SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Winston* [2015] QSC 297
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **DENIS WINSTON** (respondent)
FILE NO/S:	SC No 9202 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2015
JUDGE:	Ann Lyons J
ORDERS:	**1. Pursuant to s 30 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the Court affirms the decision made by Byrne SJA on 6 February 2009, that the respondent is a serious danger to the community in the absence of a Division 3 order** **2. The respondent, Denis Winston, continue to be subject to a continuing detention order**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the applicant seeks an order pursuant to s 30 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) that the respondent be detained indefinitely for control, care or treatment, or alternatively, that the respondent be released from custody subject to a supervision order – where it was previously found that the respondent was a serious danger to the community in the absence of a Division 3 order – whether the respondent should continue to be subject to a continuing detention order *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13, s 16, s 27, s 30, Schedule

A-G for the State of Qld v Winston [2009] QSC 11, considered
A-G (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324, considered
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; (2004) 78 ALJR 1519, considered

COUNSEL: J B Rolls for the applicant
K Prskalo for the respondent
T A Ryan for the Office of the Public Guardian

SOLICITORS: G R Cooper Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

[1] The applicant seeks an order pursuant to s 30 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the Act) that the respondent be detained in custody for an indefinite term for care, control or treatment, or an order that he be released from custody subject to such conditions as the Court considers appropriate. The respondent's custodial end date was 6 February 2009 and on that date Byrne SJA made orders pursuant to s 13 of the Act that the respondent be detained in custody for an indefinite term for care, control or treatment.[1]

[2] That order was subsequently reviewed and Byrne SJA's decision to order a continuing detention order for care, control or treatment was subsequently affirmed by Douglas J on 27 May 2010.

[3] The respondent is currently 67 years of age and his criminal history is set out in the following table:

Date	**Description of Offence**	**Sentence**
21/01/1966 Millmerran MC	Aggravated assault of a sexual nature	Convicted and fined £10 pounds. Costs £1/5/-
24/01/1996 Brisbane DC	Indecent dealing with a child under 16 years (2 charged on 1/4/95) Wilfully expose a child under 16 to an indecent act (1/4/95) Wilfully expose a child under 16 to an indecent video tape (1/4/95) Indecent dealing with a child under 16 (1/4/95) Unlawful assault	On each charge: Conviction recorded Probation 3 years concurrent On each charge: conviction recorded imprisonment of 2 years concurrent wholly suspended for a period of 4 years Community service 240 hours
19/08/1997	Maintain an unlawful relationship of a sexual nature with a child under 12 years	Imprisonment 10 years

[1] *A-G for the State of Qld v Winston* [2009] QSC 11.

Brisbane DC	and committed carnal knowledge by anal intercourse with circumstances of aggravation (30/11/96 and 01/01/97)	
	Wilfully expose a child under the age of 12 years to an indecent act with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Indecent dealing with a child under the age of 12 years with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Wilfully expose a child under the age of 12 years to an indecent photograph with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Wilfully expose a child under the age of 12 years to an indecent video tape with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Carnal knowledge by anal intercourse of a person not an adult under the age of 12 years with circumstances of aggravation (3 charges date unknown between 30/11/96 and 01/01/97)	Imprisonment 7 years
	Maintain an unlawful relationship of a sexual nature with a child under 12 years	Imprisonment 10 years
	Permitting that person to have carnal knowledge by anal intercourse with circumstances of aggravation (between 30/11/96 and 01/01/97)	Imprisonment 10 years
	Permit male person not an adult to have carnal knowledge by anal intercourse whilst under 12 years with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 7 years
	Indecent dealing with a child under 12 years with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years

	Wilfully expose a child under 16 years to an indecent magazine (date unknown between 30/11/96 and 28/01/97) Indecent dealing with a child under 12 years (date unknown between 30/11/96 and 28/01/97)	Imprisonment 4 years Imprisonment 4 years All terms of imprisonment to be served concurrently
2/10/1997 Brisbane DC	Breach of probation order of 24/01/96 Breach of community service order of 24/01/96 Breach of suspended sentence of 24/01/96	Breach proven - no action Breach proven - no action Suspended sentence of 2 years imposed - cumulative on sentence of 19/08/97. 125 days spent in custody deemed time already served. Under s 19 of the *Criminal Law Amendment Act* 1945 (Qld), must report address upon release; and report change of address for 10 years after release.

[4] As that history indicates, the respondent was found guilty on 19 August 1997 of offences which included maintaining an unlawful relationship of a sexual nature with a child under 12, indecent dealing with a child under 12, and carnal knowledge by anal intercourse with a person not an adult under the age of 12. He was sentenced to 10 years imprisonment. On 2 October 1997, the respondent was found to have breached a suspended sentence imposed on 24 January 1996 and he was sentenced to a period of two years imprisonment cumulative upon the sentence imposed on 19 August 1997.

[5] On 7 October 2008, the applicant sought orders pursuant to s 13 of the Act that the respondent be detained in custody for an indefinite term. At the hearing, the Court considered the reports of three psychiatrists, namely Professor James, Professor Nurcombe and Dr Beech. Byrne SJA was satisfied that, on the basis of the evidence before him, the community could not be adequately protected by a supervision order because if left untreated, the respondent posed too great a risk of committing serious sexual offences against boys. He did not consider the risk could be adequately addressed by a supervision order and that the risk could not be addressed unless such a regime contained extensive restraints upon the respondent's freedom of movement and association which would essentially see him "at no greater liberty than if in custody".[2] His Honour concluded that in any event no such detailed proposal for such a regime had been advanced by the psychiatrist. His Honour further observed:

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2 *A-G for the State of Qld v Winston* [2009] QSC 11, [45].

> "[46] Anyhow, no detailed proposal for such a regime has been advanced for assessment by the psychiatrists or those who would need to find the money and people to implement it. And it is not shown that the respondent has much chance of being accepted into a community-based sexual offender treatment program let alone that he might, this time around, complete such treatment.
>
> [47] There should be a continuing detention order for treatment and control."[3]

The reports of the psychiatrists for the purpose of this review

[6] The respondent has been reviewed by Dr Josephine Sundin in a report dated 12 October 2015 and by Dr Scott Harden in a report dated 19 October 2015.

Dr Sundin's report

[7] Dr Sundin notes in her report that Mr Winston is now 67 years of age and has a number of psychological and medical difficulties including psychotic illness, mild mental retardation, Type 2 diabetes, mellitus, morbid obesity, dextro-cardia and restrictive pericarditis. She also noted he had a lengthy documented history of pedophilia and that he has demonstrated significant risk factors including sexual deviancy, persistent and high intensity of sexual offending, past problems with supervision and a breach of a suspended sentence, difficulty with intimate relationships, limited intellectual capacity and a history of mental illness.

[8] Dr Sundin considered that on both the actuarial and clinical scales, the respondent's risk for sexual reoffending is moderate to high. However, she indicated that if Mr Winston could be placed in an aged care facility with appropriate levels of security, he could be safely housed. She noted that the facility would need to have locked doors and have a regular visiting medical officer who would need to liaise with the Local Community Mental Health Service so that his mental health and medications could be monitored. She noted that he required a supervision order within the Act and also is likely to need a community treatment order under the *Mental Health Act* 2000 (Qld).

[9] Dr Sundin noted that, in effect, Queensland Corrective Services created the type of nursing facility that Mr Winston required in the context of the Southern Queensland Correctional Centre.

[10] Dr Sundin indicated that the combination of his medical psychiatric and intellectual impairment precludes him from placement in the community in a less secure environment. She stated that he will not be able to cope independently. Her opinion is that because of the potential risk he poses to the community, he needs to be detained in a closely supervised restricted environment such as that where he currently resides in the medical unit of the Southern Queensland Correctional Centre or would be available in a high care/high dependency needs nursing home facility which has been difficult to identify.

[11] Dr Sundin gave evidence at the hearing and stated that she had considered the report of Dr Wolfenden, the current treating psychiatrist, who does not consider that Mr Winston

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3 *A-G for the State of Qld v Winston* [2009] QSC 11, [46]-[47].

suffers from schizophrenia. She stated, however, that her view is that whether or not his delusions are psychotic in origin, he needed to remain on the medication as his symptoms were variable. She considered that if Mr Winston is to be released into the community, her firm view was that there needed to be liaison with Community Mental Health Services.

[12] Dr Sundin further stated:

> "I'm happy to accept her diagnosis that he doesn't suffer from schizophrenia. I think that was particularly well argued by Dr Wolfenden in her original report. Mr Winston has a combination of two issues, and possibly three. He's mildly mentally retarded. He shows evidence of a personality disorder, a primarily dependent personal disorder. He's profoundly institutionalised. Within prisons at times in the past, he has been subject to quite significant bullying and QCS has responded to that by, first, giving him a carer to stay with him to, in effect, act as a protector and enabler within the system. And more recently, QCS has, in effect, set up a hostel/nursing home arrangement for Mr Winston whereby they manage him entirely within the medical centre of SQCC. He's not in – within the general population. These issues of his IQ, personality disturbance and vulnerability have at times caused him to demonstrate symptoms which may or may not be psychotic. You read phrases from colleagues referring to quasi-psychotic symptoms. I think it's extremely difficult to be entirely confident. Certainly I've seen Mr Winston off and on, I think, over four years now. He has made reference to material which to me appears to have a delusional content but I'm certainly prepared to accept that that may simply be a function of his – a combination of intellectual and personality vulnerabilities as well as institutionalisation rather than being from a true schizophrenia. I make this point because he needs to stay on an anti-psychotic in my opinion. And the transition to a residential care facility, while I think is quite possible, will need to be carefully managed."[4]

[13] Dr Sundin stated that it would be in Mr Winston's best interest to be in an appropriate nursing home facility rather than in prison. She considered that suitable nursing home placements were available and that what he required was a secure, stable and predictable environment with locked doors so he could not wander off. Whilst it was important that he did not have any access to children, there would be no risk to female residents or staff. Dr Sundin's evidence in response to questions from counsel for the applicant was as follows:

> "All right. So you say in your report at page 5, line – about 175 that he could be placed in an aged care facility with appropriate levels of security?---Yes.
>
> It would need to have locked doors?---I think that that would be appropriate. I would be concerned as to Mr Winston's ability to simply wander off if he weren't in a locked ward facility. And any number of aged care facilities within our state do provide locked wards simply for people who wander – who have dementia or old age and retardation.

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[4] T1-7 ll 23-43.

> So it's that style of facility – somewhere which caters for those persons suffering from dementia?---Yes.
>
> And you say there are any number – could you be a little bit more specific about how many there would be in Queensland?---I couldn't be more specific. Off the top of my head, I can think of half a dozen facilities. Residential care facilities these days tend to be set up in a step-wise phenomena. So a number of them will go from a retirement village or a hostel into a high dependency care unit and then ultimately within that there are then – what are effectively closed wards for people who have dementia and wander.
>
> And what sort of facility does Mr Winston require? What sort of treatment?---I think he needs to be managed in a closed ward because of the wandering risk and also simply because that environment will also manage the other issues that have brought him to our attention. We don't want him anywhere where there's any potential for access to children. And in the hostel-type environment of a nursing home where grandchildren are visiting grandparents, that would be not safe for the community."[5]

[14] Dr Sundin stated that it was clear that Mr Winston could not make his own accommodation or health decisions and she agreed with Dr Harden that there was a need for a decision maker for those matters. She continued:

> "And there'd also need to be a liaison with the Community Mental Health Service?---Well, I consider that liaison with Community Mental Health would be appropriate. I note that Dr Reddan felt that wasn't necessary when she wrote in that letter of the 19th of October. I would have thought that the involvement of Community Mental Health at the start would be beneficial. They would have a lot of experience that would advise the facility and make Mr Winston's initial transition easier. Thereafter, depending on the general practitioner's level of experience, they may well feel able to manage the situation.
>
> You heard – you were in court before when her Honour expressed some concerns that the fact that Mr Winston has been in custody for so long - - -?---Yes.
>
> - - - that there might not be a facility available for him. Can you comment on that?---Certainly. As I said, I certainly am concerned about his degree of institutionalisation in the setting of low IQ and dependent personality. Mr Winston has demonstrated quite significant acting out behaviour in the past when he's either been teased, bullied or unsettled. I think it is possible for him to be transitioned into a community care facility provided it is done well and he is well – repeatedly well educated about what's going on.
>
> And such facilities exist?---Such facilities do exist."[6]

Dr Harden's report

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5 T1-8 ll 7-32.
6 T1-9 ll 1-22.

[15] Dr Harden noted that Mr Winston was still incarcerated in the South East Queensland Correctional Centre but was housed in a medical unit. He noted that Mr Winston spent most of his time doing colouring in and was "not unhappy that he was still in prison". Dr Harden noted that the respondent was 67 years of age and had been incarcerated for 16 years since his most recent criminal offences. He noted that he had committed three groups of sexual offences against children, predominantly prepubescent boys, and that the offences had become more serious and prolific over time, with the most recent offending occurring 12 months after his release on a suspended sentence.

[16] Dr Harden considered that Mr Winston suffered from paedophilia of a non-exclusive type and has been diagnosed with schizophrenia on the basis of decreased self-care, agitation, threats or attempts to harm himself and a preoccupation that he will be transferred to another Correctional Centre and harmed. Dr Harden noted that this diagnosis was now being questioned by his most recent treating psychiatrist. Dr Harden does not consider there is any evidence of psychosis in recent years. He also considered he had a diagnosis of a dependent personality disorder and noted that most of his interpersonal deterioration and self-harm relates to his dysfunctional way of dealing with interpersonal relationships and having his dependency needs met. He considered that this causes the respondent to function "at a significantly lower level than his actual cognitive abilities at times and makes accurate assessment of his coping ability difficult as this fluctuates with his emotional state and feeling of safety and security."

[17] Dr Harden also noted that, with an IQ of around 70, Mr Winston had a Borderline Intellectual Function or Mild Mental Retardation. In relation to his risk assessment, Dr Harden considered that his future risk of sexual reoffending is high based on his combined clinical and actuarial assessment. He considered that the critical issues with Mr Winston are his paedophilia and his impaired level of function. He considered that it would be a serious error to assume that his deterioration and his level of function in relation to activities of daily living necessarily equated to a reduced risk of sexual recidivism. Dr Harden considered that the major strategy which would need to be undertaken would be to restrict the respondent's ability to access potential victims. He considered that if he were on a strict supervision order in the community with a high level of supervision, as well as supported accommodation, practical and psychiatric support, the risk would be reduced to a moderate rate.

[18] He also considered that the respondent should be treated by psychiatric services for the rest of his life and he requires anti-psychotic medication. He considered that attempts should be made to meet the respondent's treatment needs. The most recent offences had occurred within 12 months of his release on a suspended sentence. Dr Harden noted that the respondent had himself been a victim of significant abuse as a child.

[19] Dr Harden also gave evidence at the hearing and endorsed the views set out in his report. He endorsed his view that Mr Winston required the assistance of psychiatric services for the rest of his life as well as anti-psychotic medication.

[20] I note that Dr Harden also considered that appropriate accommodation was available in the community in a high care nursing home facility. His evidence in response to questioning was as follows:

> "And you don't believe that as a result of his time in detention or in custody he would be precluded from moving into – or transitioning into one of those

> facilities?---No, I don't think so. I think dementia-specific units frequently deal with issues around sexual disinhibition, so some of the risks that Mr Winston poses in the general community will – the risk assessment in a dementia-specific unit will already consider issues of potential sexual behaviour or aggressive behaviour towards other, because those can occur in dementia patients.
>
> Because often dementia patients are quite disinhibited and - - -?---Yes.
>
> So – all right. So, again, so Mr Winston's challenges, for want of a better word, would be something that would be able to be met by a dementia unit in general terms?---In my opinion, yes."[7]

Is the respondent a serious danger to the community in the absence of a Division 3 order?

[21] Section 13(2) of the Act provides that 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 from custody without a supervision order being made. This definition would be applicable and applies to the determination that is required to be made under s 30 of the Act.

[22] The expression "*unacceptable risk*" is undefined by the Act. It is incapable of precise definition but is an expression which requires the striking of a balance.[8] The relevant risk is the risk of commission of a serious sexual offence i.e. an offence of a sexual nature involving violence or against children. Risk means the possibility, chance or likelihood of commission of such an offence. An unacceptable risk is a risk which does not ensure adequate protection of the community. This phrase was considered in *A-G (Qld) v Francis*[9] when the Court of Appeal observed:

> "[39] Insofar as his Honour was concerned that, if the appellant began to use alcohol or drugs, he might abscond, the risk of a prisoner absconding is involved in every order under s 13(5)(b). 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 should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[23] The means of avoiding that risk is a continuing detention order or a supervision order.

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7 T1-13 ll 1-13.

8 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; (2004) 78 ALJR 1519, [22], [60] and [225].

9 [2007] 1 Qd R 396; [2006] QCA 324, [39].

[24] If the Court, on the review hearing, affirms a decision that the prisoner is a serious danger to the community in the absence of a Division 3 order, then the discretion granted by s30(3) is enlivened.

[25] Section 30(2) of the Act permits the Court to affirm the decision if it is satisfied by acceptable and cogent evidence and to a high degree of probability that the evidence is of sufficient weight to affirm the decision that the prisoner is a serious danger to the community in the absence of a Division 3 order. Once that decision has been affirmed, then the Court is able, by s 30(3) of the Act, to order the respondent to be subject to continuing detention or be released from custody subject to a supervision order.[10]

[26] In determining whether to make such an order, the "paramount consideration" is to "ensure adequate protection of the community".[11]

[27] If the Court declines to order continuing detention, then the Court must rescind the continuing detention order.[12]

[28] In determining whether the decision ought to be affirmed, the matters mentioned in s 13(4) of the Act must be considered.

[29] Section 13(4) of the Act provides:

> "**13 Division 3 orders**
>
> …
>
> (4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following—
>
> (aa) any report produced under section 8A;
>
> (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
>
> (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
>
> (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
>
> (d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
>
> (e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;
>
> (f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

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10 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(3).
11 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(4).
12 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 30(5).

(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."

Conclusion

[30] Having considered the material before me, I am satisfied that the respondent is a serious danger to the community in the absence of a Division 3 order. A "serious danger to the community" means that there must be an unacceptable risk that the prisoner will commit a serious sexual offence if released or if released without a supervision order.[13] A "serious sexual offence" is defined as an offence of a sexual nature involving violence or an offence against a child.[14] Clearly, the offence must be of a sexual nature with it either being an offence involving violence or in relation to a child.

[31] I note the assessment of both psychiatrists that the respondent's risk of reoffending is high and, in particular, both indicate that given that risk he needs to be subject to a Division 3 order pursuant to the Act.

[32] It is clear therefore that the order of Byrne SJA made on 9 February 2009 should be affirmed. That decision was made almost seven years ago in circumstances where there were concerns as to whether there were appropriate facilities in the community that could manage the risk that Mr Winston posed at that time.

[33] Drs Sundin and Harden both consider that Mr Winston needs to be detained in a closely supervised and restricted environment which restricts his access to children. Both psychiatrists consider that whilst such an environment has been provided in a Corrective Services facility to date, it can be provided in the future in a high care or high dependency nursing home facility. The consensus of opinion is that Mr Winston can be appropriately managed in the community subject to a supervision order if suitable high care and secure accommodation can be found for him.

[34] The evidence is that there is such accommodation available and indeed it would seem that such an option became available to him on two occasions in the last twelve months. The opportunity for a placement in a high care nursing home facility was lost, however, due to the lack of a decision maker for accommodation decisions at the point in time that those options became available. The evidence is, however, that such accommodation does become available from time to time. It is clear therefore that the risk that Mr Winston poses to the community may be adequately managed pursuant to a supervision order in the future.

[35] A supervision order cannot be made at the present time because there are no appropriate plans in place for Mr Winston's release. At this point in time, the major barrier to his release is the lack of an appropriate substitute decision maker to make decisions in his best interests in relation to accommodation.

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13 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13(2).

14 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), Schedule.

[36] When the Court makes an order that a prisoner can be released subject to a supervision order, that order contains a requirement that the prisoner reside in suitable accommodation. The prisoner is then responsible upon release from custody for finding such suitable accommodation or for arranging it, if possible, prior to release. Often released prisoners are released with their consent to the Wacol Precinct, which is adjacent to a Corrective Services facility, until they have found suitable accommodation. They are not, however, in the custody of Corrective Services, as they have been released into the community. They are, however, subject to strict conditions which often include GPS monitoring, restrictions on alcohol and a requirement to advise Corrective Services of their proposed activities. Indeed, every supervision order must contain the requirements that are set out in s 16 of the Act.

[37] Accordingly, whilst Corrective Services officers monitor released prisoners who are subject to a supervision order, they are free to make all their own decisions subject to that monitoring and oversight. Those decisions include decisions about where they shall reside and that freedom is reflected in the provisions of s 16 of the Act which provides that all supervision orders must contain a requirement that all released prisoners must notify a Corrective Services officer of every change of residence at least two business days before the change happens.[15] Any accommodation which is found is then assessed by Corrective Services officers to ensure that it is appropriate from a risk analysis perspective and that it does not breach the conditions of the supervision order. Accommodation decisions, however, are made by released prisoners.

[38] In the present case, due to Mr Winston's complex needs, including his low IQ and his personality disorder, the expert opinion is that he cannot make medical, accommodation or legal decisions for himself. It was for that purpose that an application was made for the appointment of the Public Guardian as his guardian. That appointment was made on 10 April 2012. The purpose of the application was to facilitate his release into the community on a supervision order and to ensure that any decision which was made about his future accommodation was in his best interests.

[39] The affidavit of Lindsay Irons, the Director of Guardianship at the Office of the Public Guardian, affirmed on 26 October 2015 states that for much of the period of two years between April 2012 and April 2014, no accommodation decisions were required, as for 11 months Mr Winston was too unwell to undergo an Aged Care Assessment Team assessment and for nine months Corrective Services (QCS) was unable to locate a suitable placement for him.

[40] The affidavit of Jolene Monson, Acting Principal Advisor within the High Risk Offender Management Unit (HROMU), sworn on 22 October 2015 outlines what subsequently occurred which ultimately led to Mr Winston's placement into a nursing home in the community on a supervision order being frustrated:

> "8. I am informed and verily believe that on 8 April 2014 the Queensland Civil and Administrative Tribunal ("QCAT"), during a periodic review of the respondent's guardianship matters, removed the capacity of the Office of the Public Guardian to act for the respondent in accommodation matters. The Office of the Public Guardian is now only able to act for him on legal matters.

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15 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 16(1)(c).

9. The respondent's financial matters continue to be managed by The Public Trustee.

10. In mid-2014, QCS located a possible accommodation facility for the respondent. On 20 August 2014, the proposed residence at a particular nursing facility ("the Nursing Facility") was assessed as suitable for the respondent by QCS.

11. The Nursing Facility informed QCS that they would require consent from an appointed guardian for the respondent prior to his acceptance into it. The respondent is not able to be offered placement at the Nursing Facility through his own consent. This is because he could then withdraw his consent at any time, and the Nursing Facility would have no authority to detain him in it.

12. Mr Luke Makejev, Head of Health Services at Southern Queensland Correctional Centre ("SQCC"), spoke to the respondent on two occasions about the possible accommodation at the Nursing Facility. On 12 September 2014, the respondent was not oriented to time and date and was not able to answer questions regarding accommodation. On 15 September 2014, the respondent presented with no evidence of confusion or disorientation and indicated a willingness to reside at the Nursing Facility.

13. On 15 September 2014, Ms Katherine Johnson, Senior Legal Officer, Office of the Public Guardian, was updated in relation to the issues with the respondent's apparent fluctuating capacity to provide consent. I am informed and verily believe that Ms Johnson stated words to the effect that the Office of the Public Guardian was not appointed to make decisions in relation to accommodation, and it was her understanding that QCS were responsible for consenting to the respondent's accommodation. QCS clarified that their role is to assess and approve accommodation (if it is considered suitable) for the respondent to reside at, but they are unable to provide consent on the respondent's behalf to reside at a particular accommodation.

…

15. HROMU contacted the respondent's treating psychiatrist at SQCC, Dr Claire Wolfenden, on 14 October 2014 regarding the concerns over his capacity to provide consent for his accommodation, and the possibility of him withdrawing that consent at any time. Dr Wolfenden indicated that as QCAT had made a decision to allow the respondent to make his own decisions regarding accommodation, she would need to know more about the basis of their decision-making prior to making any further assessments.

16. Dr Wolfenden contacted the Office of the Public Guardian on 14 October 2014; however, they were unable to provide her with any information regarding their decision-making process in respect of the respondent.

17. In light of this, Dr Wolfenden undertook a further assessment of the respondent. On 17 October 2014, Dr Wolfenden assessed the respondent

> and found that he lacked the capacity to make decisions for himself in relation to accommodation. Dr Wolfenden advised that she and the respondent's Prison Mental Health Service (PMHS) Transition Coordinator, Ms Loma Gillham, would lodge an application for the Office of the Public Guardian to recommence guardianship for the respondent in respect of accommodation.
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> 18. On 24 October 2014, Dr Wolfenden and Ms Gillham lodged an application for administration/guardianship appointment or review in respect of the respondent to QCAT."

[41] The application for the appointment of a guardian to make accommodation decisions was heard at QCAT on 20 November 2014. The earlier report of the Public Guardian dated 4 March 2014 had not supported the appointment of a guardian for accommodation matters as follows:

> "The Adult Guardian is therefore of the opinion that there is no longer a need for a decision maker in relation to accommodation, service provision and health care matters pursuant to section 12 of the *Guardianship and Administration Act 2000*.
>
> Arguably, an order appointing the Adult Guardian as decision maker for Mr Winston in relation to accommodation matters for Mr Winston, would have no practical effect, as it is Queensland Corrective Services, who must consent to appropriate accommodation for Mr Winston in the community.
>
> However, the Adult Guardian is of the opinion that anyone who is subject to the DPSOA and is detained indefinitely is entitled to be vigorously defended at law. The Office of the Adult Guardian holds concerns that if we are continued to be appointed in relation to accommodation matters, that our accommodation decisions could in turn be at odds with the forensic discretion that is exercised by Counsel in relation (sic) any review that may take place in relation to Mr Winston (sic) Dangerous Prisoner status, when promoting any accommodation option that could be considered for Mr Winston.
>
> To date, the Adult Guardian has not made any health care decisions on behalf of Mr Winston. In the event that future health care decisions are required on behalf of Mr Winston, the Adult Guardian is able to act as Statutory Health Attorney of last resort pursuant to section 63 of the *Powers of Attorney Act 1998*.
>
> In accordance with Mr Winston's current status as a DPSOA prisoner, his support needs are being met within a custodial setting. Currently, there are no service provision decisions proposed on behalf of Mr Winston. As a result of Mr Winston's ACAT approval, any future support needs will be met by any future accommodation arrangement."

[42] An oral submission from the Public Guardian at the November 2014 hearing was in the following terms:

> "And the position was very clear: that there would have been no utility in terms of them making a further application, because it won't change the position of the Public Guardian, that is, that, pursuant to the Corrective

> Services Act and the Dangerous Prisoners (Sexual Offenders) Act, *Mr Winston is under the continuing care, control and treatment of Corrective Services. And the Chief Executive is taken to have custody of that person if the person is in the physical custody or being supervised by an engaged service provider. Corrective Services have sourced this accommodation. There is absolutely no practical effect to an accommodation appointment.* And what we've been asked – and the letter is annexed to my report – to do, effectively, by the Crown is to consent to his security arrangements in the community in order to satisfy an order. And that's just not within the statutory purview of the Public Guardian. The Public Guardian has expressed dismay that [indistinct] come down to someone who's subject to such a restrictive piece of legislation that the suggestion would be that the Public Guardian would somehow impede this person's transition into the community on a supervision order, because they're being asked to make a decision that they can't make."[16] (my emphasis)

[43] The application for the appointment of a guardian for accommodation matters was dismissed after a hearing, which lasted 17 minutes, in the following terms:

> "So unless there's anything further, I am not satisfied in this case that there is either a need for a decision-maker in this particular context for a decision to be made about accommodation. Or, if there is a need, I take not account what has been said to me by the Public Guardian, that they will not be making a decision about accommodation, as the primary decision is made in relation to the supervision order, and any other flow on from that is not the – does not give rise to a decision-making process on the part of an appointed guardian. So I will dismiss the application this afternoon. Thank you."[17]

[44] A request for written reasons was made on 12 December 2014 and 12 May 2015. No written reasons have been provided by QCAT. A CD containing a 52 second media file has been provided by QCAT which is a recording of the oral decision set out above. QCAT responded via email on 17 June 2015 advising that the CD provided fulfils their obligations pursuant to s 123(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld). In my view, the oral decision does not adequately explain the reasons why the application was dismissed, given the evidence of need outlined by the applicant.

[45] There is no doubt that Mr Winston presents with considerable challenges due to the interplay of mental, physical, sexual and emotional difficulties. The reality is, however, that his full time release date was in February 2009 and he was placed on a continuing detention order, as no suitable accommodation for him was then available. This is only the second review of his continuing detention order due to delays which occurred in trying to source appropriate accommodation options for him. Impressively, officers within the HROMU have endeavoured to find appropriate accommodation for him. In the circumstances, it is clear that a continuing detention order must be made, as there is currently no appropriate decision making regime in place to facilitate Mr Winston's release into the community.

[46] Corrective Services do not have the ability to provide consent on behalf of the respondent to reside at any address including secure accommodation.

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16 Transcript of QCAT Proceedings of 20 November 2014 1-6 ll 27-43.

17 Transcript of QCAT Proceedings of 20 November 2014 1-11 ll 15-22.

[47] It would seem that the appointment of the Public Guardian as decision maker in relation to accommodation was not renewed in circumstances where there was a clear need. This would seem to be due to a misunderstanding of the role that Corrective Services play in relation to released prisoners under the Act. Once a prisoner is made subject to a supervision order, they are released into the community and are no longer in the custody of Corrective Services. Usually, a prisoner will only be released subject to a supervision order if there are appropriate accommodation arrangements in place which have been made by the prisoner in advance of their release and approved by Corrective Services as appropriate. Even if a Corrective Services officer assists a prisoner or a released prisoner to find accommodation, the Department of Corrective Services is not the decision maker. The prisoner or released prisoner is the decision maker. This is as it should be, as a Corrective Services officer may make an accommodation decision which would be the best decision from a risk perspective but may not ultimately be a decision in the best interests of the prisoner.

[48] If the prisoner or released prisoner has impaired decision making capacity, then a substitute decision maker needs to be appointed. That decision maker will then make decisions in the best interests of the prisoner with impaired capacity in accordance with the general principles and the health care principle in the *Guardianship and Administration Act* 2000 (Qld).

[49] Mr Ryan of Counsel was given leave to appear for the Office of the Public Guardian at the hearing and indicated that there had been a review of the approach that the Public Guardian had taken in relation to the decisions about Mr Winston. Mr Ryan recognised the importance of a renewed application for the appointment of a guardian for accommodation and health care decisions in relation to Mr Winston.

[50] The evidence before me was that such a process could take up to five months, however, it was made clear that should an appropriate placement be found for Mr Winston, then an urgent application could be made to QCAT for their appointment. It is important that such an application be made as a matter of urgency, given the opportunity which was lost last year to have Mr Winston placed in more appropriate accommodation in the community whilst being subject to the stringent conditions of a supervision order.

[51] It is also clear that an application could then be made to this Court for a periodic review pursuant to s 27 of the Act to facilitate the making of a supervision order if the Court considers it appropriate.

[52] In the current circumstances, however, Mr Winston must continue to be detained in custody for care, control or treatment.

Orders

[53] The orders of the Court are as follows:

1. Pursuant to s 30 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the Court affirms the decision made by Byrne SJA on 6 February 2009, that the respondent is a serious danger to the community in the absence of a Division 3 order.

2. The respondent, Denis Winston, continue to be subject to a continuing detention order for care, control or treatment.