SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Penningson* [2016] QSC 146
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **PAIS WANMAN PENNINGSON** (respondent)
FILE NO:	BS No 2031 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2016
JUDGE:	Burns J
ORDER:	**Being satisfied to the requisite standard that the respondent, Pais Wanman Penningson, is a serious danger to the community in the absence of an order pursuant to Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003, the court orders that Pais Wanman Penningson be detained in custody for an indefinite term for control, care and treatment.**
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 5 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 for an order pursuant to Division 3 of Part 2 of that Act – 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 Act – whether the adequate protection of the community could be reasonably and practicably managed by a supervision order – whether the requirements under s 16 of the Act could be reasonably and practicably managed by corrective services officers *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 5, s 9A, s 13, s 16, s 27, s 28

Attorney-General (Qld) v Beattie [2007] QCA 96
Attorney-General (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324
Attorney-General (Qld) v Kanaveilomani [2013] QCA 404
Attorney-General (Qld) v Phineasa [2013] 1 Qd R 305; [2012] QCA 184
Attorney-General (Qld) v Sutherland [2006] QSC 268
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46
Kynuna v Attorney-General for the State of Queensland [2016] QCA 172
Turnbull v Attorney-General (Qld) [2015] QCA 54

COUNSEL: J B Rolls for the applicant
J W J Fenton for the respondent

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

[1] By this application, the Honourable Attorney-General for the State of Queensland seeks an order pursuant to Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 detaining the respondent, Pais Wanman Penningson, in custody for an indefinite term for care, treatment or control: s 13(5)(a). In the alternative, if the court is minded to release Mr Penningson from custody, the Attorney-General asks that he be released subject to a supervision order under the Act: s 13(5)(b).

[2] It was not in issue on the hearing of the application that Mr Penningson is a serious danger to the community in the absence of a Division 3 order.[1] Rather, for Mr Penningson it was submitted, at least initially, that the adequate protection of the community could be ensured by his release subject to a supervision order,[2] and a draft supervision order containing a range of conditions was supplied to the court to that end.[3] On the other hand, the Attorney-General pressed for the making of a continuing detention order. It was argued that Mr Penningson was largely untreated and, relying on the opinion of psychiatrists who gave evidence at the hearing (Drs Grant, Sundin and Harden) it was submitted that the adequate protection of the community could not be ensured by his release on supervision.

[3] For the reasons that follow, I am satisfied by acceptable, cogent evidence and to the high degree of probability required by the Act that Mr Penningson is a serious danger to the community in the absence of an order pursuant to Division 3 of Part 2 of the Act. However, I am not satisfied that the adequate protection of the community or the requirements of s 16 of the Act can be reasonably and practicably managed by a supervision order. Accordingly, it will be ordered that Mr Penningson be detained in custody for an indefinite term for control, care and treatment.

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1 Outline of Submissions on behalf of the Respondent, par 2.
2 Ibid par 21.
3 Exhibit C.

Background

[4] Mr Penningson is only 20 years of age. He was born in Townsville and comes from a large family; he has three sisters and seven brothers. His mother was raised on Thursday Island and his father is from Papua New Guinea. The family, including the younger siblings, still reside in Townsville. As Mr Penningson said to Dr Sundin, his parents were "good people" who had "been through heaps" with him.[4]

[5] Mr Penningson was expelled from school when he was about 14 years of age and did not return. There were otherwise a number of learning and behavioural issues before this point in time but, despite all of that, Mr Penningson managed to achieve some degree of literacy and numeracy, although both are limited.

[6] He first started consuming alcohol at around 10 years of age and was a heavy user of cannabis by the age of 15. According to him, he had no contact with Child and Youth Mental Health Services until he first went to prison. Whilst in prison, he was diagnosed with Grand Mal Epilepsy and he now takes medication (sodium valproate) twice daily to manage his seizures. He also takes an anti-depressant (Lexapro). He is currently an open patient of the Prison Mental Health Service.

[7] In March 2014, a safety order was made for Mr Penningson's protection after he stated to Corrective Services officers that he was experiencing thoughts of hanging himself. He also told Dr Harden that he had at times in the past engaged in self-harming behaviour when he was upset. He also reported that, from about the age of 17, he started hearing voices inside his head when he was especially stressed.

[8] From about the age of 15, Mr Penningson was in a relationship with a young woman "off and on for two years living some weeks at her parents' home and with him occasionally returning to his parents' home".[5] Although this relationship ended prior to Mr Penningson being taken into custody, the union produced a son born in December 2012. He reported that his former partner visited him in prison "every two or three weeks" and that they previously also kept in contact by telephone but that had ceased.[6]

Criminal history

[9] Mr Penningson has some juvenile history dating back to 2012. Of particular relevance to this application, however, are the offences that occurred on 18 November 2012 and 23 May 2013 when Mr Penningson was aged 16 and 17 years respectively.

18 November 2012

[10] There were two episodes of offending on 18 November 2012, only one of which resulted in convictions. Although the other episode became the subject of a criminal charge, it was discontinued. Nonetheless, in the accounts Mr Penningson gave to Drs

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4 Report dated 20 April 2016, 16.
5 Report of Dr Sundin dated 20 April 2016, 17.
6 Report of Dr Harden dated 6 December 2015, 7.

Harden and Grant, he accepted that the conduct relied on to found the discontinued charge had taken place.[7]

[11] Although a discontinued charge could not form part of a prisoner's "criminal history" within the meaning of s 13(4)(g) of the Act, if the conduct giving rise to the discontinued charge is later admitted by the prisoner or is otherwise proven to the satisfaction of the court, such conduct may nevertheless be capable of constituting a "relevant matter" within the meaning of s 13(4)(j). Of course, any such conduct must still be relevant to the question whether the prisoner is a serious danger to the community in the absence of a Division 3 order but, if it is, the court *must* have regard to it in deciding that question: s 13(4). Given the content of the admissions made by Mr Penningson to Drs Harden and Grant, I am satisfied that the conduct underlying the discontinued charge is a "relevant matter" in that sense, and Mr Penningson's counsel did not submit otherwise.[8] That conduct must therefore be taken into account (along with the other matters specified in s 13(4)) when deciding whether Mr Penningson is a serious danger to the community.

[12] That made clear, the first episode of offending on 18 November 2012 occurred at around 7.00 pm. The complainant, a 27 year old female, was out running for exercise along a street in Wulguru, a suburb of Townsville. She heard a male shout out to her. The complainant pretended to ignore him, but called her husband on her mobile telephone. She then began walking to the home of friends who lived on the same street, but Mr Penningson followed. When he caught up with the complainant, he took hold of her arm and asked if he could hug her. The complainant told him to go away and then screamed for help. Mr Penningson put his hand over the complainant's mouth and placed her in a headlock. He grabbed her singlet strap and brassiere and tried to pull them down. He pushed her against a fence and rubbed his erect penis against her crotch while trying to pull down her shorts. Fortunately, the complainant's husband was by then running towards them and, when Mr Penningson saw him, he fled. As he let go of the complainant, she collapsed to the ground.

[13] On 18 July 2013, police attempted to speak with Mr Penningson at the Townsville Correctional Centre about this incident. After he declined to participate in a record of interview, he was charged with sexual assault and remanded in custody. Subsequently, the prosecution was discontinued when it was discovered that a DNA profile obtained from a tape lift of the complainant's brassiere was insufficiently conclusive to prove that Mr Penningson had been the assailant.

[14] The second episode of offending occurred approximately four hours after the first. The complainant in this instance was a 32 year old female who lived in Wulguru with her nine year old daughter. After hearing a noise at her back door and, a short time later, at her kitchen window, she sent a text message to her mother to the effect that she thought someone was trying to break into her home. She then checked on her

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7 See, e.g., Report of Dr Harden dated 6 December 2015, 3, where it is recorded that Mr Penningson "was shown the Queensland Police Service Brief account and agreed that [it] was in general accurate". That account is exhibited to the affidavit of Ms Murphy filed on 25 February 2016, Exhibit CLM3. And see to similar effect the report of Dr Grant dated 4 April 2016, 6-7. According to Dr Sundin, Mr Penningson "gave no account of the offences involving the woman jogger" (or, for that matter, the offences that occurred on 23 May 2015 and for which Mr Penningson was convicted and sentenced): Report of Dr Sundin dated 20 April 2016, 15.

8 T. 1-31 – 1-32.

daughter who was asleep in her bedroom. The complainant then spoke to her mother who told her to call the police.

[15] As the complainant was dialling "Triple 0", she heard the sound of breaking glass at the rear of her home. She rushed into her daughter's bedroom and leant against the closed bedroom door. She was still on the phone to the Emergency Services operator when Mr Penningson made his way into the house and pushed on the bedroom door. The complainant shouted that she was calling the police. Undeterred, Mr Penningson forced the door open and said, "If you come with me I won't stab you". At the same time, he took hold of the complainant from behind and pulled her towards him. He was holding a knife that he had taken from the complainant's kitchen. Her daughter then awoke and, seeing what was going on, screamed at Mr Penningson to let go of her mother, but he instead moved the knife to the complainant's throat and said, "You're going to have sex with me". With that, the complainant grabbed hold of the blade and, as she did so, it snapped off in her hand. Mr Penningson, perhaps not aware that the blade had broken away, gestured towards the complainant's daughter and said, "I'm going to stab her first". He then suddenly released his hold on the complainant and ran from the house.

[16] The police arrived on the scene a short time later and, amongst other things, located the handle of the knife. A DNA profile was later obtained from the handle and it was for all intents and purposes found to match Mr Penningson's DNA. When spoken to by police, he refused to participate in a police interview. He was charged with entering a dwelling with intent, assault with intent to rape, deprivation of liberty and common assault.

[17] Mr Penningson pleaded guilty to these offences in the Children's Court at Townsville on 12 May 2014 and was sentenced as an adult. By then he had been in custody on remand for 355 days. He received an effective head sentence of 18 months' imprisonment and, after a declaration of pre-sentence custody was made, a parole eligibility date of 23 May 2014 was fixed. Included in the sentencing remarks were these pertinent observations:

> "It is the stuff that women have nightmares about, really. Someone coming and forcing their way into the house and threatening to rape them and threatening the child and producing a knife. It all is terrifying. I do not need to see a victim impact statement to know that that will have had an enormous effect on that woman and on the child. That is what really disturbs me. The child saw this."

23 May 2013

[18] A little after midnight on 23 May 2013, Mr Penningson made telephone contact with a 26 year old sex worker. A booking was made after which the woman drove to an address in Wulguru that had been provided by Mr Penningson. On arrival, Mr Penningson was waiting outside. He said that he wanted to be taken to her place. She asked whether he had money and he told her they would need to stop at an ATM on the way to her apartment. The woman agreed and Mr Penningson got into the front passenger seat of her vehicle. When they stopped at an ATM, Mr Penningson produced a knife and placed it forcefully on the left-hand side of the woman's throat. It was a slim steak knife, about 20 cm in length. Mr Penningson said, "Don't do anything stupid or I will hurt you". The woman tried to push Mr Penningson away and pleaded for him not to hurt her. He took hold of her left hand and again threatened to hurt her if she did anything "stupid". He then demanded that the woman give him

her vehicle. At about this time, a security vehicle pulled up in the near vicinity. When this occurred, Mr Penningson moved the knife from the woman's throat but positioned it about 30 cm from her body. He then took her car keys, mobile telephone and handbag, alighted from the vehicle and ran across the road.

[19] The police were called and, on arrival, searched the area. Mr Penningson was spotted hiding behind a store, a short distance from where the woman's vehicle was parked. When he saw the police approach, he fled into nearby bushland but he was quickly apprehended. He told police, "I was there, but it was someone else who had the knife". Although Mr Penningson participated in a record of interview later that morning, he made a number of denials and was subsequently charged with attempted robbery (whilst armed, with personal violence), unlawful entry of a motor vehicle and assault/obstruct police. He was denied bail and was remanded in custody.

Mr Penningson pleaded guilty to these offences in the District Court at Townsville at the same time as he was dealt with for the offences arising out of the second episode on 18 November 2012 (entering a dwelling with intent, assault with intent to rape, deprivation of liberty and common assault). He was sentenced to a term of 12 months' imprisonment, cumulative on the 18 month term of imprisonment ordered with respect to the 2012 offences, but with the same parole eligibility of 23 May 2014).

Other matters

[20] It only remains to be said with respect to the offending on 18 November 2012 and 23 May 2013 that, when interviewed by Dr Harden, Mr Penningson said that he did not see his offences as having any sexual component. He attributed his behaviour to having been intoxicated, and stated that he would not have offended if he had not been intoxicated.

[21] Under the sentences imposed on 12 May 2014, Mr Penningson's full-time release date was 22 May 2016. However, on 18 May 2016, he was sentenced in the District Court at Townsville for assaulting a Corrective Services officer. He received a sentence of three months' imprisonment, suspended after four days for an operational period of six months. However, at a review held on 20 May 2016, it became apparent that the subject application could not be finally decided before Mr Penningson's release day. Accordingly, pursuant to s 9A of the Act, I ordered that the application be adjourned to 13 June 2016 for hearing and that Mr Penningson be detained in custody until it was finally decided.

Custodial history

[22] Following a Rehabilitation Needs Assessment that was carried out on 10 June 2014, it was recommended that Mr Penningson participate in educational and vocational programs relevant to his future employment and, of particular relevance to this application, programs to address his offending behaviour as well as his substance abuse.

[23] To that end, Mr Penningson was interviewed on 26 September 2014 and accepted a placement in the Getting Started: Preparatory Program to be delivered at the Townsville Correctional Centre. Although he attended a pre-program session on 3 December 2014 and completed the pre-program assessment component, he failed to

attend the first session of the program which was held on 28 January 2015. The program facilitators spoke with him the next day regarding his absence and tried to encourage him to attend the next session, but Mr Penningson refused to participate any further. In this regard, he told Dr Harden that the program was, "not for [him]", that he was "not that person to go and cause these offences", that "drugs [and] alcohol caused" them and that he just wanted to "look forward".

[24] Mr Penningson of course became eligible for parole on 23 May 2014. After receipt of his application for parole, the place nominated for his residence was assessed to be unsuitable. Although an alternative address was later submitted by Mr Penningson, the Parole Board deferred making a decision with respect to the application until further information was provided in relation to this alternative address as well as information regarding his participation in the Getting Started: Preparatory Program. The Board notified the respondent of its decision on 28 August 2014. As just discussed, Mr Penningson chose not to continue with that program and ended up serving the whole of the periods of imprisonment imposed on 12 May 2014.

The Legislative scheme

[25] 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.[9]

[26] 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.[10] The Attorney-General may apply for such an order,[11] and bears the onus of proving that the subject of any such application is indeed a "serious danger to the community".[12]

[27] 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.[13] A "serious sexual offence" means an offence of a sexual nature involving violence or against a child.[14]

[28] 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 a high degree of probability, that the evidence is of sufficient weight to justify the decision.[15]

[29] 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

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9 Section 3.
10 Section 13(1).
11 Section 5(1).
12 Section 13(7).
13 Section 13(2).
14 Section 2 and the Schedule to the Act, being the Dictionary. See also *Attorney-General (Qld) v Phineasa* [2013] 1 Qd R 305; [2012] QCA 184 at [23]-[45] per Muir JA; *Kynuna v Attorney-General for the State of Queensland* [2016] QCA 172 at [56] per McMurdo P.
15 Section 13(3).

community.[16] 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".[17]

[30] 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;
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> (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;
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> (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
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> (d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
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> (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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> (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."

[31] 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 order[18] or released pursuant to a supervision order subject to such requirements as the court considers appropriate.

[32] The correct approach to a consideration of the issues arising under these provisions was explained by McMurdo J (as his Honour then was) in *Attorney-General (Qld) v Sutherland*[19] as follows:

> "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.[20] There is no submission here that if the prisoner is a serious danger to the community,

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16 Section 13(6)(a).
17 Section 13(6)(b).
18 As to which, see *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [29].
19 [2006] QSC 268.
20 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46 at [19], [34]; cf in relation to s 30 *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [31].

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.

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*[21] 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.[22] The Court observed:[23]

> '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 made.[24] What must be proved is 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

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21 [2007] 1 Qd R 396; [2006] QCA 324.
22 Ibid [37].
23 Ibid [39].
24 Ibid.

> risk can be acceptable consistently with the adequate protection of the community.
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> 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."[25]

The evidence

[33] The main focus of the evidence assembled on behalf of the Attorney-General was the opinions expressed by Drs Grant, Sundin and Harden who each examined Mr Penningson, provided a written report and gave oral evidence at the hearing. No evidence was called on behalf of Mr Penningson.

Dr Grant

[34] Dr Grant expressed the opinion that Mr Penningson was affected by a childhood Conduct Disorder and possibly also Attention Deficit Hyperactivity Disorder which had now developed into an adult Antisocial Personality Disorder with some possible borderline traits. Dr Grant reported what he described as a "vague history of some auditory hallucinations"[26] and a family history of schizophrenia. He considered that Mr Penningson should be monitored in the future for warning signs of the development of a major mental illness, such as schizophrenia.

[35] Dr Grant discussed the index offending (that is, the two episodes on 18 November 2012 and the offences committed on 23 May 2013). He considered that the extent of the physical coercion and restraint involved in these offences, along with the premeditated use of a knife on two occasions, coupled with apparent sexual motivations was of great concern. Although none of these incidents progressed to "full-blown sexual assault",[27] Dr Grant could not exclude such a progression in the future. He reported that there was "considerable concern as to whether Mr Penningson might be progressing towards serious serial sexual offending".[28]

[36] Dr Grant assessed Mr Penningson using a range of formal risk assessment instruments and, in addition, conducted a clinical interview with him in order to provide an overall risk assessment to the court. On the Static 2002R, Mr Penningson scored in the moderate to high risk group for future sexual offending. On the Hare Psychopathy Check List, he achieved a score of 25 which indicated significant psychopathic traits for a man of his age. On the HCR-20, Mr Penningson achieved scores which indicated that he was in the high risk range for future violence including non-sexual and sexual violence. On the Risk for Sexual Violence Protocol, Mr Penningson returned significant scores in the areas of sexual violence history, psychological judgment, mental disorder, social adjustment and manageability. Overall, this indicated that his risk for future sexual violence was moderate to high and that his future management

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25 [2006] QSC 268 at [26]-[30]. See also *Attorney-General for the State of Queensland v Kanaveilomani* [2013] QCA 404 at [118]-[120] per Morrison JA; *Turnbull v Attorney-General (Qld*) [2015] QCA 54 at [36]-[37] per Morrison JA.

26 Report of Dr Grant dated 4 April 2016, 21.

27 Ibid.

28 Ibid.

would require monitoring and cessation of alcohol and drug abuse, treatment for alcohol and drug problems and participation in a Sexual Offender Treatment Program.

[37] Dr Grant provided the following risk summary:

> "Precise estimates of risk in Mr Penningson are made somewhat difficult by his youth and the somewhat unusual nature of his offending and medical history. However, overall his history is of concern. The fact that such violent, potentially sexually aggressive behaviour has occurred at this young age is of considerable concern. Intoxication is clearly an issue in disinhibiting this behaviour but I believe that it is not by any extent the total explanation for his behaviour. Overall I consider the risk for future sexual offending to be moderate to high.
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> There is a high risk of future violent offending, in my opinion. His custodial behaviour has demonstrated the propensity for interpersonal violence."[29]

[38] The following recommendations were then made by Dr Grant for Mr Penningson's management:

> "In my opinion, Mr Penningson requires quite close psychiatric monitoring to assess whether he might be developing a more serious mental illness. I note that he is receiving some medication and it is unclear whether that represents antidepressant medication or the new imposition of some antipsychotic medication. Future psychiatric review would be important to clarify the issues and attempt to assist Mr Penningson with his anxiety and possible psychotic symptomatology with appropriate medication. Compliance may be an issue.
>
> Interventions will be necessary to address alcohol and substance abuse. Mr Penningson sees alcohol abuse as having been a major factor in his offending and it is certainly a relevant factor. Drug abuse prior to coming to prison mainly involved marijuana. However, he now says that he is regularly using Subutex[30] in custody illicitly and that he needs that to control his stress. He has some recognition that the use of illicit drugs in prison is a rather poor prognostic factor for him in achieving abstinence from substances once he leaves prison. I believe that reversion to drugs and/or alcohol would be a major risk when he leaves prison and would be a significant risk factor for re-offending.
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> …
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> Once he has undergone psychological assessment it would be easier to plan future treatments. I believe he needs to undergo a substance abuse program and it would be important for him to also undergo a Sexual Offender Treatment Program, preferably prior to release from custody. Depending on psychological assessment he might be suitable for a Medium Intensity Sexual Offender Program or who may need to have the Inclusions Program for people with some intellectual deficits. In my opinion, the application of those treatment programs prior to leaving custody is important to attempt an increased level of insight and motivation on Mr Penningson's part and also to clarify the risk issues and how they might best be managed if he was released into the community."[31]

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29 Ibid 23-24.

30 When Dr Sundin gave evidence, she explained that Subutex is a synthetic opiate which is used to manage persons with an opiate dependency but that it was "quite vigorously [and illicitly] traded within the prison environment": T. 1-11.

31 Report of Dr Grant dated 4 April 2016, 24-25.

[39] Dr Grant then went on to discuss release from custody on a supervision order. He expressed the opinion that, if Mr Penningson was "released untreated", the "chances of him lasting without early breaches of the order would be low".[32] Similarly, he considered that the chances of Mr Penningson successfully complying with treatments and being abstinent from substances in the community would be low, even with the helpful support of his family.

[40] In oral evidence, Dr Grant was asked why he had expressed the opinion in his report that Mr Penningson should undertake treatment for substance abuse and sexual offending prior to his release from custody. In response, Dr Grant pointed to the intensive programs that are available in custody compared to what is available by way of treatment in the community. He said that the former "are regarded as the more effective way of undergoing such treatment".[33] He made the point that Mr Penningson has an ongoing problem with substance abuse and has been using Subutex illicitly (and intravenously) while in custody on almost a daily basis. He remarked that Mr Penningson was not even "in a state of abstinence to … start off with".[34] As such, Mr Penningson was unlikely in Dr Grant's opinion to be abstinent and able to participate in appropriate treatment in the community. He considered that the chances of Mr Penningson living within the community under the terms of a supervision order were low and that he would find it very difficult going from a position of being drug dependent in prison to being drug free in the community.

[41] Dr Grant rejected the proposition that a supervision order might operate as a type of "early warning system" so that the authorities were alerted to any difficulties Mr Penningson was experiencing before he offended in any sexually violent way. He said that it could not be assumed that there would be a "kind of prolonged period of lead up with substance abuse before an offence occurs".[35] He said that it was likely that there would be some other form of offending or drug or alcohol taking behaviour that would precede any sexually violent offending but said that the "time relationship" between that behaviour and the offending was "not completely predictable".[36]

[42] Dr Grant described Mr Penningson as "quite a troubled and disturbed young man".[37] He was impulsive with a great deal of behavioural disturbance in his past. Dr Grant doubted whether he understood the relationship between his substance abuse and his offending. He expressed the opinion that Mr Penningson would only "get that understanding by undergoing a thorough treatment program".[38] Dr Grant also pointed out that intoxication was not the sole explanation for the index offences. In particular, he observed that there was "a severe personality disorder emerging in this young adult now".[39] As to the suggestion that "nothing more than a supervision order is required" given that Mr Penningson was 17 years of age at the time of the last of the index offences and will have matured in custody to some degree, Dr Grant said that this was a "hopeful theoretical statement" and that if one looked at Mr Penningson's progress in custody, he "hasn't matured much at all".[40] He pointed to Mr Penningson's several

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32 Ibid 25.
33 T. 1-18.
34 Ibid.
35 T. 1-19.
36 Ibid.
37 T. 1-20.
38 Ibid.
39 Ibid.
40 T. 1-22.

prison disciplinary breaches and the feature that he was still abusing drugs whilst in custody.

[43] In cross-examination, Dr Grant was asked whether further custody would adversely affect Mr Penningson in the sense that he would become institutionalised. Dr Grant agreed that long periods of incarceration can produce institutionalisation but that, in Mr Penningson's case, he saw benefits in continued detention because it would help him to develop routines to live within normal limits, to curb his violent behaviours and to cease using drugs. He confirmed his opinion that, if a supervision order was effective to manage Mr Penningson within the community, the risk of future violent sexual offending was low to moderate. However, Dr Grant emphasised that such a reduction in risk could only come about if Mr Penningson was able to live within the strictures of a supervision order and not breach it. He repeated his opinion that the chances of that occurring were low.

Dr Sundin

[44] Dr Sundin reported that Mr Penningson was "a very concerning individual".[41] She referred, in particular, to something Mr Penningson said during their clinical interview about the second episode of offending on 18 November 2012, as follows:

> "At his interview with me, I was very concerned by Mr Penningson's statement that had he not been interrupted by what he thought was the police, that he would have cut the woman's throat and that he was seeking to engage in a high risk behaviour as he '*wanted to try something more serious*'."[42] [Emphasis in original]

[45] Dr Sundin recorded that none of the victims were known to Mr Penningson, that each of the offences appeared to have occurred "precipitously and opportunistically"[43] and that he was intoxicated on each occasion. She referred to what she described as a "significant history of violence dating back to primary school years" as well as "multiple serious breaches within the prison for prisoner-on-prisoner assaults" as well as Corrective Services staff.[44] Of added significance was the feature that Mr Penningson had refused to engage in any relevant therapeutic programs.

[46] Dr Sundin regarded Mr Penningson's "unmodified risk of sexual re-offending within the community [as being] moderate tending to high".[45] She then expressed these opinions:

> "Given his immaturity, impulsivity and institutional record, I think that there is a high chance of him quickly reverting back into alcohol and substance abuse within the community shortly after release. Such behaviour is likely to be associated with re-engagement with anti-social acts, violent behaviour and sexually violent behaviour.
>
> Future victims are likely to be adult females who will be assaulted at a time when Mr Penningson is intoxicated. There is a significant risk of a high degree of harm to adult victims; given his past history of use of weapons.

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41 Report of Dr Sundin dated 20 April 2016, 2.
42 Ibid.
43 Ibid.
44 Ibid.
45 Ibid 3.

> As yet, Mr Penningson has not engaged in any intervention programmes within the prison which might have the effect of modifying his risk.
>
> In my opinion, he needs to undertake both the Pathways Programme and the Medium Intensity Sexual Offender's Programme or the indigenous equivalent; the Sexual Offender's Programme for Indigenous Males".[46]

[47] Otherwise, Dr Sundin was of the opinion that Mr Penningson met the DSM-V criteria for Anti-Social Personality Disorder with significant psychopathic traits and Polysubstance Use Disorder (alcohol, cannabis and the use of Subutex whilst incarcerated). She agreed that Mr Penningson would have likely met the criteria for juvenile Conduct Disorder, childhood Attention Deficit Hyperactivity Disorder and possibly Oppositional Defiant Disorder. She confirmed that he suffers from Grand Mal Epilepsy.

[48] By reference to the risk assessment instruments she used, Dr Sundin reported that, on the Static-99R, Mr Penningson was revealed to be a high risk of sexual recidivism relative to other known adult male sex offenders, on the Sex Offender Risk Appraisal Guide, he placed in the highest category and within a population considered to be at 100% risk of sexually violent reoffending within 10 years, on the Hare Psychopathy Rating Scale, he scored scored highly on antisocial and lifestyle risk factors and, on the Sexual Violence Risk Scale-20, he was assessed as being a high risk for future violent sexual recidivism.

[49] Dr Sundin made this recommendation:

> "In my opinion, the risk of potential recidivism is sufficiently high and the risk of serious physical harm to victims of sufficient concern that I would respectfully recommend to the court that consideration be given to Mr Penningson's continued detention in prison until completion of such programmes."[47]

[50] In oral evidence, Dr Sundin confirmed her opinion that Mr Penningson should complete prevention programs before his release – the Pathways Program to address his problem with poly-substance abuse and the Sexual Offenders' Treatment Program. She also suggested that intelligence testing occur so that the programs best suited to Mr Penningson's cognitive skills are selected or, in his case, perhaps modified. She believed that Mr Penningson should remain in custody until he had completed both programs because, she said, "his current institutional record shows that he's not really being adequately managed … as regards his potential risks as a danger to others".[48] In this regard, she made mention of the "physical violence that he's been caught up in" as well as his "ongoing substance abuse whilst in prison".[49] She did not think that the risk Mr Penningson currently poses to the community can be adequately managed on a supervision order in the usual form. She was asked to comment on a suggestion that a supervision order "would work because of the blanket prohibition on the use of drugs and alcohol" as well as random testing, but she said that the problem was that there had been "no time gap" between Mr Penningson's abuse of substances and the index offences. Because of this, she said:

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46 Ibid.
47 Ibid 24
48 T. 1-8.
49 Ibid.

> "[A] supervision order isn't going to pick up on the abuse of substances and enable interpolation of some sort of action to stop a sexual offence occurring".[50]

[51] Dr Sundin expressed the opinion that the Pathways Program would provide Mr Penningson with a much greater degree of comprehension of the need for him to abstain from the abuse of substances. It would also provide instruction on alternative behaviours that could be utilised to avoid Mr Penningson relapsing. It would also attempt to make Mr Penningson stop and think about the consequences of his behaviour before he offends. She emphasised that Mr Penningson's problems are not merely limited to alcohol abuse and that the Pathways Program was multifaceted.

[52] So far as the Sexual Offenders' Treatment Program is concerned, Dr Sundin hoped that completion of this program by Mr Penningson would help him to start to understand his "pathway to offending, to identify belief systems that have predisposed him to offending" and to ultimately help him to "develop a plan that would increase his safety within the community".[51] She was asked whether Mr Penningson could undertake that type of program in the community rather than in prison, but she said that there was "nothing in the community that would provide the level of intensity, one on one challenge that [Mr Penningson would] get from doing the program".[52] She said that he also needed a "properly contained environment with easy access to prison mental health services",[53] psychologists and the like to give him the best chance of success. That type of regime is simply not available in the community.

[53] When cross-examined, Dr Sundin did not agree that any return to sexual offending would necessarily be accompanied by "warning signs". She did agree that minor breaches of a supervision order were possible before a return to sexually violent offending. She did agree that a return to sexual offending would be preceded by breaches such as alcohol or drug use. She was then referred to an affidavit read on behalf of the Attorney-General from the acting manager of the High Risk Offender Management Unit, Ms Cowie, regarding an enquiry she had made with an organisation known as Psylution Worx regarding the availability of various forms of treatment in the community that would be available if a supervision order was made. Dr Sundin was then asked whether such a regime would address Mr Penningson's outstanding treatment needs and she replied that it would not. She pointed out that she, along with Drs Grant and Harden, had each recommended that Mr Penningson should be treated before he is released into the community. She also said that, based on what was known regarding Mr Penningson, she expected that he would probably "breach fairly quickly once on a supervision order".[54] Further, Dr Sundin said:

> "I think there's a chance he could sexually offend quickly, but I think there's a very high chance that he will go out and breach in a very short space of time which will then send him straight back into prison and we'd be in exactly the same place we are now".[55]

[54] Dr Sundin added that Mr Penningson is "clearly struggling to even acknowledge that he has a polypharmacy abuse problem" and that he is potentially "developing a

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50 Ibid.
51 T. 1-10.
52 Ibid.
53 Ibid.
54 T. 1-14.
55 T. 1-14.

psychotic illness", the latter of which is "likely to be detected more quickly in prison than it is in the community".[56] She did not think that GPS monitoring to ensure compliance with a curfew was a "failsafe" because they could be "very easily removed and individuals do breach curfews whilst wearing GPS monitors".[57]

Dr Harden

[55] Dr Harden also administered a number of assessment instruments. On the Static-99R, Mr Penningson placed in the high risk category for sexual recidivism. On the Stable 2007, he placed in the high needs group in terms of a sexual offender's dynamic risk. On the Sex Offender Risk Appraisal Guide, he was in the highest risk category with the consequence that he had a 100% rate of violent or sexually violent re-offending at seven years and a 100% rate at 10 years. On the Hare Psychopathy Checklist, there was a significant elevation with regard to anti-social acts and lifestyle factors. On the SVR-20, he was generally in a high risk category on the measure of sexual violence risk.

[56] Dr Harden expressed these opinions:

> "His ongoing modified risk of sexual re-offence in the community is in my opinion at least moderate – high and possibly high.
>
> If he is released from custody without further intervention or planning it is very likely that he will return to alcohol abuse within days to weeks. Then it is very likely that he will commit other interpersonal violent offences and some of these are likely to be sexual in nature.
>
> His greatest risk factors are in my opinion, substance intoxication, impulsiveness, poor problem-solving skills, negative emotionality and problems cooperating with supervising authorities.
>
> If he were to reoffend sexually, it is likely to be while intoxicated. The victims are likely to be adult females and are likely to be opportunistic victims. They could be known to him or strangers. Physical injury is possible. The use of weapons is likely.
>
> If he were to be placed on a supervision order in the community, in my opinion the risk of sexual recidivism would reduce to low to moderate."[58]

[57] Otherwise, Dr Harden diagnosed Mr Penningson as suffering from Antisocial Personality Disorder and Poly-Substance Abuse. In his view, Mr Penningson should remain abstinent from alcohol and substance intoxication permanently. He also expressed the opinion that, ideally, Mr Penningson should undertake substance abuse and sexual offender programs prior to his release into the community.

[58] When Dr Harden gave oral evidence, he explained why he had expressed the view in his report that Mr Penningson should undertake treatment before his release:

> "He's clearly got issues associated with sexual offending and substance misuse, which are untreated and unaddressed, and largely unexplored. And also the programs for those things are not readily available in the community."[59]

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56 T. 1-15.
57 T. 1-16.
58 Report of Dr Harden dated 6 December 2015, 20.
59 T. 1-27.

[59] Dr Harden then went on to expand on the benefits of the in-custody programs that had been recommended for Mr Penningson compared to the treatment available within the community. He said, "Community based programs tend to be either individual based, brief, low in intensity, or all three".[60] Although he accepted that there would be some reduction in risk associated with the strictures of a supervision order, he said that it was "[hard] to be sure about" the quantum of that reduction because there were in his opinion too "many unanswered questions about [Mr Penningson] and also because … his personality dysfunction is severe".[61] He added that Mr Penningson is "impulsive, unpredictable and doesn't comply".[62] Dr Harden said that his experience was that "people who are non-compliant in detention are even less likely to be compliant in the community, even on a supervision order".[63]

[60] As to the proposition that a return to offending would be preceded by other breaches of a supervision order, Dr Harden said that such breaches and the subsequent offending "could all happen … within a couple of hours".[64] He regarded Mr Penningson's prospects of complying with a supervision order as "poor".[65]

Determination

[61] As stated at the outset, it was not in issue on the hearing of the application that Mr Penningson is a serious danger to the community in the absence of a Division 3 order. The case was fought instead, initially at least, on the question whether Mr Penningson should be detained for an indefinite term for care, treatment or control (s 13(5)(a) of the Act) or released subject to a supervision order (s 13(5)(b)).

[62] Despite the concession made on behalf of Mr Penningson, it is still necessary for the court to consider whether Mr Penningson is a serious danger to the community in the absence of a Division 3 order. For the reasons earlier expressed, it will only be if that is so that the court need concern itself with whether the adequate protection of the community or the requirements of s 16 of the Act can be reasonably and practicably managed by a supervision order.

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

[63] Mr Penningson is clearly a troubled young man. His background prior to being taken into custody in 2013 was marked by violence as well as alcohol and substance abuse. He is already afflicted with a number of mental health issues and there are real fears that he is in the early stages of developing a more serious mental health condition such as schizophrenia.

[64] The index offences are revealing of someone who, whilst intoxicated, engaged in offending that I have no doubt was sexually motivated. Two of the three episodes of offending involved the use of a knife. Each involved physical coercion to some degree. Furthermore, the nature of the offending significantly worsened between the first and second episodes on 18 November 2012 and, then again, between that episode

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60 T. 1-28.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 T. 1-30.

and the offending that occurred in the early hours of 23 May 2013. Mr Penningson went from sexually accosting a female jogger to, only a few hours later, using a knife to invade a woman's home and, finally, to what was effectively an abduction of a sex worker where he again resorted to the use of a knife. The account he gave Dr Sundin to the effect that, had he not been interrupted during the second of the two episodes that occurred on 18 November 2012, he would have slit the woman's throat was chilling. That, of course, was the attack that occurred in the presence of the woman's nine-year-old daughter. It is therefore unsurprising that Dr Grant, for example, expressed the concern that Mr Penningson might be progressing towards "serious serial sexual offending".

[65] In the opinions expressed by each of the psychiatrists, Mr Penningson currently presents as a moderate to high risk of reoffending in a sexually violent way. That risk has not been reduced or modified in any way whilst he has been in custody because, of course, Mr Penningson has refused to participate in the treatment options that have been offered to him. As well, whilst in custody he has continued his abuse of illicit substances and exhibited a number of concerning behavioural issues on several occasions. He is difficult to handle and refuses to be treated. He has very little, if any, insight into the depths of his problems or their relationship to his past offending.

[66] Psychiatric opinions offered in evidence are to the effect that any future sexually violent offending will likely be perpetrated against adult females at a time when Mr Penningson is intoxicated and, if that occurs, there is a significant risk of a high degree of harm to the victims. The use of weapons is likely. In this regard, it is useful to keep in mind what was said by Keane JA (as his Honour then was) in *Attorney-General (Qld) v Beattie*[66] 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".[67] As such, even if the risk that Mr Penningson might reoffend in a sexually violent way was only at a moderate level, there remains a high risk of very serious harm being caused to a future victim if that were to occur. Overall, the risk that Mr Penningson will commit a serious sexual offence within the meaning of the Act if he is released from custody or, alternatively, if he is released from custody without a supervision order being made is unacceptably high. The Attorney-General has established this by acceptable cogent evidence and to the high degree of probability required under the Act.

[67] I am therefore satisfied that Mr Penningson is a serious danger to the community in the absence of a Division 3 order.

Which order?

[68] 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 –

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66 [2007] QCA 96.
67 Ibid [19].

(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."

[69] 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*[68] 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 should be constrained to no greater extent than is warranted by the statute which authorised such constraint."[69]

[70] Drs Grant, Sundin and Harden are as one in the proposition that Mr Penningson should be treated before he is released. That will involve the satisfactory completion by Mr Penningson of both the Pathways Program and the Sexual Offenders' Treatment Program although, after intelligence testing, it may be that a modified form of either program will be seen to be more effective in Mr Penningson's case. It should also not be ignored that his mental health will require close monitoring.

[71] There seems to me to be little doubt that this treatment will be required before serious consideration can be given to Mr Penningson's release on a supervision order. That reality should not be seen in any way as a precondition to release but, rather, as a necessary step in the reduction of his risk profile. The fact of the matter is that, until Mr Penningson is treated, the risk of sexually violent reoffending is likely to remain at its current unacceptable level. Indeed, that will almost certainly be the position for so long as Mr Penningson continues to abuse illicit substances in custody, engages in violent behaviours and persists in his refusal to accept help.

[72] If Mr Penningson was released on a supervision order, whether on the conditions suggested in the draft provided by his counsel or on even stricter conditions, I do not consider that the adequate protection of the community or the requirements under s 16 of the Act could be reasonably and practicably managed by such an order. To the contrary, I would expect that such an order would be breached by Mr Penningson very quickly and in a way that would almost certainly involve the abuse of alcohol or drugs or both. If that were to occur, it is entirely possible that he would also reoffend in a sexually violent way. I do not consider that a supervision order would, in this particular case, operate as a form of "early warning system" to those responsible for supervising Mr Penningson so as to forestall him reoffending.

[73] It will accordingly be ordered that Mr Penningson be detained in custody for an indefinite term for control, care and treatment.

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68 [2007] 1 Qd R 396; [2006] QCA 324.

69 Ibid [39].

[74] That decided, I wish to add the following remarks in the hope that they may assist Mr Penningson as well as the Department in the future.

[75] Once an order is made of the kind I have just indicated, the scheme of the Act is such that the order becomes the subject of annual reviews by the court under Part 3 of the Act. However, by s 27(1A), the hearing of the first review and all submissions for that hearing must be completed "within 2 years after the day the order first had effect". Here, that will be by 24 June 2018. Thereafter, there must be subsequent annual reviews for so long as the order remains in effect: s 27(1B). Furthermore, a prisoner may apply to the court for his or her continuing detention to be reviewed if exceptional circumstances can be made out, but only after the first review has been conducted: s 28(1).

[76] It follows that, although the Attorney-General is obliged to make application to the court to cause the first review to be carried out, there is no obligation to do so any earlier than such time as will be sufficient to ensure that "the hearing … and all submissions for the hearing" are completed by 24 June 2018.

[77] At the hearing, counsel for Mr Penningson was able to indicate that there is now an appreciation on Mr Penningson's part that it will be necessary for him to complete the programs that have been recommended to address his offending behaviour. If so, that will take some time and, on the estimates provided at the hearing, probably not until well into 2017. However, if Mr Penningson does participate in, and satisfactorily complete, those programs, I would hope that the Attorney-General commences an application to facilitate the first review as soon as possible after that occurs given, in particular, Mr Penningson's youth.