SUPREME COURT OF QUEENSLAND

CITATION:	*Bickle v Attorney-General for the State of Queensland* [2015] QCA 263
PARTIES:	**STEVEN SHANE BICKLE** (appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 4273 of 2015 SC No 846 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 64
DELIVERED ON:	8 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2015
JUDGES:	Fraser and Philippides JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – OTHER CASES – where the appellant was subject to a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the order expires on 18 May 2016 – where the appellant applied for a declaration he was no longer a serious danger to the community and an order that the supervision order be discharged – where the primary judge found that the risk of the appellant committing a serious sexual offence was low – where, despite this finding, the primary judge refused to make the requested order – where the primary judge held that there was no power under the Act to discharge a supervision order – where the appellant argued that the power to terminate a supervision order is found in s 48 of the *Constitution of Queensland* 2001, the inherent jurisdiction of the Supreme Court or r 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the Supreme Court has the power to shorten the duration of a supervision order – whether the Supreme Court has the power to discharge a supervision order

HIGH COURT AND FEDERAL COURT – THE FEDERAL JUDICATURE – NATURE AND EXTENT OF JUDICIAL POWER – CONFERRAL ON STATE COURTS – where the appellant argued, in the alternative, that if the Supreme Court did not have the power to discharge a supervision order it was unconstitutional – where the High Court of Australia held in *Kable v Director of Public Prosecutions (NSW)* that State legislation that purports to confer upon a State court a power or function which substantially impairs the court's institutional integrity is constitutionally invalid – where the appellant argued that the Act required the Supreme Court to maintain a declaration that is not true, contrary to the Court's own finding – whether the reasoning and logic of the Supreme Court contradicted the supervision order – whether the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) was unconstitutional

Constitution of Queensland 2001, s 48
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 3, s 13, s 15, s 16, s 18, s 19, s 20, s 21, s 22
Uniform Civil Procedure Rules 1999 (Qld), r 668

Attorney-General v Hansen [2006] QSC 35, cited
Attorney-General for the State of Queensland v Bickle [2006] QSC 130, related
Attorney-General for the State of Queensland v Bickle [2008] QSC 211, related
Attorney-General for the State of Queensland v Francis [2012] QSC 275, considered
Attorney-General for the State of Queensland & Anor v Sambo [2012] QCA 171, cited
Attorney-General (NT) v Emmerson (2014) 253 CLR 393; [2014] HCA 13, cited
Attorney-General (Qld) v Van Dessel [2007] 2 Qd R 1; [2006] QCA 285, considered
Beckwith v The Queen (1976) 135 CLR 569; [1976] HCA 55, cited
Bickle v Attorney-General for the State of Queensland [2015] QSC 64, related
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, considered
Grassby v The Queen (1989) 168 CLR 1; [1989] HCA 45, cited
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24; considered
North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia [2015] HCA 41, cited
Re Totalisator Administration Board of Queensland [1989] 1 Qd R 215, cited
Reid v Howard (1995) 184 CLR 1; [1995] HCA 40, applied
Smith v Corrective Services Commission (NSW) (1980) 147 CLR 134; [1980] HCA 49, cited
State of Western Australia v O'Rourke [2010] WASCA 141, considered

The King v Davies [1906] 1 KB 32, cited
The Queen v Forbes; Ex parte Bevan (1972) 127 CLR 1; [1972] HCA 34, cited
Watson v Marshall (1971) 124 CLR 621; [1971] HCA 33, cited

COUNSEL: J W Fenton for the appellant
P Dunning QC, with A D Scott, for the respondent

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

[1] **FRASER JA:** The appellant is subject to a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("DPSO Act"). The order was made on 2 June 2006 and amended on 9 September 2008. The period during which the order is effective, as stated in the amended order, expires on 18 May 2016.

[2] The appellant applied in the Trial Division for a declaration that he was no longer a serious danger to the community in the absence of an order pursuant to Div 3 of the Act, orders that the supervision order be further amended to bring it to an end forthwith and that it is discharged, and, alternatively, for an order that the supervision order be further amended to delete certain conditions. The primary judge amended the supervision order by deleting some of the conditions. That is not in issue in this appeal. The primary judge refused to make any of the other orders sought by the appellant.

[3] The appellant has appealed against the refusal of those orders. There are two issues in the appeal:

(a) If the Supreme Court finds that a person subject to a supervision order made under the DPSO Act is no longer a serious danger to the community, does the Supreme Court have the power to discharge the supervision order or shorten the period during which the order has effect?

(b) If not, is the DPSO Act constitutionally invalid under the principle established in *Kable v Director of Public Prosecutions (NSW)*?[1]

[4] For the following reasons both questions should be answered in the negative and the appeal should be dismissed.

Decision of the primary judge

[5] The primary judge summarised the circumstances in which the supervision order against the appellant was made.[2] From about 1988 until the appellant was incarcerated in 1992 he committed sexual offences against adolescent and pre-adolescent children. The appellant committed those offences at a time when he was under significant interpersonal stresses and while he was a step-parent or de facto parent of the complainants. For those offences the appellant was sentenced to imprisonment for a total period of 13 years and nine months. Whilst imprisoned the appellant completed courses which were designed to address the issues giving rise to his offending. The judge who made the supervision order in 2006 considered that a risk that the appellant

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1 (1996) 189 CLR 51.
2 *Attorney-General for the State of Queensland v Bickle* [2006] QSC 130.

would re-offend would arise if he was released without appropriate constraints and support, and particularly if he abused alcohol or other substances or experienced stress when he had access to children, particularly pre-pubertal girls in a family situation.

[6] The supervision order stated that it would remain in effect until 18 May 2026. In 2008 a judge in the Trial Division ordered amendments to the supervision order, including an amendment which substituted 18 May 2016 for the original end date of 18 May 2026. The judge who ordered the amendments referred to expert evidence given by psychiatrists. Professor Nurcombe considered that at the end of 10 years the appellant's risk of re-offending would be "infinitesimal", largely because of the appellant's age. Similarly, Dr Harden accepted that a 10 year supervision order was sufficient to adequately protect the community. The judge preferred Professor Nurcombe's evidence that an emphasis upon the restrictions of the supervision order would be counter-productive for the respondent's rehabilitation and explained the reason for the amendment in the following passage:

> "Mr Hunter submitted that it was inappropriate that a hearing brought about by the respondent's breach should be productive of a reduction in the time that the order operates upon him. This is to see such an order as in some way punitive. The only justification for making an order of the kind contemplated by Division 3 is the protection of the community and the facilitation of the rehabilitation of the respondent. The two years during which the respondent has been subjected to the order demonstrates that the risk to the community may be addressed with a reduced period. That reduction will positively, facilitate the respondent's rehabilitation. I am persuaded that the opinion, particularly of Professor Nurcombe, and not dissented from by Dr Harden, together with the period of supervision without breach, dictates that the duration of the order should be reduced from 20 to 10 years."[3]

[7] The respondent did not appeal against the orders made in 2008.

[8] The primary judge found that the appellant had formed a relationship with his partner before the appellant was released from prison, they had a stable, mutually supportive, and positive relationship, and the appellant had established a stable lifestyle. The evidence before the primary judge included expert evidence given by psychiatrists. Dr Madsen considered that the appellant had "no outstanding treatment needs and … there was no need for on-going psychological treatment". Dr Harden referred to the appellant's stable lifestyle, stable long-term relationship and general compliance with the conditions of his order, and observed that the appellant had "significantly more realistic planning around managing situations of high risk" since Dr Harden saw the appellant in 2008. Dr Harden considered that the appellant was at "low-moderate risk of re-offence sexually in the community at the point in time of the assessment". Professor Nurcombe considered that "in Mr Bickle's current social circumstances, and while the supervision order is still operative, the risk of sexual offending is low" and "if the order were to terminate and Mr Bickle were to be affected by stress such as a personal loss, the risk of sexual offending might rise to a moderate level", although "many protective factors are operating". Professor Nurcombe testified that the appellant was "only at risk of re-offending if he is in a family, in an intimate relationship within a family where there are female children under the age of 16, and at that time he is

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3 *Attorney-General for the State of Queensland v Bickle* [2008] QSC 211 at [15].

feeling rejected, lonely, unjustly unwanted … He's not in danger of predatorily seeking children to sexually abuse…it would be very wise for him now and in the future not to be in a family situation where there was such children." Dr Harden also gave similar evidence.

[9] The primary judge found that the appellant did not plan to form a relationship and cohabit with a woman who had children under 16 years of age, that his current partner had no children, it was expected that the appellant would continue to reside with her until the date of the expiry of the current supervision order and beyond, and in those circumstances the risk of the appellant committing a serious sexual offence during the remaining period under the supervision order was low.

[10] The primary judge observed that if there was power to amend the period stated in the order to bring it to an end forthwith or in the coming days, or if there was power to discharge the supervision order, then he would exercise that power. The primary judge held that there was no such power. The primary judge refused to make a declaration that the appellant was no longer a serious danger to the community in the absence of an order pursuant to Div 3 of the DPSO Act, because such a declaration lacked utility in the absence of any power to discharge the supervision order.

If the Supreme Court finds that a person subject to a supervision order made under the DPSO Act is no longer a serious danger to the community, does the Supreme Court have power to discharge the supervision order or shorten the period during which the order has effect?

[11] The appellant conceded that there was no explicit power to discharge a supervision order or otherwise to bring it to an end on application made by a prisoner who is subject to the supervision order. He argued that power to terminate a supervision order is found in s 48 of the *Constitution of Queensland* 2001, the inherent jurisdiction of the Supreme Court, or r 668 of the *Uniform Civil Procedure Rules* 1999 (Qld). I accept the respondent's argument that the primary judge was correct in holding that there was no power to discharge a supervision order or make any other order having the effect that the supervision order would terminate before the end of the stated period.

[12] Section 3 of the DPSO Act states its objects as being "[t]o provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community" and "[t]o provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation". Part 2, Div 3 of the DPSO Act empowers the Supreme Court to make "final orders" which give effect to those objects. Under s 13, in the case of a prisoner who is serving imprisonment for a serious sexual offence, if the Court is satisfied that the prisoner is a "serious danger to the community in the absence of a Div 3 order", in the sense that "there is an unacceptable risk that the prisoner will commit a serious sexual offence … if the prisoner is released from custody; or released from custody without a supervision order being made", then "the court may order that the prisoner be detained in custody for an indefinite term for control, care or treatment (***continuing detention order***); or that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (***supervision order***)."

[13] Section 15 of the DPSO Act is important for the disposition of this appeal. It provides:

> "A supervision order or interim supervision order has effect in accordance with its terms –

(a) on the order being made or on the prisoner's release day, whichever is the later; and

(b) for the period stated in the order."[4]

Section 15 unambiguously provides for a supervision order to have effect in accordance with its terms for the period stated in the order.

[14] Part 2 Div 4 provides for the amendment of supervision orders and interim supervision orders. Section 18 allows applications for such amendments to be made by a prisoner released under a supervision order, or interim supervision order, or by the Chief Executive with the Attorney-General's consent. Section 19 provides:

"(1) The court may, on application, amend the requirements of a supervision order or interim supervision order if the court is satisfied that—

(a) the released prisoner is not able to comply with the requirements of the order because of a change in the released prisoner's circumstances; or

(b) an amendment of the requirements is necessary or desirable for any other reason.

(2) The court may amend the requirements if it is satisfied that—

(a) the requirements, as amended, are sufficient to ensure adequate protection of the community; and

(b) it is reasonable to make the amendment in all the circumstances.

(3) If the court amends the requirements on an application made by the chief executive, the court must also amend the supervision order or interim supervision order to include all of the requirements under section 16(1) if the order does not already include all of those requirements.

(4) To the extent the supervision order or interim supervision order includes a requirement mentioned in section 16(1), the order can not be amended under this section in relation to the requirement."

[15] The primary judge held that the power of amendment in s 19 did not permit amendment of the appellant's supervision order so as to alter the period stated in that order. That is consistent with authority cited by the primary judge to the effect that the period stated in the order is not one of the "requirements" of a supervision order which may be amended under s 19.[5] The reference in s 19 to "the requirements of a supervision order" is to the requirements imposed upon the prisoner by s 16. Section 16(1) provides

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[4] The only amendment to s 15 after the appellant's supervision order was made in 2006 merely substituted the words "on the prisoner's release day" for the words of s 15(a) "at the end of the prisoner's period of imprisonment": s 9 of the *Dangerous Prisoners (Sexual Offenders) and Other Legislation Amendment Act* 2010 (Qld). The expression "release day" is defined as meaning, in relation to a prisoner, "the day on which the prisoner is due to be unconditionally released from lawful custody under the *Corrective Services Act 2006*": DPSO Act, Schedule.

[5] *Attorney-General v Hansen* [2006] QSC 35, at [34] – [37] (Mackenzie J); *Attorney-General (Qld) v Van Dessel* [2007] 2 Qd R 1 at 6 [17] (Jerrard JA).

that an order that a prisoner is released from custody under a supervision order or interim supervision order "must contain requirements that the prisoner", for example, "(a) report to a corrective services officer" and "(b) report to, and receive visits from, a corrective services officer". Section 16(2) provides that the order may contain "any other requirements" considered by the Court or a relevant Appeal Court to be appropriate to ensure adequate protection of the community or the prisoner's rehabilitation or care or treatment. As was held in *Attorney General for the State of Queensland & Anor v Sambo*[6], the reference to "requirement" in s 16(2) comprehends only a requirement imposed upon the prisoner. The period stated in the order under s 15(b) cannot be regarded as such a requirement.

[16] The primary judge considered that the absence of power in the Court to reduce the period stated in a supervision order as the period during which it has effect was anomalous. The primary judge observed:

> "Remarkably, if someone in the applicant's position wished to engage the Court's jurisdiction to reduce the length of the supervision order; he or she might commit some trivial contravention of its simply to prompt a contravention hearing at which the Court would have power under s 22(7) to amend the existing order to reduce its duration. It is hard to believe that the legislature intended to create a situation in which persons who contravene supervision orders can engage the jurisdiction of the Court to reduce the duration of the supervision order, but those who do not contravene supervision orders cannot seek such an amendment. This apparently anomalous situation might be addressed by an independent assessment of the Act's anomalies and deficiencies. But that is a matter for the legislature."[7]

[17] Section 22 provides:

> (1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the ***existing order***).
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> (2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—
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> (a) if the existing order is a supervision order, rescind it and make a continuing detention order; or
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> (b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order."
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> …
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> (7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community

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6 [2012] QCA 171 at [17].
7 [2015] QSC 64 at [21].

> can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—
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> (a) must amend the existing order to include all of the requirements under section 16(1) if the order does not already include all of those requirements; and
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> (b) may otherwise amend the existing order in a way the court considers appropriate—
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> (i) to ensure adequate protection of the community; or
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> (ii) for the prisoner's rehabilitation or care or treatment.
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> (8) The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1)."

[18] The appellant endorsed the primary judge's conclusion that the Act was anomalous because the period of supervision might be shortened under s 22(7)(b) for a person released under a supervision order who contravened that order but the period could not be shortened for a person who, like the appellant, had not contravened and was not likely to contravene the supervision order. If s 22(7)(b) does empower the Court to shorten the period of a supervision order where the released person has contravened or is likely to contravene the order, it would seem difficult to accept that the same power does not exist where there has been no contravention and it is not likely that there will be a contravention. It is necessary then to consider whether or not s 22(7)(b) does confer such a power upon its proper construction.

[19] Upon a literal construction of that provision divorced from its context, it might be understood as empowering the Court to amend the order by shortening the period stated in it. It is also necessary to bear in mind what Wills J (delivering the judgment of himself, Lord Alverstone CJ and Darling J) described as "the necessity of caution in dealing with a matter where the liberty of the subject is concerned".[8] In *Smith v Corrective Services Commission of New South Wales*[9], the High Court referred to "the established principle of statutory interpretation requiring strict construction of a penal statute, or an Act which affects the personal liberty of the subject." More recently, in *North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* French CJ, Kiefel and Bell JJ said that "the principle of legality favours a construction, if one be available, which avoids or minimises the statute's encroachment upon fundamental principles, rights and freedoms at common law", and where (as in this case) the statutory purpose involves interference with the liberty of the subject this principle "is properly applied … to the choice of that construction, if one be reasonably open, which involves the least interference with that liberty."[10] In the same case, Nettle and Gordon JJ approved Wilson and Dawson JJ's statement in *Williams v The Queen* that "[t]he presumption which requires clear words to override fundamental common law principles has an obvious application in a matter as basic as the liberty of the person."[11]

[20] It does not follow that relevant context may be disregarded when construing a statutory provision. To say, as Walsh J said in *Watson v Marshall*,[12] that when

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8 *The King v Davies* [1906] 1 KB 32, at 47.

9 (1980) 147 CLR 134, at 139. Citations omitted.

10 [2015] HCA 41, at [11].

11 [2015] HCA 41, at [222].

12 (1971) 124 CLR 621, at 629 with reference to Griffith CJ's judgment in *McLaughlin v Fosbury* (1904) 1 CLR 546, at 559.

interpreting an Act affecting personal liberty "the function of the Court is limited to interpreting and giving effect to [the legislature's] will as expressed in the statute" is to acknowledge that the Court cannot disregard the legislative purpose derived from the statutory provisions. So much was made clear by Gibbs J's observations in *Beckwith v The Queen* that the meaning of a penal statute must be determined by applying the ordinary rules of construction, "but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences."[13]

[21] The most significant context for the construction of s 22(7)(b) is found in inextricably related statutory provisions in the same division of the DPSO Act. Section 22 is in Div 5, which is headed "Contravention of supervision order or interim supervision order". The first section in that division, s 20, applies "if a police officer or corrective services officer reasonably suspects a released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the released prisoner's supervision order or interim supervision order".[14] In such a case the officer is empowered to apply to a magistrate for a warrant which directs police and corrective services officers to arrest the released prisoner and bring him or her before the Supreme Court to be dealt with according to law.[15] If the released prisoner is brought before the Court under such a warrant, then the Court "must" make an order detaining the released prisoner in custody until the final decision under s 22 or, only if the released prisoner satisfies the Court that his or her detention in custody pending the final decision is not justified because of exceptional circumstances, release the prisoner.[16] In the event of the Court ordering release, the release must be subject to the existing supervision order or interim supervision order as amended in a way which ensures that it includes all of the requirements under s 16(1) if the order does not already include all of those requirements.[17] The policy underlying those provisions is also reflected in s 22(8).

[22] No provision of the DPSO Act confers upon a released prisoner any entitlement to apply for a reduction in the length of a supervision order, even though he or she is the person who would most obviously and directly benefit from it. Nor does the DPSO Act provide for regular reviews of supervision orders, as it does in relation to detention orders. The absence of such provisions would be very surprising if s 22(7)(b) empowered the Court to shorten the period of a supervision order. Furthermore, the released prisoner would be before the Court when an order is made under that provision only because he or she was detained under a warrant issued on the ground that he or she was likely to contravene, was contravening, or had contravened a requirement of an existing supervision order; and an order shortening the period of a supervision order could be made only if such a ground is established. Those grounds make the appellant's construction seem very surprising. So too does the absence of any provision identifying what must be established before the period of a supervision order might be shortened (for example, a provision that the Court is satisfied that it is unlikely that the released prisoner will commit a serious sexual offence). It is also relevant that, after being detained under a warrant, the released prisoner must be detained in custody until a final decision under s 22, unless the released prisoner proves that such detention in custody is not justified because of exceptional

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13 (1976) 135 CLR 569 at 576, endorsed in *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, at 145 and *Waugh v Kippen* (1986) 160 CLR 156, at 164.

14 DPSO Act, s 20(1).

15 DPSO Act, s 20(2).

16 DPSO Act, ss 21(2), (4).

17 DPSO Act, ss 21(6), (7).

circumstances, and that the final order must result in the prisoner's detention unless the prisoner proves that, despite the contravention or likely contravention of the order, the adequate protection of the community can be ensured by the existing order as amended. Those provisions suggest that the only available orders must result either in detention or release under the existing supervision order, or that order with amendments to include all of the requirements under s 16(1), to ensure the adequate protection of the community or for the prisoner's rehabilitation or care or treatment.

[23] Furthermore, if there is power to amend a supervision order to shorten its duration, in an appropriate case the period might be shortened so that the order terminates immediately or within a short time after the amendment is made. That is not readily reconcilable with the provisions to the effect that any order made under s 22(7)(b) must impose upon the released prisoner the requirements in s 16(1) or with the absence of any provision empowering the Court to discharge a supervision order.

[24] In *The Attorney General for the State of Queensland v Francis*[18] Byrne SJA accepted that where s 22 applied, s 22(7)(b) empowered the Court to extend the duration of a supervision order:

> "The concession that s 22(7)(b) confers a power to extend the duration of a supervision order looks to be correct. First, the statutory authority is to amend "the existing order", not just its "requirements": contrast s 19(1). Secondly, the *Act* posits two regimes, either of which can result in an extension. One is enlivened by contravention, or likely contravention, of a supervision order. Section 19B, on the other hand, may be invoked, and only by the Attorney-General, to seek a "further" – that is, a new – supervision order even where no contravention has happened or is likely. Thirdly, an interpretation of s 22(7)(b) that precludes an amendment to extend duration produces a consequence so odd that it is unlikely to have been intended; if the Attorney General does not apply under s 19B for a new supervision order and s 22(7)(b) does not authorise an extension of an existing order, there will be cases – indeed, the present is an example – where the prisoner must be ordered to continuing detention where extended supervision, if it could be ordered, would suffice to ensure adequate protection against the risk of a "serious sexual offence" see s 13(2)."[19]

[25] It is not necessary to consider that question in this appeal. Giving weight both to the generality of s 22(7)(b) and the importance of the principle of statutory construction favouring personal liberty, reference to the statutory context demonstrates that a construction of s 22(7)(b) that it empowers the Court to shorten the period during which a supervision order has effect is not reasonably open. No provision of the DPSO Act confers such a power or a power to discharge a supervision order.

Section 58 of the *Constitution of Queensland* 2001 and the inherent jurisdiction of the Supreme Court

[26] The appellant submitted that there were no "clear words of necessary intendment ousting the inherent jurisdiction of the court". Relying upon the width and generality

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18 [2012] QSC 275.

19 [2012] QSC 275, at [7] footnote 3. Section 19B is in Division 4A of Part 2, which was added by the *Dangerous Prisoners (Sexual Offenders) and Other Legislation Amendment Act* 2010 (Qld). It empowers the Attorney General to apply for one further supervision order which, if made, will have effect in accordance with its terms for the period stated in that order.

of the authority of the Supreme Court, including its "unlimited jurisdiction at law , in equity and otherwise" to administer justice in Queensland, the appellant submitted that the Court had power to discharge an order made pursuant to s 13 of the Act. In support of this proposition the appellant cited authorities[20] which emphasised the breadth and ill-defined nature of the Supreme Court's inherent jurisdiction. This all-encompassing jurisdiction was submitted to be the mechanism by which the court could intercede in the absence of an explicit mechanism to prevent an "abuse of court" – the abuse being the continued constraint upon the appellant's personal liberty where the factual basis for that order no longer existed.

[27] Section 58 of the *Constitution of Queensland* 2001 provides:

> "(1) The Supreme Court has all jurisdiction necessary for the administration of justice in Queensland.
>
> (2) Without limiting subsection (1), the court –
>
> (a) Is the superior court of record in Queensland and the supreme court of general jurisdiction in and for the State; and
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> (b) has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise."

[28] The appellant relied upon s 58(1). That provision does not materially differ from s 23 of the *Supreme Court Act* 1970 (NSW), which was considered in *Reid v Howard*.[21] Toohey, Gaudron, , McHugh and Gummow JJ said:

> "Although it has been said that the inherent power of a superior court cannot be restricted to defined and closed categories, the power is not at large. Nor is the jurisdiction conferred by s 23 of the *Supreme Court Act*. Neither the inherent power nor the completely general terms of s 23 can authorise the making of orders excusing compliance with obligations or preventing the exercise of authority deriving from statute."[22]

[29] In *State of Western Australia v O'Rourke*, McLure P held that West Australian legislation very similar to the DPSO Act was "the exclusive source of the substantive law relating to the imposition and amendment of preventive orders imposed on dangerous sexual offenders." [23] As the primary judge concluded, the DPSO Act is "the exclusive source of the law relating to the duration of supervision orders".[24] An order which has the effect of terminating the supervision order before the expiry of the period stated in it would excuse the appellant from compliance with the statutory requirements of a supervision order expressly given effect for the period stated in the order by s 15 of the DPSO Act. The High Court's decision in *Reid v Howard* compels the conclusion that neither s 58 of the *Constitution of Queensland* 2001 nor the inherent power of the Supreme Court authorises the Court to make such an order.

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20 See *Grassby v The Queen* (1989-90) 168 CLR 1, at 6 ("[the inherent jurisdiction of the court] is an elusive concept and . . . metaphysical"); *Re Totalisator Administration Board of Queensland* [1989] 1 Qd R 215, at 217; *The Queen v Forbes; Ex parte Bevan* (1972) 127 CLR 1, at 7 ("'Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description.")

21 (1995) 184 CLR 1.

22 (1995) 184 CLR 1, at 16.

23 [2010] WASCA 141, at [35].

24 [2015] QSC 64, at [44].

[30] In *Attorney-General v Van Dessel*,[25] Jerrard JA held that a supervision order which was expressed to have effect "until further order" gave jurisdiction to the Supreme Court, if only under s 58 of the *Constitution of Queensland* 2001, subsequently to hear an application to amend the conditions of an order and to discharge it. Jerrard JA added: "… jurisdiction would exist in this Court in any event, if, for example, a supervised prisoner fell into an irreversible coma, or suffered incapacitating injury or illness making the supervision unnecessary." As the primary judge noticed, this remark was not necessary for the decision in that case, whether or not such a power existed was apparently not a subject of argument in that case, and the other members of the Court did not adopt Jerrard JA's view.

[31] Extraordinary circumstances might render a supervision order unnecessary after it was made. In such a case it would obviously be appropriate to amend the order to reduce its requirements to the bare minimum required by s 16(1). I am, however, unable to accept that the Court possesses any power to discharge a supervision order or otherwise to shorten the period during which it has effect.

***Uniform Civil Procedure Rules* 1999 (Qld), r 668**

[32] Rule 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) confers upon the Supreme Court a discretionary power to stay enforcement of an order, or give other appropriate relief, in a case in which "facts arise after an order is made entitling the person against whom the order is made to be relieved from it…". The appellant acknowledged that this rule was not invoked before the primary judge. The respondent did not argue that the appellant should be precluded from relying upon it in the appeal. If the rule might apply at all, it does not assist the appellant because it would be inconsistent with the DPSO Act to hold that the appellant is entitled to be relieved from the supervision order.

Declaratory relief

[33] The circumstance that the supervision order made in 2006 includes a recital that "the Court is satisfied to the requisite standard that [the appellant] is a serious danger to the community in the absence of an order pursuant to Division 3 s 13(2)(b) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003" does not justify the Court in now making a declaration to the contrary effect. The recital evidenced the Court's conclusion that the jurisdictional requirement in s 13(2)(b) for the making of a supervision order was satisfied when the order was made. The Court no doubt made an informed prediction that this state of affairs would continue for the period stated in the order. It does not follow that the supervision order implies a statement by the Court at any subsequent time that the appellant remains a serious danger to the community. As the primary judge pointed out, the regime under the DPSO Act requires the making of "imperfect assessments about the risk that a person will commit a serious sexual offence if released from custody in the absence of a supervision order being made"[26] and "the period that is stated in the order is, at best, an informed prediction by the Court about the period that the person is likely to remain a serious danger to the community in the absence of a Division 3 order", a "prediction [which] may be falsified by subsequent events and developments, including the enhanced rehabilitation of the offender and an unexpected moderation of risk."[27] The predictive nature of the

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25 [2007] 2 Qd R 1, at [17].
26 [2015] QSC 64, at [36].
27 [2015] QSC 64, at [37].

exercises required by the DPSO Act was apparent when the High Court upheld the validity of that Act in *Fardon v Attorney-General (Qld)*.[28] Callinan and Heydon JJ referred to the absence of novelty in the process of reaching a predictive conclusion about risk, noted that the Family Court undertakes a similar process on a daily basis, and also noted that sentencing itself "may be a predictive exercise requiring a court on occasions to ask itself for how long an offender should be imprisoned to enable him to be rehabilitated, or to ensure that he will no longer pose a threat to the community."[29]

[34] The making of a declaration could not have any practical effect in the absence of a consequential order discharging the supervision order or providing for its early termination. Such a declaration would have no utility. The appellant has not demonstrated any error in the primary judge's exercise of the discretion to refuse the declaration.

Is the DPSO Act constitutionally invalid under the principle established by *Kable v Director of Public Prosecutions (NSW)*?

[35] *Kable v Director of Public Prosecutions (NSW)* established the principle that State legislation that purports to confer upon a State court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role under Ch III of the Constitution as a repository of federal jurisdiction and as a part of the integrated Australian court system, is constitutionally invalid.[30]

[36] The essence of the appellant's argument that the DPSO Act infringes the principle in *Kable* is that the Supreme Court is required "to maintain a declaration that is not true, contrary to the Court's own finding,"[31] such that the reasoning and logic of the primary judge contradicted the supervision order.[32] For the reasons given in [33] there is no such contradiction.

[37] The DPSO Act is not constitutionally invalid on the ground articulated by the appellant.

Proposed order

[38] The appeal should be dismissed.

[39] **PHILIPPIDES JA:** I have had the advantage of reading the draft reasons of Fraser JA. I agree with those reasons and with the order proposed.

[40] **MULLINS J:** I agree with Fraser JA.

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28 (2004) 223 CLR 575.

29 (2004) 223 CLR 575, at [225], [226].

30 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Duncan v Independent Commission Against Corruption* (2015) 324 ALR 1, at [16] (French CJ, Kiefel, Bell and Keane JJ); *North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* [2015] HCA 41, at [39] (French CJ, Kiefel and Bell JJ), [184] (Keane J).

31 Outline of submissions on behalf of the appellant filed 20 August 2015, at [61].

32 Transcript, 28 August 2015, at 1-14.