landscape Materials (TAFE) – 1997;
 - (c) Junior English and Junior Maths studies – 1998;
 - (d) Violence Intervention Program – 1999;
 - (e) Stress Management – 1999;
 - (f) Adult Junior Ordinary Mathematics – 1999;
 - (g) Food Handler Training – 1999;

¹¹ See affidavit of Carolyn Murphy sworn on 27 March 2015 (page 8).

- (h) Domestic Violence Program – 2002;
 - (i) Substance Abuse Education Program – 2002;
 - (j) Anger Management Core Program – 2002;
 - (k) A module of Certificate III in Indigenous Australian Language Studies – 2003;
 - (l) Cognitive Skills Core Program – 2003;
 - (m) Introductory Computer Skills – 2003;
 - (n) ISOP – 2004;
 - (o) Tertiary Entrance Program – 2004;
 - (p) High Intensity Sex Offender Program – 2005;
 - (q) Sex Offending Maintenance Program – 2006; and
 - (r) Ending Offending Program – 2011.
- [22] In the last of those programs – Ending Offending – Mr Mitchell was observed to be a highly motivated participant and demonstrated considerable insight into the relationship between his substance abuse and criminal activities as well as the negative impacts such practices had on him and others. He was regarded as strongly committed to change and, in particular, abstinence.

The Dangerous Prisoners legislation

- [23] 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 for the continuing control, care or treatment of such prisoners to facilitate their rehabilitation.¹²
- [24] To those ends, the Act provides for the continued detention in custody or supervised release of prisoners but only if the court is satisfied that they represent a “serious danger to the community” in the absence of an order providing for their continuing detention or supervision under Division 3 of Part 2 of the Act.¹³ The Attorney-General may apply for such an order,¹⁴ and bears the onus of proving that the subject of any such application is indeed a “serious danger to the community”.¹⁵
- [25] A prisoner is a “serious danger to the community” if there is “an unacceptable risk” that the prisoner will commit a “serious sexual offence” if released from custody or if released without a supervision order being made.¹⁶ A “serious sexual offence” means an offence of a sexual nature involving violence or against a child.¹⁷
- [26] On the hearing of the application, the court may decide that a prisoner poses a serious danger to the community only if it is satisfied by acceptable, cogent evidence, and to

¹² Section 3.

¹³ Section 13(1).

¹⁴ Section 5(1).

¹⁵ Section 13(7).

¹⁶ Section 13(2).

¹⁷ Section 2 and the Schedule to the Act, being the Dictionary.

a high degree of probability, that the evidence is of sufficient weight to justify the decision.¹⁸

[27] The paramount consideration in deciding whether to make a continuing detention order or a supervision order is the need to ensure adequate protection of the community.¹⁹ In addition, the court must consider whether adequate protection of the community can be “reasonably and practicably managed by a supervision order” and whether the requirements for such orders specified in s 16 can be “reasonably and practicably managed by corrective services officers”.²⁰

[28] Section 13(4) provides that, in deciding whether a prisoner is a serious danger to the community, 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.”

[29] Section 13(5)(a) then goes on to provide that, if the court is satisfied that a prisoner is a serious danger to the community in the absence of a Division 3 order, the court may order that the prisoner be detained indefinitely for control, care or treatment pursuant to a continuing detention order²¹ or released pursuant to a supervision order subject to such requirements as the court considers appropriate.

¹⁸ Section 13(3).

¹⁹ Section 13(6)(a).

²⁰ Section 13(6)(b).

²¹ As to which, see *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396 at [29].

The Evidence

- [30] Although a considerable body of affidavit material was read in support of this application, the matters to which I must have regard under s 13(4) of the Act were, to the extent relevant, addressed in a series of psychiatric reports prepared for the purpose of these proceedings, and each of the authors – Dr Beech, Dr Harden and Professor Nurcombe²² – gave oral evidence at the hearing. Importantly, Mr Mitchell also gave evidence on affidavit and orally at the hearing, and a letter he penned whilst in custody regarding the circumstances leading to his positive drug test on 28 August 2014 as well as other matters became Exhibit 4.²³ In addition, his Prison Throughcare officer, Mr Paterson, provided a supporting affidavit.²⁴ I was also assisted by two reports obtained from Mr Mitchell’s treating psychologist, Mr Acutt,²⁵ along with affidavit evidence regarding Mr Mitchell’s “accommodation status” and the “supports and treatment available to him should he be made subject to a supervision order”.²⁶
- [31] The parties’ submissions on the question whether Mr Mitchell was serious danger to the community rightly focussed on the evidence detailed in the preceding paragraph.

Mr Acutt

- [32] Mr Acutt provided two reports dated 15 December 2014 and 31 March 2015. He has been treating Mr Mitchell since March 2014. He reported that Mr Mitchell had been “completely compliant”, punctually attended all sessions, readily engaged in counselling sessions and “showed a positive attitude to treatment”. He and Mr Mitchell had “spent quite some time talking about risk factors including his ex-partner and other friends who are drug users”.
- [33] Mr Acutt expressed the opinion that Mr Mitchell has responded well to supervision in the community and enjoys good family support in that regard. He believes that the prognosis for Mr Mitchell is “very positive” and, based on 10 items of the Static-99 Questionnaire, thought that he “presents as being a low risk of recidivism”.

Dr Beech

- [34] Dr Beech provided two reports, dated 2 June 2012 and 15 September 2014. In the first of those reports he wrote:²⁷

“SUMMARY and OPINION

Gregory Mitchell is a 47-year-old man coming to the end of a fifteen-year sentence for the callous prolonged and brutal rape of a woman in 1996.

There is a significant history of criminal offending that arose from juvenile delinquency, and which has persisted into recent times. Many of the crimes have involved violence and the material indicates that the

²² The reports of Drs Beech and Harden were provided pursuant to an order of the court made under s 8 of the Act and the reports of Professor Nurcombe were provided at the request of the Attorney-General: T. 1-4.

²³ A copy of this letter is also annexed to the affidavit of Roberta Embrey affirmed on 29 October 2014.

²⁴ And see the annexure marked “B” to the affidavit of Jessica Horne affirmed on 3 November 2014, being a letter under Mr Paterson’s hand dated 31 October 2014.

²⁵ See affidavit of Amanda McLean sworn on 1 April 2015 (pages 7 and 9).

²⁶ See affidavit of Cassandra Cowie sworn on 31 March 2015.

²⁷ At pages 34-37.

violence [h]as continued into the prison setting and to a lesser extent into parole. Certainly the rule-breaking has persisted. He is now facing serious charges of having arranged an assault while he was in prison.

In my opinion he has an Antisocial Personality Disorder.

On the **Hare Psychopathy Checklist Revised** I gave Mr Mitchell a score of 31. This is high and in the range of psychopathy. There may be some evidence that he is maturing and the psychopathy is lessening. He may be becoming less impulsive and he may have better control of his temper and volatility. However, his continued parole violations, and the current charges, if true, indicate to me that he still retains significant psychopathic traits.

These seem to have emerged from childhood. On the surface there is not much that explains their origin. However bullying and racist taunts may have played a role. Certainly the early commencement of substance use and the association with delinquent peers played a role. What comes through is a masked impaired sense of self-esteem which he has bolstered by violence and intimidation, alcohol, and the attempts to big-note himself with mates. This appears to have been in concert with a limited respect for women, a promiscuous lifestyle, and a sense that he could share some of the largesse with mates and thereby enhance his standing.

Alcohol abuse has been problematic and, unusually, h[e] has turned to amphetamines at a later stage in his life. There are features of alcohol and amphetamine abuse and possibly dependence.

RISK ASSESSMENT

*I assessed Mr Mitchell with a number of instruments that have been shown to have some validity in the estimation of risk of recidivism in violent or sexual offenders. A description of these instruments is attached to this report as **Appendix C**. They include both actuarial and structured dynamic clinical assessment.*

ACTUARIAL RISK ASSESSMENT

On the **Static-99R** I gave him a score of 3. This version of the Static-99 takes into account [h]is age. The score placed him in the group regarded as being of moderate-low risk of re-offending with sexual violence.

Because of his high psychopathy score and continued parole violations and drug use, and the current charges, I consider that the score slightly underestimates the risk.

DYNAMIC RISK ASSESSMENT

The **Risk for Sexual Violence Protocol** lists twenty-two items that are known to be dynamic factors associated with the risk for further sexual violence. In my opinion, through his life Mr Mitchell has demonstrated the presence of 13 factors. Many of these continue into his present circumstances.

I believe that the most pertinent factors at present are:

- Psychopathy

- An extensive criminal history
- The use of extreme physical and psychological coercion.
- Minimisation of the sexual violence.
- Deficits in some self awareness regarding his offending.
- Significant problems with substance use.
- A history of violent behaviour.
- Problems in intimate relationships.
- Problems coping with stress
- Past problems with supervision.

However, I do not believe that he has a sexual deviance. I consider that the rape was callous, and in some respects was used to enhance his standing with others, but I do not think he has the deviance of sadism. He has not offended sexually in the past, although clearly there is a complaint from a former partner. His behaviour in general has improved with time.

Overall, I do not consider that the risk of further sexual violence is high. He is starting to get on in years. There is no entrenched pattern of sexual violence. In general rapists tend to have less risk as they go past forty years of age. I judge the risk to be in the moderate range, within the range of the 'average' sex offender.

I consider though that the risk of general violence is still high.

Should Mr Mitchell offend sexually it is most likely that the victim will be an adult female. She will probably be known to him. She could be someone with whom he has a relationship.

The violence may occur within a domestic relationship.

Mr Mitchell will most likely use coercion, either threats and intimidation, or actual violence. The risk of injury will be high. The victim is likely to suffer physical and psychological injury.

Factors that would lead to the violence would include Mr Mitchell feeling stressed, deflated or somehow diminished. It is likely to occur as part of a process of general libidinous pursuit involving promiscuity, partying, and drugs. Alcohol intoxication will most likely be an acute high risk element.

The risk could be lowered by supervision in the community. The focus would be on monitoring him so that he remains abstinent. To this end it would be helpful to obtain the Getting Smart exit report.

He would also benefit from counselling about managing stress. It would be helpful to undertake a sex offender maintenance course in the community. Ultimately he needs to find stable accommodation and employment.

The most troubling aspect is whether he would be able to abide by any form of supervision. He seems in earlier years to have abided by supervised release but the most recent parole has been fraught with breaches. They are though the types of breaches that could be relatively easily detected.”

- [35] In the most recent report prepared by Dr Beech on 15 September 2014, he provided the following summary and opinion:

“Gregory Mitchell is a 49-year-old separated man who currently resides in Rockhampton with his three young children. There is significant criminal history that has involved a range of offending, particularly violent offending, which appears to have commenced in his youth. In my opinion he has an Anti-Social Personality Disorder; the origin has probably occurred in the context of his upbringing and association with like-minded people. Over the years he has had significant involvement in criminal activity and drug use possibly spurred on by distorted beliefs about masculinity, entitlement, and the use of violence to achieve his ends. This attitude has continued up until recent years with a conviction for a recent offence.

He is able to speak relatively articulately about a recent change in his attitude prompted by the necessity of becoming more responsible for his young children. In my opinion, this is a relatively recent change and I think that overall his life trajectory has been one of psychopathy but I accept that in more recent years, as a result of aging and maturity and family, this is starting to ameliorate.

There is a single conviction for sexual offences that occurred in 1997. He admits though to earlier coercive sexual activities. Following his conviction he has spent a long period of time in custody with limited opportunity to re-offend. On release on parole he breached it with a return to substances and offending and he was returned to custody. I do not think, despite the violence involved in the sexual offence, that he suffers from Sadism and there is no evidence to suggest any sexual deviance. There is though evidence to suggest general beliefs about entitlement and coercion, which he indicates he has modified through counselling and programs.

Overall I think that there is a moderate risk of return to sexual violence in the community without a supervision order. He has only had one conviction for sexual assault. He is now getting older and more mature. However he has a pattern of using violence to achieve his aims and he rates in the range of psychopathy. I think that any re-offending would simply be a return to old ways where, possibly in an intoxicated state, he felt entitled to use violence to coerce sexual favours. The likelihood is not high but if it did occur the risk of violence and injury is high. He is in my opinion more likely to offend in a more general sense with a return to general criminal activity.

However he has now been released on a Supervision Order and while it is very early days he appears to have been compliant with this. He does seem to have adopted a responsible attitude to himself and to his family. He is able to demonstrate when he saw the risk factors involved in relapse into offending. He is using available supports responsibly.

I think that with his supervision risk of further sexual violence reduces to low. Matters could change though if he were to enter into an unstable relationship, if he were to return to alcohol and drug use, or if the children were not in his life to provide a stabilising deterrent for him. As he gets older the risk of sexual offending will continue to reduce.

In my opinion he is now doing well on a supervision order and he seems to be able to see the benefits that it provides although he does not agree with its necessity. His ability to comply with the order, and his current status, is in marked distinction to how he seems to have behaved on earlier release orders. It is my opinion, cautiously voiced, that his ability to abide by a supervision order is good.”

[36] In oral evidence, Dr Beech expressed the opinion that he is now more confident than he was when he authored his first report that Mr Mitchell can abide by a supervision order, although he believes that it is the current interim supervision order which is keeping Mr Mitchell “on the straight and narrow”. He said that a supervision order will provide “structure around” Mr Mitchell incorporating, as the interim order currently does, monitoring to ensure abstinence, counselling, social support and stability. Dr Beech considered that the making of a supervision order would make it “more likely that [Mr Mitchell] will continue with his relatively positive trajectory”.²⁸ When cross-examined by counsel for Mr Mitchell, Dr Beech pointed to the number of relapses into substance abuse when Mr Mitchell was on parole, and then said, “without a supervision order, the risk of him returning to amphetamine use is quite high”.²⁹

[37] When asked to comment on Mr Mitchell’s desire to be free of the constraints imposed by such an order, Dr Beech said:

“Well, he says that. And ... I suspect that he’s genuine when he says that. But these positive aspirations though, he’s voiced them for quite a long period of time now. If you go back to 2004 when he did the indigenous sex offender program ... the facilitators gave quite glowing reports about him. And it was at that time he voices his positive aspirations about how he will abstain, how he will change his ways, how he will avoid associates and he will pursue a pro-social lifestyle. But, again, when he was released into the community, he very quickly returned to substance use, some criminal activities, and he continued with some criminal activities when he was back in custody. I think he has, during his more recent releases, again, voiced those positive aspirations, and it comes through in what he reports to Anglicare, what he reports to ATODS. But when you actually look at his behaviours, I think he tends to lapse. He lapsed back into substance use and other difficulties. I think that it’s the order which probably keeps him in check.”³⁰

[38] When commenting on the letter written by Mr Mitchell,³¹ Dr Beech remarked that, even with the benefit of the interim supervision order, it “does not take too much for [Mr Mitchell] to return to substance use”.³² Although Mr Mitchell expressed remorse

²⁸ T. 1-21.

²⁹ T. 1-25.

³⁰ T. 1-20.

³¹ Exhibit 4.

³² T. 1-22.

for the contravention discussed in that letter, Dr Beech “could see that without the presence of a supervision order, this lapse could have led to a relapse into amphetamine use”.³³

- [39] As to the risk of sexual violence, Dr Beech identified substance use as “a risk factor for further offending” and then said:

“I think the risk is that if he gets stressed or decides to start using drugs for other reasons and he becomes intoxicated, possibly dependant on them, then all these good aspirations will fall by the wayside, and his risk of violence and sexual violence will increase.”³⁴

- [40] As to the level of that risk, Dr Beech put it in these terms:

“I think the risk is measured in two ways. One is the likelihood that something will occur. And if something does occur, what type of damage or harm will be done. So if the likelihood that something will occur is in that low to moderate range, moderate/low, it’s just around the average rate of a sex offender being released. But in my opinion, if sexual offence were to occur, then it’s quite likely that significant physical violence could be involved. He has a history – quite a substantial history, as noticed by the last sentencing judge, of a significant history of violence, and he’s used it instrumentally for general criminal activities, but certainly for that sexual offence back in 1997.

...

I think he would use physical coercion. That’d be the risk, and I think that – that physical coercion could occur in a – a brief liaison – someone he’s met that night. It might occur in a domestic situation, but he has a history of violence, and I think even as far – and even as recently as, I think – was it 2012, he has shown propensity to invoke violence.”³⁵

- [41] When counsel for Mr Mitchell suggested that there was “nothing in the material to suggest that there was any earlier sexual offences involving other individuals before” the index offences, Dr Beech disagreed. He said that Mr Mitchell’s description of that offending was part of a pattern of predatory behaviour which had been “going on for some time” whereby Mr Mitchell and his “associates would go out, party, drink, pick up a woman, take her out to some secluded area and then use that plus physical coercion to sexually assault her”.³⁶ However, Dr Beech accepted that such a pattern did not include behaviour where actual “physical violence was involved”.³⁷

Dr Harden

- [42] Dr Harden provided three written reports dated 25 July 2012, 4 August 2014 and 30 March 2015. In the second of those reports Dr Harden offered the following opinion, diagnoses, risk statement and recommendations:

³³ T. 1-23.

³⁴ Ibid.

³⁵ T. 1-21. And see, T. 1-26-27.

³⁶ T. 1-27.

³⁷ T. 1-28.

“OPINION

Gregory MITCHELL is a 49-year-old man who has been convicted in the past of one extremely violent sexual offence as part of a group of offenders with one victim.

He has a long and extensive criminal history with many different kinds of criminal offences including a number of serious assaults in the past both in the community and when incarcerated.

He had a history of very problematic behaviour when incarcerated including serious assaults on other prisoners up until 2003.

He has had multiple returns to custody since release in 2007 associated predominantly with substance misuse of amphetamines, but also with new convictions for firearms charges and a further conviction with regard to organising a serious assault on someone who he believed had harmed his partner at the time.

He has a long-standing previous pattern of problematic substance use with regard to alcohol, most likely marijuana and more recently amphetamines. He previously appeared to have little insight into the potential issues with his use of amphetamines, but has now identified some issues that may have predisposed to his amphetamine use and ostensibly has insight into his need to abstain from use of illegal drugs and alcohol.

He does suffer from some serious medical complaints in the form of coronary artery disease requiring further treatment but as previously noted this does not appear to affect his activities of daily living to any great extent.

He has previously had chaotic intimate relationships having fathered children by multiple women. He has chosen to remain out of a relationship currently, albeit only for a few months so far, this appears to show some improvement in insight. He also seems to have established some ongoing contact with his older children.

He has significant support from his mother and sisters and now says that he is avoiding contact with his previous criminal associates, only time will tell if this is sustained.

His role in caring for his 3 small children, appears to offer him both emotional reward and social structure. The only risk appears to be that it may overstretch him in a practical sense, although he appears to have significant social support in this role. If he is able to sustain this parenting role it may well significantly reduce his risk of sexual or violent reoffence.

Diagnoses

He meets diagnostic criteria for **Alcohol Abuse, In Remission, Marijuana Abuse, In Remission** and **Amphetamine Abuse, In Remission**.

He meets criteria for **Antisocial Personality Disorder** with significant psychopathic features. These features seem to be mellowing with time as

is commonly seen in the 4th and 5th decade of life in men with this condition.

There is no suggestion that he suffers from a paraphilia.

Risk statement

He has successfully undertaken appropriate sexual offender interventions. These still remain largely untested due to his recurrent readmissions to custody.

His ongoing unmodified risk of sexual re-offence in the community is in my opinion in the moderate range and this is consistent with the actuarial instruments.

His ongoing unmodified risk of nonsexual violent reoffence in the community is high although likely to be starting to decline.

His greatest risk factors are his antisocial and psychopathic personality features, persistent substance abuse, ongoing association with a criminal and substance abusing subculture and his previous multiple failures to comply with supervisory/parole activities in the community.

Based on the information currently available I would suggest that any future sexual offending is likely to occur while intoxicated with substances and quite possibly in the company of other antisocial individuals. The most likely victims would be adult women who are previously known to him and in the environment, stranger victims are possible but less likely. Any sexual re-offence is likely to involve significant violence or threats.

It is still my opinion that a high level of community supervision, prosocial community integration and to a lesser extent therapeutic intervention, such as that associated with a supervision order would reduce his risk of sexual re-offence significantly, most likely into the low – moderate range.

Recommendations

I recommend ongoing substance use intervention.

I would recommend that he be abstinent from all intoxicating substances for the foreseeable future. This should involve frequent random drug testing to enhance his compliance.

I would recommend that he not associate or communicate with individuals with a significant past history of criminal behaviour.

I recommend he continued his ongoing contact with his psychologist to look at addressing his significant range of criminogenic needs.

I recommend that he be subject to a supervision order in the community for a period of at least 5 years. If he is able to sustain a supervision order without re-incarceration for that period he will have made very significant progress.

He should be highly supported in his parenting endeavours, as I have noted previously his parenting role provides him with structure, prosocial emotional reward and likely decreases his offending risks significantly.”

[43] In the last of his three reports, dated 30 March 2015, Dr Harden wrote:

“Mr Mitchell has not yet been in the community long enough to reduce his actuarial risk of sexual recidivism (minimum two year period offence free).

The major concern continues to be that without a very high frequency of urine drug testing and a high risk of reincarceration, the past history of behaviour would suggest that Mr Mitchell is very likely to resume use of illicit substances in particular amphetamines. As I described in my previous report this would be unhelpful to him and increase his risk of recidivism.

If he were to be placed on a supervision order, my opinion with regard to the conditions of such an order is the same as in my report of 4 August 2014. In my view, other restrictions not relating to the issues I have previously laid out are not necessary.

As I have previously stated, in my opinion if a supervision order were to be imposed and Mr Mitchell was compliant with the abstinence from substance abuse associated with such an order, then **five years** would be long enough to be satisfied that the risk would be significantly reduced.”

[44] In oral evidence, Dr Harden was reminded of Mr Mitchell’s positive urine test in August 2014. He characterised it as “more of the same” in light of what he described as Mr Mitchell’s “long history of breaching time in the community on parole with the use of amphetamines”.³⁸ He was then asked about the “risk of sexual violence recidivism” to which he responded:

“The risk is that he would return to intermittent or regular use of amphetamine and intoxication. This would increase his risk of generally and violent, and sexually violent offending.”³⁹

[45] Later in his evidence, Dr Harden offered this further explanation:

“If he uses amphetamines, there’s two risks: one is that he is intoxicated with amphetamines, which affects his general judgement, increases aggressive drives and increases sexual drives, and as well, it’s rule breaking behaviour, which goes to a pattern of choosing not to obey normal social rules, which increases the risk of opportunistic sexual offence.”⁴⁰

[46] Dr Harden accepted that, given there was in this case only “one detected and convicted sexual offence”, his understanding of the risk was based to a certain extent on that episode. However, he confirmed his written opinion that, if Mr Mitchell were to “reoffend sexually, it would be more likely to occur in the context of substance use, possibly with other people, and the victims would probably be adult women who were known to him” and would likely involve significant violence or threats.⁴¹

³⁸ T. 1-38.

³⁹ Ibid.

⁴⁰ T. 1-41.

⁴¹ Ibid.

- [47] Although Dr Harden accepted that he was “extrapolating based on the previous offence to a certain extent”,⁴² he said that as creatures of habit, there is a tendency to “return to the same patterns”.⁴³ Dr Harden also confirmed his written opinion that convictions for offences of violence will result in “some increase in risk” of sexual reoffending and that “almost all offending increases [the] risk of recidivism because it has to do with compliance with social rules”.⁴⁴
- [48] He was of the opinion that the risk Mr Mitchell might relapse into drug use should be managed by “very frequent” urine testing and “significant consequences” for returning a positive sample, that is, “re-incarceration”.⁴⁵ In addition, regular psychological therapy focussed on drug use would assist in his management.⁴⁶
- [49] To the extent that Mr Mitchell takes the view that he has “been on the straight and narrow now for six months” and no longer needs any “external controls”, Dr Harden did not think such a view to be correct because “he keeps using amphetamines”.⁴⁷ He remained of the view that Mr Mitchell was a moderate risk of reoffending if left unsupervised in the community, but that the risk will drop substantially to “low” with the benefit of a supervision order.⁴⁸
- [50] When cross-examined, Dr Harden acknowledged that, although there were less breaches in custody after “about 2003/2004” and that this did show a degree of maturation, he regarded Mr Mitchell’s role in the offending that took place on 4 October 2011 as “pretty concerning”. In particular, he thought that it “shows a degree of preparedness to use violence as he sees necessary”.⁴⁹
- [51] Dr Harden did not regard the periods that Mr Mitchell has been in the community on parole as particularly determinative. He said:
- “I don’t regard it as a long period of time in terms of substance abuse and other recidivism issues. I think six months is the sort of bedding down period in the community. He does - it is a longer period for him to remain abstinent, given that he is being tested on a regular basis. However - and that’s good; but it is in the context of him being tested on a regular basis, and having been returned to custody in August last year when he threw up a positive urine screen. And also in the context of his increased sense of responsibility for his children, I suspect, and his desire to stay out of custody on their behalf. So I think it’s quite a complex mixture of factors that are at play now.”⁵⁰
- [52] Nonetheless, Dr Harden recognised that, although Mr Mitchell had relapsed on occasion into substance abuse, that was not productive of sexual violence. So, too, did Dr Harden accept that Mr Mitchell has insight into his problem given his decision

⁴² T. 1-39.

⁴³ Ibid.

⁴⁴ T. 1-40.

⁴⁵ Ibid. And see, T. 1-58.

⁴⁶ T. 1-60.

⁴⁷ Ibid.

⁴⁸ T. 1-43. This opinion was not, however, expressed to be one with respect to the specific risk of violent sexual reoffending.

⁴⁹ T. 1-50.

⁵⁰ T. 1-51.

to voluntarily seek drug counselling. He accepted that, if Mr Mitchell remained abstinent, the risk of him offending in a sexually violent way was low.⁵¹

- [53] When re-examined by counsel for the Attorney-General, Dr Harden expressed the opinion that Mr Mitchell's "chances of remaining abstinent without external help are poor", with "high" prospects of failure.⁵² Further, Dr Harden thought that, if Mr Mitchell failed in that regard, then his "risk profile" would go "from moderate to high".⁵³

Professor Nurcombe

- [54] Professor Nurcombe provided four written reports dated 25 January 2012, 11 March 2012,⁵⁴ 5 August 2014 and 28 March 2015.⁵⁵ In his third report, he provided the following summary of his risk analysis together with some recommendations:

"If Mr Mitchell is abstinent from alcohol and illicit drugs, the risk of sexual offending is *low*. The risk of violent reoffending is *moderate*, provided he is abstinent. If he reverts to drinking excessively or using methamphetamine the risk of sexual and violent offending is increased. There is evidence of improvement in self-awareness and moderation of his chauvinistic attitudes towards women. Nonetheless, the current situation is a fragile one. Mr Mitchell is struggling to be a full-time carer of three small children. He is supported by his mother and two sisters, but the stress is considerable. He is cooperative with supervision and benefits from it. He is aware that society is trying to help him.

Although I believe that there have been genuine improvements in his attitude towards women, self-understanding, and desire to lead a drug-free life, given the psychopathic elements in his personality, his supervisors and those who treat him should be careful not to be gulled.

I recommend that he continue on his current Supervision Order. He needs an individual psychotherapist to help him to revise and abide by his Relapse Prevention Plan. His plan to enter a parenting course (Parents Under Stress) is commendable."⁵⁶

- [55] Professor Nurcombe provided his most recent report dated 28 March 2015, following a review of a range of updating material. His opinion as to risk did not change. He said:

"I believe the risk of sexual reoffending is *low*. The risk of violent reoffending is *moderate* provided that Mr Mitchell remains abstinent from alcohol or illicit drugs."

- [56] In oral evidence, Professor Nurcombe said that the positive urine test in August 2014 indicates that, although there has been a considerable improvement within Mr Mitchell, his situation is "still rather fragile and ... not completely stable".⁵⁷ He

⁵¹ T. 1-56-57.

⁵² T. 1-57.

⁵³ Ibid.

⁵⁴ Exhibit 5.

⁵⁵ Exhibit 6.

⁵⁶ Paragraphs 46 to 48.

⁵⁷ T. 1-64.

believes that such fragility and instability requires management in the form of “continuing psychological support, continuing counselling in alcohol and substance abuse, and for continuing monitoring of his urine and breath”.⁵⁸

[57] On the question of risk of sexual reoffending, Professor Nurcombe said that the risk in the case of Mr Mitchell “would probably be low to moderate” at most, and that violent reoffending was “much more likely” if he becomes “intoxicated or withdrawing from amphetamines”.⁵⁹ He did not think it likely that Mr Mitchell will commit a sexual offence but, if he did, it will most likely be “rape, or forcible sexual intercourse”.⁶⁰

[58] In the absence of a supervision order, Professor Nurcombe was of the opinion that the prospects of Mr Mitchell remaining abstinent were “at this point, not good”.⁶¹ He thought the prospects of failure were “high”. He said:

“Well, he’s – I think he’s now contravened his order on five occasions by using amphetamines, which are a highly addictive and dangerous drug and potentially could cause such a disinhibition as to increase the likelihood of sexual but particularly violent re-offending.”⁶²

[59] When cross-examined, Professor Nurcombe explained why he is of the opinion that Mr Mitchell is not likely to commit a sexual offence:

“He’s committed only one sexual offence to my knowledge; certainly only one that he’s been charged for. It was a long time ago when he was a young man. He’s no longer young. Rape becomes decreasingly common after the age of 45. This was a gang rape of power assertive nature, and as the – it’s the offence of a young man, not of a 50 year old man with cardiac problems.”⁶³

[60] He also accepted that the periods of time Mr Mitchell has been in the community without any sexual reoffending supported his conclusion.⁶⁴

[61] Lastly, when asked whether the treatment Mr Mitchell is receiving from Mr Acutt would be alone sufficient to deal with Mr Mitchell’s “longstanding drug problem”, Professor Nurcombe said, “not yet”.⁶⁵ Similarly, voluntary drug testing would in an “ideal situation” assist Mr Mitchell but Professor Nurcombe believes that Mr Mitchell’s situation is “not yet ideal”.⁶⁶

Mr Mitchell

[62] The affidavits sworn by Mr Mitchell depose to the steps he has taken to address his offending behaviour as well as his substance abuse problem. Mr Mitchell also explains how he manages to cope with the responsibility for the sole care of his three youngest children and describes the support structures around him.

⁵⁸ Ibid.

⁵⁹ T. 1-67, 70.

⁶⁰ Ibid.

⁶¹ T. 1-70.

⁶² Ibid.

⁶³ T. 1-71.

⁶⁴ Ibid.

⁶⁵ T. 1-72.

⁶⁶ Ibid.

- [63] He has derived a great deal of assistance from the Alcohol, Tobacco and Other Drug Service in Rockhampton and, in particular, from Nicole Smith who is a psychologist. Mr Paterson, his Prison Throughcare officer, is also a source of significant assistance. In preparation for the prospect that no supervision order will be made – and the consequence that the psychological therapy currently being provided by Mr Acutt will no longer be available because the cost will be beyond his means – Mr Mitchell made contact with the Bidjerdii Aboriginal and Torres Strait Islander Community Health Service and ascertained that he may, at no cost to himself, consult with a psychologist attached to that organisation. It should also be recorded that he has more recently obtained casual work mowing lawns and labouring for family and friends.
- [64] On the basis of his affidavit evidence, the contents of Exhibit 4 and his oral evidence, Mr Mitchell struck me as having an appropriate degree of insight into his own difficulties. His Relapse Prevention Plan records that his sole concern is amphetamines and that his goals are “total abstinence” and “disassociation”, the latter reference recognising the danger of associating with “old drug user mates”.⁶⁷ He appears determined to be a good parent. He no longer wishes to live under the restrictions of a supervision order.
- [65] When giving oral evidence, Mr Mitchell accepted that he did not disclose to any of his supports that he had ingested amphetamines in August 2014.⁶⁸ He also accepted the accuracy of the history recorded by Dr Beech as to the occasions between 2008 and 2011 when he tested positive for amphetamines whilst on parole.⁶⁹

Determination

- [66] As stated at the outset, the principal issue for determination is whether Mr Mitchell is a serious danger to the community in the absence of a Division 3 order.
- [67] In the context of this case, the question is whether the Attorney-General has satisfied me to the high degree required under the Act that there is an unacceptable risk that Mr Mitchell will commit an offence of a sexual nature involving violence if he is released from custody without a supervision order being made.

Is Mr Mitchell a serious danger to the community in the absence of an order?

- [68] As to the correct approach when considering such an issue, in *Attorney-General (Qld) v Sutherland*,⁷⁰ McMurdo J said this:

“No order can be made unless the court is satisfied that the prisoner is a serious danger to the community. But if the court is satisfied of that matter, the court may make a continuing detention order, a supervision order or no order.⁷¹ There is no submission here that if the prisoner is a serious danger to the community, nevertheless no order should be made. As already mentioned, it is conceded on behalf of the prisoner that I could be satisfied in terms of s 13(1) and that a supervision order would be appropriate.

⁶⁷ See, Annexure A to the affidavit of Mr Mitchell affirmed on 1 April 2015.

⁶⁸ T. 1-78, 79.

⁶⁹ See, Report of Dr Beech dated 2 June 2012 at pages 30 and 37.

⁷⁰ [2006] QSC 268.

⁷¹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [19], [34]; cf in relation to s 30 *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396 at [31].

The court can be satisfied as required under s 13(1) only upon the basis of acceptable, cogent evidence and if satisfied “to a high degree of probability that the evidence is of sufficient weight to justify the decision.” Those requirements are expressed within s 13(3) by reference to the decision which must be made under s 13(1). They are not made expressly referable to the discretionary decision under s 13(5). The paramount consideration under s 13(6) is the need to ensure adequate protection of the community. Subsection 13(7) provides that the Attorney-General has the onus of proving the matter mentioned in s 13(1). There is no express requirement that the Attorney-General prove any matter for the making of a continuing detention order, beyond the proof required by s 13(1). So s 13 does not expressly require, precedent to a continuing detention order, that the Attorney-General prove that a supervision order would still result in the prisoner being a serious danger to the community, in the sense of an unacceptable risk that he would commit a serious sexual offence. However in my view, such a requirement is implicit within s 13.

The paramount consideration is the need to ensure adequate protection of the community. But where the Attorney-General seeks a continuing detention order, the Attorney-General must prove that adequate protection of the community can be ensured only by such an order, or in other words, that a supervision order would not suffice. The existence of such an onus in relation to s 13(5) appears from *Attorney-General v Francis*⁷² where the Court allowed an appeal from a judgment which had made a continuing detention order upon the primary judge’s view that the Department of Corrective Services would not provide sufficient resources to provide effective supervision of the prisoner upon his release. The Court found an error in that reasoning because of the absence of evidence that the resources would not be provided.⁷³ The Court observed:⁷⁴

‘The question is whether the protection of the community is adequately ensured. 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 principal, 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 statute which authorised such constraint.’

Thus the absence of evidence of the inadequacy of resources was important because that matter had to be proved, as a step in persuading the court that only continuing detention would suffice.

The Attorney-General must prove more than a risk of re-offending should the prisoner be released, albeit under a supervision order. As was also observed in *Francis*, a supervision order need not be risk free, for otherwise such orders would never be made⁷⁵. What must be proved is

⁷² [2007] 1 Qd R 396.

⁷³ At [37].

⁷⁴ At [39].

⁷⁵ Ibid.

that the community cannot be adequately protected by a supervision order. Adequate protection is a relative concept. It involves the same notion which is within the expression “unacceptable risk” within s 13(2). In each way the statute recognises that some risk can be acceptable consistently with the adequate protection of the community.

The existence of this onus of proof is important for the present case. None of the psychiatrists suggests that there is no risk. They differ in their descriptions of the extent of that risk. But the assessment of what level of risk is unacceptable, or alternatively put, what order is necessary to ensure adequate protection of the community, is not a matter for psychiatric opinion. It is a matter for judicial determination, requiring a value judgement as to what risk should be accepted against the serious alternative of the deprivation of a person’s liberty.”⁷⁶

- [69] Even though, in recent times, Mr Mitchell appears to have been making reasonable progress in his attempts to address his offending behaviour and the underlying issue of substance abuse, serious reservations were expressed by each of the psychiatrists about Mr Mitchell’s ability to remain abstinent in the absence of a supervision order. On the whole of the evidence, I think those reservations are well founded.
- [70] The fact of the matter is that Mr Mitchell did not perform well when released on parole in 2007. Of course, he cannot have been helped in that regard by the relationship he formed with his now former partner, but on several occasions he was dealt with for breaches of the conditions of his parole. Such breaches were constituted by violations of the law and the use of illicit substances. Of those violations, the most concerning was his preparedness whilst in custody in 2011 to enlist others at large to assault someone who had supplied a drug to his former partner that made her ill. Further, although Mr Mitchell’s compliance appears to be much better under the terms of the interim supervision order, his use of amphetamines in August 2014 cannot be overlooked and, given the recency of that occurrence, it is equally concerning.
- [71] Indeed, the lapse into substance abuse last year points up the fundamental difficulty with expressing any degree of confidence that Mr Mitchell is capable of remaining abstinent without the structure, testing and support that a supervision order would provide. As already mentioned, the psychiatrists spoke with one voice. Dr Beech thought that the risk of Mr Mitchell returning to amphetamine use without a supervision order was quite high and that the interim supervision order keeps him in check. Dr Harden thought that Mr Mitchell was very likely to return to the use of illicit substances without a supervision order. He said that Mr Mitchell’s prospects of remaining abstinent without the external help afforded by a supervision order to be poor, with high prospects of failure. Professor Nurcombe agreed. He thought that Mr Mitchell’s current situation is fragile and not completely stable. He said that the prospects of Mr Mitchell remaining abstinent at this stage were not good and that his prospects of failure were high. Of course, none of this is to say that Mr Mitchell does not positively aspire to remain drug free but, to borrow a phrase from Professor Nurcombe, the issue is whether such aspirations will be “durable under pressure”.⁷⁷ At this stage, I think not.

⁷⁶ At [26]-[30].

⁷⁷ T. 1-65.

- [72] For Mr Mitchell, it was argued that the risk of sexual violence without a supervision order was moderate at worst and, for that reason, the court could not be satisfied that Mr Mitchell is a serious danger to the community. In this regard, Dr Beech considered the risk of a return to sexual violence in the absence of a supervision order to be “in the moderate range, moderate/low”⁷⁸ but, with the benefit of such an order, the risk will reduce to low. Dr Harden was in substantial agreement but said that, if Mr Mitchell remained abstinent, the risk of him offending in a sexually violent way was low. However, he said that, if Mr Mitchell failed to remain abstinent, his risk profile would go from moderate to high. Professor Nurcombe thought the risk was low and said that he did not think that Mr Mitchell is likely to commit a sexual offence given his age in particular, but nonetheless recommended that he continue on a supervision order.
- [73] The problem with the argument advanced in this respect on behalf of Mr Mitchell is, as Keane JA (as his Honour then was) said in *Attorney-General (Qld) v Beattie*,⁷⁹ it “overlooks the point that whether or not a moderate risk is unacceptable must be gauged by taking into account the nature of the risk and the consequences of the risk materialising”.⁸⁰ Here, the psychiatrists were again in agreement as to the possible consequences. Dr Beech considered that, if Mr Mitchell does reoffend sexually, he will most likely use coercion in the form of threats and intimidation, or actual violence, and the risk of injury to the victim will be high. He said that, if such an offence were to occur, it is quite likely that significant physical violence could be involved. Dr Harden expressed the opinion that any sexual reoffence is likely to involve significant violence or threats. Professor Nurcombe thought that, in the unlikely event a sexual offence is committed, it will most likely be rape.
- [74] In the end, Mr Mitchell’s overall situation is indeed fragile. There is a high risk that, unsupervised, he will return to the use of illicit substances. If that occurs, his risk of sexually offending will increase appreciably. Then, if Mr Mitchell does reoffend in a sexual way, it is likely that significant physical violence will be used against the victim.
- [75] It follows that it would be short-sighted in the extreme to consider the risk of future sexual violence solely on the basis that Mr Mitchell will remain abstinent. Given the high risk of failure in that respect if Mr Mitchell is unsupervised, it is necessary to consider the risk presented if Mr Mitchell returns to the use of substances. In that scenario, the risk that Mr Mitchell will commit a violent sexual offence is unacceptably high.
- [76] I am therefore satisfied to the standard required by the Act that Mr Mitchell is a serious danger to the community in the absence of an order under Division 3 of the Act. To the point, I am satisfied there is an unacceptable risk that Mr Mitchell will commit a serious sexual offence if released from custody without a supervision order being made.
- [77] For completeness, I should record that I consider that the Attorney-General has established this by acceptable cogent evidence and to a high degree of probability such that the evidence is of sufficient weight to justify the court being satisfied that

⁷⁸ T. 1-21.

⁷⁹ [2007] QCA 96.

⁸⁰ At [19].

the respondent is a serious danger to the community in the absence of a supervision order.

- [78] In reaching this conclusion I have been mindful of the limitations associated with the prediction of future human behaviour and the feature, in this case, that there has been only one episode of sexually violent offending in Mr Mitchell's past. Dr Harden agreed that it is "very difficult to predict with any certainty whether a person may reoffend" and accepted that there is a "high margin for error". Further, the statistical risk of violent sexual recidivism in a particular case does not necessarily mean that the actual risk attributable to the individual is at the same level. That is why forensic psychiatrists such as Dr Harden "use broad categories and try to individualise factors once people are placed in a broad risk category".⁸¹ I am satisfied that each of the psychiatrists approached their task on that basis and that they did so mindful of the single episode feature to which I have just referred.
- [79] I am otherwise fortified in the making of what is essentially a value judgment as to the risk of violent sexual reoffending by the other evidence in the case. This includes the evidence as to Mr Mitchell's sense of entitlement towards women which, although now quite avowedly abandoned, was revealed in a pattern of behaviour which included the index offences, his not infrequent resort in the past to violence and other "rule-breaking" behaviour, the long and opportunity-depriving period of time Mr Mitchell has not been at liberty since the commission of the index offences and, lastly, his relapse into substance abuse in August last year. That evidence goes in support of the common view of the psychiatrists that it is too early to consider Mr Mitchell's unsupervised release.
- [80] Finally, I have also kept in mind the restraining consequences which the making of a supervision order will have on Mr Mitchell. However, the paramount consideration under s 13(6) is the need to ensure adequate protection of the community and I am satisfied that such an objective cannot be attained without the making of such an order.

Which order?

- [81] Being so satisfied, the question is whether, under s 13(5) of the Act there should be a continuing detention order or a supervision order. Section 13(6) provides:
- “(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.”

⁸¹ T. 1-49.

- [82] The need to ensure adequate protection of the community as required by s 13(6)(a) was explained by the Court of Appeal in *Attorney-General (Qld) v Francis*⁸² in the following way:

“The Act does not contemplate that arrangements to prevent such a risk must be ‘watertight’; otherwise, orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. 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 could be constrained to no greater extent than is warranted by the statute which authorised such constraint.”⁸³

- [83] I must also consider whether the requirements under s 16 can be reasonably and practicably managed by corrective services officers. In this, I can obviously have regard to their management of Mr Mitchell under the terms of the interim supervision order.
- [84] Bearing in mind that the paramount consideration is the need to ensure adequate protection of the community, I have had regard to the considerations specified in s 13(4), the opinions expressed by each of the psychiatrists and the evidence as to Mr Mitchell’s substantial compliance with the terms of the interim supervision order. Having done so, and subject to what I say below regarding paragraphs 20, 30 and 31 of the draft supervision order, I am satisfied that a supervision order in the terms of that draft will adequately address the risk posed by Mr Mitchell and that the adequate protection of the community can be reasonably and practicably managed by such an order.

Duration of the order

- [85] Drs Beech and Harden favoured a supervision order of five years’ duration.⁸⁴ That is the minimum period under the Act.⁸⁵ In light of that opinion, and the other evidence in the case establishing that Mr Mitchell is on a reasonably positive trajectory, I do not consider that any longer period than the statutory minimum is required.

Conditions of the order

- [86] Section 16 of the Act provides that a supervision order must contain certain mandatory conditions. The order may also contain additional requirements if the court considers that they are appropriate to ensure the adequate protection of the community or for the respondent’s rehabilitation, care or treatment.
- [87] There was no real issue about the proposed conditions, save for paragraphs 10, 20 and 31.⁸⁶ Paragraph 10 was conceded by counsel for the Attorney-General to be covered

⁸² Supra.

⁸³ [2007] 1 Qd R 396 at [39].

⁸⁴ Dr Beech (T.1-24), Dr Harden (T. 1-42).

⁸⁵ See s 13A.

⁸⁶ And see the evidence of Dr Harden who considered the other terms of the proposed supervision order.

by paragraph 11⁸⁷ and, for that reason, was not pressed.⁸⁸ Paragraphs 20 and 31 were in these terms:

- “20. if directed by a corrective services officer, make complete disclosure of the terms of this supervision order and the nature of his past offences to any person as nominated by a Corrective Services officer who may contact such persons to verify that full disclosure has occurred;
31. not have any direct or indirect contact with the co-offenders to the offence committed on or about 4 October 2011 without the prior written approval of an authorised Corrective Services officer.”⁸⁹

[88] Dr Beech saw utility in the inclusion of paragraph 20,⁹⁰ but considered that the disclosure of past offences should be limited to the index offences.⁹¹ Dr Harden also agreed that disclosure of the terms of the supervision order would be useful but did not consider disclosure of the nature of Mr Mitchell’s past offending was warranted.⁹² Professor Nurcombe regarded the condition as reasonable,⁹³ so long as it was limited to the index offences.

[89] In my view, paragraph 20 should not go so far as to require the disclosure by Mr Mitchell of all of his past offending; it should be limited to the index offences. Although each of the psychiatrists supported the need to require disclosure of the terms of the supervision order, I am not convinced that there is any utility in that. I am also mindful that the order should be no more invasive of Mr Mitchell’s rights than is necessary to secure adequate protection of the community. I do not think such disclosure should be required in the circumstances of this case. Paragraph 20 should therefore read as follows:

20. If directed by a corrective services officer, make complete disclosure of the nature of the offences he committed on 20 September 1996 to any person as nominated by a Corrective Services officer who may contact such persons to verify that full disclosure has occurred.

[90] As to paragraph 31, Dr Beech considered it important that Mr Mitchell “avoid past associates involved in criminal activities and particularly drug use”.⁹⁴ When asked whether the condition should extend to his former partner, a co-offender with respect to the offence committed on 4 October 2011 and the mother of the three children in his care, Dr Beech accepted that Mr Mitchell should be able to have contact with her although some “restrictions” would be desirable given her issues with substance abuse. He believed that there ought to be a requirement to notify Corrective Services about any such contact, and emphasised that he would be “very concerned” if Mr Mitchell’s former partner “moved in with him again”.⁹⁵ Otherwise, Dr Beech

⁸⁷ T. 1-100.
⁸⁸ T. 1-103.
⁸⁹ Exhibit C.
⁹⁰ T. 1-24.
⁹¹ T. 1-30.
⁹² T. 1-47.
⁹³ T. 1-69.
⁹⁴ T. 1-24.
⁹⁵ T. 1-32.

accepted that the draft condition could usefully be modified to make it clear that “incidental contact” could not constitute a breach.⁹⁶ Dr Harden agreed that “clauses that make it difficult for Mr Mitchell to associate with known criminal associates are probably helpful” but supported modification of the “wording”, as discussed in evidence with Dr Beech. Professor Nurcombe thought that such a condition “made sense early after [Mr Mitchell’s] release from prison” but no longer.⁹⁷ He said, “I don’t think this man’s likely to link up with past offenders and go out raping women. I think that’s very unlikely.”⁹⁸

[91] Unlike the proposed paragraph 30, which contains an absolute prohibition against contact by Mr Mitchell with his co-offenders in the commission of the index offences, paragraph 31 permits contact if prior written approval of an authorised Corrective Services officer is obtained. It seems to me that this difference is a satisfactory way of dealing with the need, if it arises, for Mr Mitchell to have some contact with his former partner in her capacity as the mother of their three children.

[92] Otherwise, I accept as necessary a need to make it clear that inadvertent contact should not be captured by the order as something that could lead to a conclusion of contravention. That should be done with respect to both of the draft paragraphs 30 and 31. I also think that it is desirable to name the co-offenders so that the order stands by itself. Paragraph 31 shall be in these terms:

31. Save for contact which is inadvertent, not have any direct or indirect contact with the co-offenders to the offence committed on 4 October 2011, namely, [names omitted from reasons for judgment]... without the prior written approval of an authorised Corrective Services officer.

[93] For the reason I have just expressed, paragraph 30 will also be revised to add the names of Mr Mitchell’s co-offenders in the commission of the index offences.

Conclusion

[94] I will make a supervision order in the terms appearing in the Schedule to these reasons. Given that the Schedule contains the names of various persons, including Mr Mitchell’s former partner, I direct that the Schedule not be published with these reasons.

⁹⁶ Ibid.

⁹⁷ T. 1-69.

⁹⁸ T. 1-70.