SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Kennedy* [2016] QSC 287
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **DAMIEN PAUL KENNEDY** (respondent)
FILE NO/S:	BS No 9531 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2016
JUDGE:	Burns J
ORDER:	**The court, being satisfied to the requisite standard that the respondent, Damien Paul Kennedy, 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 (Qld), orders that the respondent be released from custody subject to the requirements set forth in the draft supervision order, being Exhibit 3 in the proceeding, until 5 December 2021.**
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 can be reasonably and practicably managed by a supervision order – whether the requirements under s 16 of the Act can be reasonably and practicably managed by corrective services officers

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 2, s 3, s 5, s 13, s 13A, s 16

Attorney-General (Qld) v Beattie [2007] QCA 96, followed
Attorney-General (Qld) v Fardon [2011] QCA 111, cited
Attorney-General (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324, cited
Attorney-General (Qld) v Kanaveilomani [2013] QCA 404, cited
Attorney-General (Qld) v Lawrence [2010] 1 Qd R 505; [2009] QCA 136, cited
Attorney-General (Qld) v Phineasa [2013] 1 Qd R 305; [2012] QCA 184, cited
Attorney-General (Qld) v Sutherland [2006] QSC 268, followed
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, cited
Kynuna v Attorney-General for the State of Queensland [2016] QCA 172, cited
Turnbull v Attorney-General (Qld) [2015] QCA 54, cited

COUNSEL: J Rolls for the applicant
J McInnes for the respondent

SOLICITORS: G R Cooper Crown Solicitor 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, Damien Paul Kennedy, 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 Kennedy from custody, the Attorney-General asks that he be released subject to a supervision order under the Act: s 13(5)(b).

[2] For Mr Kennedy, it was conceded that he is a person to whom the Act applies, that is to say, that he is a serious danger to the community in the absence of a Division 3 order. However, it was submitted that the adequate protection of the community can be ensured by his release subject to a supervision order for a duration of five years. The Attorney-General accepts that the evidence supports the making of such an order provided it contains conditions appropriate to Mr Kennedy's circumstances and, in particular, conditions designed to address his use of illicit substances. A draft supervision order containing a range of conditions was supplied by counsel for the Attorney-General to that end.[1] Of those proposed conditions, only one was contentious and it concerns where Mr Kennedy will be accommodated if he is released on supervision. In that regard, the Attorney-General submitted that Mr Kennedy should first be accommodated at the Precinct at Wacol so that he can be transitioned to the community after a settling-in period whereas Mr Kennedy wishes to reside with his sister in accommodation that has already been assessed by Corrective Services as suitable.

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1 Exhibit 3.

[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 Kennedy is a serious danger to the community in the absence of an order pursuant to Division 3 of Part 2 of the Act. Further, I am satisfied that the adequate protection of the community can be reasonably and practicably managed by a supervision order and that the requirements under s 16 of the Act can be reasonably and practicably managed by corrective services officers. As to Mr Kennedy's accommodation, it is appropriate that he be initially accommodated in the Precinct and, thereafter, at such place within the State of Queensland as may be approved by a corrective services officer by way of a suitability assessment. That will allow Mr Kennedy to move to the residence of his sister after a period of transition in the Precinct.

[4] Mr Kennedy's full time release date is today, 5 December 2016.

Background

[5] Mr Kennedy is 27 years of age. His parents separated at around the time of his birth and he lived with his mother until he was about six years of age. He then lived with his father although that was particularly fractious at times. He was exposed in his childhood to a range of undesirable influences, including the drug culture. Mr Kennedy was expelled from four separate primary schools and was in regular conflict with his teachers, as well as other students. He was prescribed Ritalin for Attention Deficit Hyperactivity Disorder between the ages of 8 to 12 years and was an outpatient with the Child and Youth Mental Health Services before the age of 13 years. At around that time, he was admitted to a substance abuse rehabilitation facility in Toowoomba for almost a year. Prior to his admission he was using cannabis on a daily basis and in significant quantities.

[6] As soon as he left the substance abuse rehabilitation facility, Mr Kennedy resumed his use of cannabis and, not long after, began using amphetamines. This, too, gradually increased to daily intravenous use. According to the history he provided Dr Harden, by the time of his incarceration at the age of 19 years, he was a daily user of illicit substances in one form or another.[2] He told Dr McVie that he was "spending $500 to $1000 per week on drugs" at that time and admitted that he was a "junkie".[3]

[7] Not surprisingly, Mr Kennedy has not had much in the way of an education. He has worked in a supermarket as a trolley pusher and in a job cleaning cars. In more recent times, Mr Kennedy has been employed as a joint sealer, doing work in bathrooms. It is said that he worked fairly consistently in that job when he was on parole, and this particular employment was provided to him by a friend with whom he had grown up. He believes that he will be able to regain that employment on his release from custody.

[8] Mr Kennedy also anticipates receiving support from various people in the community including the Catholic prison ministry, his parents, his older sister and the friend he hopes will again employ him. His sister is 28 years of age. She has recently married, has no children and resides with the husband in accommodation that, as I have already noted, has been assessed as suitable by Corrective Services as a place to accommodate Mr Kennedy if released on supervision. Otherwise, Mr Kennedy has been in three relationships of note and has maintained contact, to varying degrees, with each of these women since those relationships ended.

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2 Affidavit of Scott Harden filed on 16 September 2016, Exhibit SH-2 at p 7.

3 Exhibit 5 (Report of Dr McVie dated 31 October 2016 at page 5).

Criminal history and index offending

[9] Mr Kennedy has a reasonably extensive juvenile criminal history including convictions for offences in respect of which he was sentenced to short periods in detention. These were for stealing, wilful damage, common assault, possession of tainted property, possession of cannabis, possession of utensils, burglary, unlawful use of a motor vehicle, dangerous operation of a motor vehicle and evading fares. He was first imprisoned as an adult at the age of 17 years for a brace of offences including burglary and unlawful use of a motor vehicle.

[10] So far as the index offences are concerned, on 15 August 2008 Mr Kennedy pleaded guilty in the District Court at Brisbane to one count of assault with intent to commit rape, one count of rape, one count of stealing and one count of fraud. He was 18 years of age at the time of these offences and 19 at the time of sentence. The victim was a 49 year old sex worker.

[11] The circumstances of the offences were summarised by the Crown prosecutor at the sentencing hearing in this way:

> "On the 8th of March 2007, around 1 p.m., the prisoner attended at [the complainant's] townhouse. She asked him to come in and when he walked in she closed the door. She introduced herself and asked him what his name was and he actually said that his name was Jerry which was obviously not right. She asked him to leave his shoes on the tiles so he did that, including his socks. He walked back into the lounge room and she asked him whether his day went well and asked him to go upstairs.
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> …
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> She asked him if he was all right and he said that his money was in his shorts. She told him that he was a bit short of pockets. He told her that he needed to go to his car to get some more money. She said okay and [he] walked past her and down the stairs. She followed him down the stairs and then when he came around the bottom of the stairs she noticed that his left hand was spasming.
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> …
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> Her doorbell rang and the prisoner had come back in. He started talking about the police being everywhere. He walked through the lounge room and sat down in the chair, continually talking about four police cars looking for a blonde lady and that they had a warrant. The complainant at the time was wearing a blond wig.
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> …
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> He came out of the toilet and sat down into a chair and said that he was going to wait for about 10 to 15 minutes. She then told him to leave and opened the front door for some 30 centimetres for him. He tried to step behind her and she told him that the door opens this way and the shoes were there. The prisoner then slammed the door shut and grabbed the phone out of her hand and pulled … her arm behind his back.
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> She asked for her mobile back and at this point he punched her to the left side of her head. He grabbed her around the neck and pushed her towards the lounge room, or the lounge. They struggled. He continued punching her, hitting her and grabbing her around the head and upper body until she fell to the ground. He straddled her and was now again groping the top of his pants. He produced a pair of scissors, with one blade more pointy than the other.

…

> So he's put the scissors to her throat. She bit her hand and his fingers side on and the scissors fell as a result of her bitting him. He attempted to reach for them so she manoeuvred herself on top of the scissors. He punched her in the face as a result. He then grabbed her by her wig, on both sides of her head. He lifted her head off the ground and banged her head twice into the floor. He attempted again to bang her head a third time but this time her wig had come off. She attempted to grab at his testicles and it (sic) at this point in time that she decided to stop struggling. Obviously, thinking about the predicament she was in. He was still sitting on top of her. She put her hand up and touched his upper torso and told him that it was okay and that he didn't have to hurt her and asked him what he wanted.
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> She lay down. He climbed on top of her and she pulled her knees up and guided his penis into her vagina, as she didn't want him tampering with the condom. He then of course had sexual intercourse with her. He seemed to stop at one point and then continued again and he eventually ejaculated. He withdrew from her and pulled the condom off and she took some tissues and extended the hand then placed the condom in the tissue. He put his boxers and shorts on and picked up the things of his chair. He moved towards the door and apologised for hitting her."

[12] For Mr Kennedy, a report from a psychiatrist, Dr Schramm, dated 30 April 2008 was relied on by way of mitigation of sentence. Dr Schramm offered these opinions:

> "Mr Kennedy is a young man who was raised in what sounds like an extremely toxic family environment characterised by a mother who probably used and sold drugs herself and showed little effective parenting with regards your client. From an early age he has displayed a variety of antisocial behaviours and a moral code would likely have been exacerbated by what sounds like a concurrent attention deficit disorder during his formative years.
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> At the time of the offences, as was often the case when not in enforced abstinence, your client was in an acutely intoxicated state having consumed a large amount of amphetamines in a variety of forms. He had also had little sleep in the preceding 48 hours. At the time of the offences, it is likely that your client was in a state that could be diagnosed as 'psychotic' in that he was experiencing fleeting delusional ideas about police outside. In addition, he was also experiencing that agitation, impulsivity and severe impairment in judgment that is also associated with intoxication on amphetamines. There is little evidence to indicate that he was experiencing a psychotic illness independent of his being intoxicated."

[13] Mr Kennedy was sentenced to nine years imprisonment for rape, five years imprisonment for assault to commit rape and 280 days for each of the stealing and fraud counts. All terms of imprisonment were ordered to be served concurrently and presentence custody of 280 days was deemed to be time already served under those sentences. The sentencing judge, Noud DCJ, ordered that Mr Kennedy be eligible for release on parole on 9 November 2010. When passing sentence, his Honour remarked:

> "You come before the Court with some criminal history, but I can tell you at the outset, it does not loom large in the sentencing of you in the view I take of the matter. It is the seriousness with which I view the rape and the assault upon the woman that will lead, in this case, to a substantial sentence. And I am of the opinion that that must be so in spite of the very significant detail that Mr Brown, your counsel, has brought to my attention.

> In a sense your – and I am not overlooking the interests of the victim for a moment – moral culpability in relation to this offending is not of a high order. I say that because you have had very little opportunity in life. I was appalled actually to read the detail of it as set out in the psychiatrists report Exhibit 4.
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> But what has to be balanced against that in the opinion I hold is the need for there to be control over you for some considerable time. You have a serious problem. In my view it is associated with the abuse of drugs more so than with any sexual deviancy."

[14] Without in any way wishing to detract from the obvious seriousness of the offences for which Mr Kennedy was sentenced on 15 August 2008, it is to be observed that each of those offences was committed in one episode of offending and, further, that is the only instance in Mr Kennedy's past where he has committed a "serious sexual offence" within the meaning of the Act.

Custodial history

[15] Whilst in custody, Mr Kennedy has engaged in a range of sexual offenders' treatment programs[4] as well as a number of vocational programs. He also successfully completed the *Getting Smart and Stepping Up* substance abuse programs in 2011 and 2014. Unfortunately, he has a not insubstantial violation history which is, in the main, associated with failed drug tests. There was also an incident in 2015 when Mr Kennedy was found in possession of medication without approval. In all, there have been six major violations for being under the influence of drugs.

[16] As mentioned earlier, Mr Kennedy's parole eligibility date was 9 November 2010. However, he did not make a parole application until 10 June 2011. That application was refused on 28 November 2011 but, when Mr Kennedy applied again on 18 June 2012, the Queensland Parole Board decided to grant him parole on and from 29 January 2013.

[17] On 19 December 2013, Mr Kennedy's parole was suspended after he returned a urine sample that tested positive for amphetamine, methylamphetamine, cannabis, morphine and codeine. He was returned to custody on 10 January 2014.

[18] On 2 July 2014 Mr Kennedy was again released on parole but, 12 days later, he returned a positive urine sample for amphetamine, methylamphetamine and cannabis. On 25 July 2014, the Board cancelled his parole order because of these breaches.

[19] On 6 May 2015, Mr Kennedy was once again released on parole but a little over two months later (7 July 2015) his parole was suspended. This was because he was found in the company of a person known to him who had served a term of imprisonment (and who was subsequently charged with drug offences whilst he was in the company of Mr Kennedy) and because he failed to comply with reporting conditions (he did not answer his telephone on three occasions and was two hours late to his parole reporting appointment).

[20] Finally, on 21 September 2015, Mr Kennedy was released on parole for the last time but, on 23 October 2015, his parole was suspended following a positive urine test for amphetamine and methylamphetamine. The parole order was formally cancelled on 30

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[4] The *Getting Started: Preparatory Program*, the *Medium Intensity Sexual Offending Program* and the *Sexual Offending Maintenance Program.*

October 2015 and Mr Kennedy has remained in custody ever since. He is currently incarcerated at the Woodford Correctional Centre.

The legislation

[21] 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.[5]

[22] 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.[6] The Attorney-General may apply for such an order,[7] and bears the onus of proving that the subject of any such application is indeed a "serious danger to the community".[8]

[23] 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.[9] A "serious sexual offence" means, relevantly, an offence of a sexual nature involving violence or against a child.[10] The expression, "unacceptable risk", is not defined in the Act. Although it is incapable of precise definition, it is an expression that calls for the striking of a balance.[11] So far as the assessment of risk is concerned, "risk" means the possibility, chance or likelihood of the commission of a serious sexual offence. A risk will be at an unacceptable level if the adequate protection of the community cannot be ensured.

[24] 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.[12] The court's assessment is to be carried out with respect to "the prisoner's current state and in respect of release at the time the application is determined, and not at some indeterminate time in the future".[13]

[25] The paramount consideration in deciding whether to make a continuing detention order or a supervision order is the need to ensure adequate protection of the community.[14] 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

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5 Section 3.
6 Section 13(1).
7 Section 5(1).
8 Section 13(7).
9 Section 13(2).
10 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] (Muir JA); *Kynuna v Attorney-General for the State of Queensland* [2016] QCA 172 at [56] (McMurdo P).
11 See *Fardon v Attorney-General for the State of Qld* (2004) 223 CLR 575 at [22], [60] and [225].
12 Section 13(3).
13 *Attorney-General for the State of Queensland v Kanaveilomani* [2013] QCA 404 at [118]-[120] (Morrison JA).
14 Section 13(6)(a).

managed by corrective services officers".[15]

[26] 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;
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> (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;
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> (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;
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> (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."

[27] 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[16] or released pursuant to a supervision order subject to such requirements as the court considers appropriate.

[28] The onus of demonstrating that a supervision order affords inadequate protection to the community is on the applicant.[17] However, before a supervision order can be made, it must appear on all the evidence that such an order would be, "efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences"[18] or to put it another way, "… the likely effect of a supervision order in terms of reducing the opportunities for the appellant to engage in acts of [serious sexual offending] to an acceptably low level".[19]

[29] 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*

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15 Section 13(6)(b).
16 As to which, see *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [29].
17 See *Attorney General for the State of Queensland v Lawrence* [2010] 1 Qd R 505; [2009] QCA 136.
18 See *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111at [29] (Chesterman JA).
19 See *Attorney-General for the State of Queensland v Beattie* [2007] QCA 96 at para 19 (Keane JA).

Sutherland[20] 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.[21] There is no submission here that if the prisoner is a serious danger to the community, nevertheless no order should be made. As already mentioned, it is conceded on behalf of the prisoner that I could be satisfied in terms of s 13(1) and that a supervision order would be appropriate.
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> 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.
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> 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*[22] 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.[23] The Court observed:[24]
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> > '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.'
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> 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.

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20 [2006] QSC 268.

21 *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].

22 [2007] 1 Qd R 396; [2006] QCA 324.

23 Ibid [37].

24 Ibid [39].

> 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.[25] 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 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."[26]

[30] Finally, it is with respect helpful to keep in mind the following observations of Chief Justice de Jersey regarding the character of Division 3 orders in *Attorney-General v Fardon*:[27]

> "These orders have the character of a compact between the prisoner and the community: the prisoner is accorded a measure of personal freedom, but only provided he is willing to, and does, submit to a regime of tight control. Of substantial present concern is the respondent's demonstrated unwillingness to submit fully to that regime, hence Dr Grant's conclusion that 'there must be considerable doubt therefore about the prospect of successful management in the community under such a supervision order'."[28]

The evidence

[31] Although no evidence was adduced on behalf of Mr Kennedy in response to this application, the Attorney-General relied on a considerable body of evidence, including reports from three consultant psychiatrists – Dr Harden, Dr Lawrence, and Dr McVie – each of whom also gave oral evidence at the hearing and was cross-examined by counsel for Mr Kennedy. It is sufficient for present purposes to summarise the overall effect of their evidence, and I do so immediately below.

Dr Harden

[32] Dr Harden interviewed Mr Kennedy at the Woodford Correctional Centre on 29 April 2016. He impressed Dr Harden as being generally cooperative, a good historian and of average intelligence. Mr Kennedy was able to reflect on his offending and substance abuse and, importantly, to identify the consequences such abuse has had on his life. With respect to the index offences, Mr Kennedy confirmed that he had gone to the complainant's place of work with the intention of robbing her and, at the time, he was intoxicated with amphetamines, having consumed a substantial quantity in the previous

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25 Ibid.

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

27 [2011] QCA 155.

28 Ibid [29].

24 hours. Mr Kennedy described significant guilt and remorse for the harm he had caused the victim.

[33] He told Dr Harden that he found the treatment programs he had undertaken whilst in custody to be helpful in gaining insight into his offending. He had also received a better understanding of high risk situations and had developed positive future goals. In addition to interviewing Mr Kennedy, Dr Harden administered a number of risk assessment tools, including the Static-99R, the Stable 2007, the Sex Offender Risk Appraisal Guide and the Sexual Violence Risk-20.

[34] Dr Harden could find no evidence of sexual paraphilia. He opined that Mr Kennedy was suffering from mild Antisocial Personality Disorder and Poly-substance Abuse with a preference for amphetamines and cannabis. Not surprisingly, Dr Harden considered that substance abuse remains Mr Kennedy's "Achilles' heel".

[35] Overall, Dr Harden considered Mr Kennedy's ongoing unmodified risk of sexual reoffending in the community to be moderate. His greatest risk factors are his avoidant coping style and subsequent substance misuse. He was of the opinion that, should Mr Kennedy have the benefit of a supervision order, his risk of sexual re-offence will be reduced to low and, further, that Mr Kennedy will be likely to comply with the requirements of any such order. Dr Harden recommended that any supervision order should be in place for five years.

[36] Dr Harden also made these recommendations regarding Mr Kennedy's future treatment:

> "If released into the community he should have ongoing psychological therapy with an appropriately skilled practitioner. He has a severe and persistent substance misuse problem that will require ongoing individual treatment and community-based support.
>
> He should permanently abstain from alcohol and drug use in my opinion.
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> If released into the community he should be supported in re-engaging in employment immediately and supported to broaden his prosocial support network.
>
> A supervision order in this man might be counter-therapeutic if it interfered with his ability to rapidly return to employment and enhance his prosocial peer networks. The only therapeutic benefit of a supervision order would be the improved likelihood of maintaining abstinence from substance misuse."[29]

Dr Lawrence

[37] Dr Lawrence interviewed Mr Kennedy on 17 October 2016 and also administered a number of risk assessment tools. She considered Mr Kennedy's misbehaviour as a juvenile to be consistent with the diagnosis of ADHD. She noted that Mr Kennedy became a substance abuser in very early adolescence and that he has abused many different substances including marijuana, amphetamines, hallucinogens and variants of these drugs. Dr Lawrence also noted the consequent deterioration of his behaviour but, despite that, Mr Kennedy was still able to maintain appropriate social skills and engage in a number of significant relationships with girlfriends. There was no evidence of paraphilia or any deviant sexual practices. Dr Lawrence believed that Mr Kennedy gave truthful responses to her questions and did not try to present himself in a more favourable light

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[29] Affidavit of Scott Harden filed 16 September 2016, Ex SH-2 at p 18.

than was justified. His attitude to the index offences was described by Dr Lawrence as "self-disgust". She noted that the index offences were the only sexual offences in his criminal history. He is capable of empathy and is not a psychopath.

[38] Dr Lawrence considered that the greatest risk factor in Mr Kennedy's case is his polysubstance abuse disorder. It is in controlled remission due to his incarceration. Dr Lawrence opined that there was a moderately low risk of Mr Kennedy sexually reoffending on release. If he is to be released, abstinence from all drugs will be required and this should be enforced by frequent random testing. Dr Lawrence considered that, if released, Mr Kennedy will require specialised psychological help as well as substance abuse therapy.

[39] Overall, Dr Lawrence considered that as a result of Mr Kennedy's time in prison and the programs he has undertaken whilst there, his risk has reduced to a "moderate to low level and possibly low".[30] However, he remains a considerably high risk of reoffending as a result of his polysubstance abuse disorder. She considered that he is suitable for release on supervision provided the order includes conditions to accommodate these concerns. She agreed with Dr Harden that any order should be for a period of five years.

Dr McVie

[40] Dr McVie interviewed Mr Kennedy on 8 October 2016 and, like Drs Harden and Lawrence, administered a number of risk assessment tools. She expressed the opinion that Mr Kennedy would present as a moderate to high risk of future violence in the absence of management strategies to address his risk factors. A likely scenario for reoffending would involve non-compliance with supervision and monitoring, relapse into significant substance abuse, possible re-emergence of psychotic symptoms secondary to substance abuse and re-engaging in general criminal behaviour. She considered that Mr Kennedy satisfies the DSM-IV criteria for antisocial personality disorder and substance abuse. She agreed that he does not have any type of paraphilic disorder. Overall, Dr McVie considered Mr Kennedy to be at least a moderate risk of reoffending sexually and a moderate to high risk of reoffending violently. He has moderate to high treatment needs.

[41] Dr McVie recommended that Mr Kennedy be released on a supervision order, provided that strict conditions requiring him to abstain from alcohol and illicit substances are incorporated in any such order. His association with others should also be closely monitored in her opinion.

[42] Dr McVie recommended that Mr Kennedy receive ongoing therapy for his substance abuse disorder as well as regular psychological support to address issues such as his impulsivity, cognitive problems, solving skills and general learning skills as required.

Consideration

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

[43] As stated at the outset, it was not in issue on the hearing of the application that Mr Kennedy is a serious danger to the community in the absence of a Division 3 order. Nevertheless, it is still necessary for the court to consider that question. For the reasons earlier expressed, it will only be if that is so that the court need concern itself with whether

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30 Exhibit 4 (Report of Dr Lawrence dated 10 November 2016 at page 29).

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. Put another way, if Mr Kennedy is not a serious danger to the community in the absence of a Division 3 order, he will not be a person to whom the Act applies.

[44] Here, the psychiatrists agree that Mr Kennedy's major problem is substance abuse. Although his unmodified risk of sexually violent reoffending has been assessed at different levels by the three examining psychiatrists (from low to moderate), a relapse into the use, for example, of methylamphetamine will increase that risk exponentially. The victim is likely to be an adult female. Furthermore, there is a significant risk of psychological and/or physical harm to the victim. The use of weapons is not unlikely.

[45] In this context, it is necessary to recall what was said by Keane JA (as his Honour then was) in *Attorney-General (Qld) v Beattie*,[31] 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".[32] As such, even if the risk that Mr Kennedy might reoffend in a sexually violent way is only at a low to moderate level, there remains a high risk of very serious harm being caused to a future victim if he lapses back into substance abuse. Given the index offending, his past history of substance abuse and breaches of parole, the risk that Mr Kennedy will commit a serious sexual offence within the meaning of the Act if he is released from custody or, alternatively, 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.

[46] It follows that Mr Kennedy is a person to whom the Act applies.

Which order?

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

> "(6) In deciding whether to make an order under subsection (5)(a) or (b) –
>
> (a) the paramount consideration is to be the need to ensure adequate protection of the community; and
>
> (b) the court must consider whether –
>
> (i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and
>
> (ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers."

[48] 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*[33] 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

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31 [2007] QCA 96.
32 Ibid [19].
33 [2007] 1 Qd R 396; [2006] QCA 324.

> 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."[34]

[49] Each of the psychiatrists supported release on supervision, and a supervision order will significantly reduce his risk of sexually violent reoffending. In particular, it will provide for a structured regime of supervision and monitoring to ensure that Mr Kennedy abstains from the abuse of illicit substances. This is critically important. It will also serve to monitor his relationships with others to ensure that he is not the subject of adverse influences and, importantly, it will provide for his future treatment. Each of these measures will serve to reduce the risk that Mr Kennedy will in the future commit a serious sexual offence.

[50] In my opinion, the adequate protection the community can be reasonably and practicably managed by a supervision order incorporating the conditions proposed by counsel for the Attorney-General.[35] I am also of the opinion that the requirements under s 16 of the Act can be reasonably and practicably managed by corrective services officers.

[51] The supervision order shall be for the minimum period allowed under the Act, that is to say, five years.[36]

The accommodation condition

[52] As I remarked at the beginning of these reasons, only one of the conditions proposed by the Attorney-General was contentious. Under that proposed condition, Mr Kennedy would be required to:

> "Reside at a place within the State of Queensland as approved by a Corrective Services Officer by way of a suitability assessment and obtain written approval prior to any change of residence."

[53] Mr Kennedy's sister's residence has been assessed for accommodation suitability by Corrective Services and approved. There is adequate space for Mr Kennedy, it is accessible for home visits, there are no electronic monitoring impediments and Mr Kennedy's sister is willing to accommodate him. However, the General Manager, Probation and Parole considers that it is "appropriate to exercise a degree of caution in relation to accommodation" in light of Mr Kennedy's poor performance while subject to parole. Although Mr Kennedy remained on parole on the first occasion for approximately 11 months, on the next two occasions he lasted only one month and five months respectively until he breached those parole orders. In each instance, he abused methylamphetamine, the same substance he abused prior to the index offending. For these reasons, the General Manager has recommended that Mr Kennedy be initially accommodated at the Precinct at Wacol for a period of time until he has demonstrated compliance with the conditions of his supervision order, abstinence from all substances

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34 Ibid [39].
35 Exhibit 3.
36 Section 13A(3).

and a willingness to address his risk factors including substance abuse. Once that has occurred, it is proposed that Mr Kennedy be transitioned to his sister's residence.

[54] The Precinct at Wacol provides contingency accommodation for prisoners released under supervision. Subject to availability, prisoners who have no suitable alternative accommodation at the time of release are accommodated in the Precinct. This accommodation is provided for an initial three month period and is subject to review thereafter. Whilst housed in the Precinct, prisoners are expected to actively source suitable long term accommodation in the community, to live independently, source employment and be responsible for their own reintegration activities. The Precinct is not a secure facility; prisoners are able to come and go as they please subject only to the curfew or other restrictions contained in their individual supervision orders. Similar contingency accommodation is provided in Rockhampton and Townsville.

[55] Here, Mr Kennedy has suitable accommodation but, the firm recommendation of Corrective Services is that he be accommodated in the Precinct for the reasons I have summarised above. On the hearing of this application, the Attorney-General submitted that this recommendation should be followed. On the other hand, it was submitted on behalf of Mr Kennedy that the proposed accommodation condition be changed so as to specify the residence of his sister which would then allow him to reside with her.

[56] Each of the psychiatrists was asked about this issue.

[57] Dr McVie expressed the opinion in her report that she could not see "any clear advantage" to Mr Kennedy being accommodated in the Precinct prior to moving to his sister's residence. In oral evidence, however, Dr McVie said that she could not argue against the recommendation of Corrective Services or the cautious approach reflected by that recommendation given the history of parole breaches in this case. She accepted that it may be to Mr Kennedy's advantage to learn about the strictures of his supervision order in the Precinct prior to moving into his sister's home. She did not think that "four to six weeks in the Precinct" would "adversely disadvantage him".[37]

[58] Dr Harden did not support Mr Kennedy being accommodated at the Precinct on his release. He was unconvinced that such a course was a "less stressful way of reintroducing" Mr Kennedy to "society" than being accommodated with his sister.[38] He nonetheless agreed that it was appropriate to place reliance on those within Corrective Services who are charged with the management of Mr Kennedy whilst on supervision because they have "expertise in what they do".[39] He also agreed that, wherever Mr Kennedy is accommodated, his "transition will be complex".[40] Dr Harden accepted that he did not have a "strong objective basis" to say that one option was better than the other.[41] Instead, his reservations about Mr Kennedy being initially placed within the Precinct were based on a general concern about the propensity for supervision orders to "interfere with [the prisoner's] reintroduction into society and reintroduction into pro-social activities".[42]

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37 T. 1-18, ll. 19-20.
38 T. 1-23 ll. 46-47.
39 T. 1-24 l. 18.
40 T. 1-24 l. 26.
41 T. 1-24 l. 37-42.
42 T. 1-24-25.

[59] Dr Lawrence also supported Mr Kennedy being accommodated with his sister rather than at the Precinct. The effect of her evidence was, the sooner Mr Kennedy moves into an environment where he can draw on the support of his family, the better. When giving evidence to the court, Dr Lawrence however said that she had no strong objection to Mr Kennedy being accommodated at the Precinct for an initial period, but expressed the view that she thought that this was "a bit unnecessary".[43]

[60] For Mr Kennedy it was submitted that the "preponderance of available information on the issue appears to favour" allowing Mr Kennedy to live with his sister after he is released. Whilst that may be said of the opinions expressed by the psychiatrists, it is also to be observed that none of them was strongly opposed to Mr Kennedy being accommodated at the Precinct for an initial period at least. Further, the recommendation of the General Manager is, it seems to me, soundly based given the difficulties Mr Kennedy has encountered in the past with substance abuse when released on parole. What is proposed by the General Manager is a sensible way of ensuring that Mr Kennedy is properly equipped to work within the strictures of the supervision order when he is eventually residing with his sister. In this regard, it is important to remember that the conditions of the supervision order will be considerably more onerous than the conditions of his previous parole orders. It may very well take Mr Kennedy time to adjust to each of the requirements but, adjust he must, because compliance with the order is the only way of ensuring the adequate protection of the community, not to mention his future treatment.

[61] There is also a further consideration. I am unpersuaded that the court should be imposing its will over those who will usually be in a much better position to decide where Mr Kennedy should be accommodated, namely, the personnel at Corrective Services who will be charged with Mr Kennedy's day-to-day management. Of course, there may be cases where the court does see the need to specify where a particular prisoner should reside when on supervision but this is not one of them. In circumstances where the opinions expressed by the psychiatrists on the topic are not strongly opposed to an initial period of residence in the Precinct and the recommendation of the General Manager, Probation and Parole is soundly based, that recommendation must be followed.

[62] I find that the accommodation condition proposed by counsel for the Attorney-General is appropriate to ensure the adequate protection of the community.[44] It is not appropriate in the circumstances of this case to specify the place where Mr Kennedy shall reside. That is something which is much better left to Corrective Services to determine throughout the currency of the order.

Disposition

[63] Having been satisfied to the requisite standard that Mr Kennedy is a serious danger to the community in the absence of an order pursuant to Division 3, it will be ordered that he be released from custody subject to the requirements of a supervision order incorporating each of the conditions proposed by counsel for the Attorney-General. The order shall remain in place until 5 December 2021.

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43 T. 1-30 ll. 18, 38-39.

44 Section 16(2)(a).