SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Lawrence* [2014] QCA 220
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (appellant) **v** **MARK RICHARD LAWRENCE** (respondent)
FILE NO/S:	Appeal No 4117 of 2014 SC No 7468 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	25 June 2014
JUDGES:	Fraser, Gotterson and Morrison JJA Judgment of the Court
ORDERS:	**1. The appeal be allowed.** **2. The orders of the learned primary judge made on 2 May 2014 be set aside.** **3. The respondent, Mark Richard Lawrence, continue to be subject to the continuing detention order made on 3 October 2008.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – GENERAL PRINCIPLES – FUNCTIONS OF APPELLATE COURT – GENERALLY – where the respondent has been subject to a continuing detention order under Div 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") since 2008 – where the primary judge rescinded that order and ordered the respondent be released subject to a supervision order – where the appellant argues the appellate court should substitute its own decision for the primary judge's even if error in the primary decision of the kind described in *House v The King* is not demonstrated – whether the principles in *House v The King* concerning appellable error are applicable to an appeal against a discretionary decision to release a prisoner on a supervision under s 30(3) of the Act CRIMINAL LAW – SENTENCE – SENTENCING ORDERS –

ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the primary judge rescinded the continuing detention order to which the respondent had been subject since 2008 – where the expert witnesses gave evidence that the respondent's risk level had decreased – where those assessments were based on the assumption that the respondent was being truthful about certain matters – where the respondent was not called to give evidence about those matters– whether the primary judge properly assessed whether there was adequate evidence for assuming the respondent was being truthful about those matters – whether in all the circumstances a supervision order could ensure adequate protection of the community

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 27, s 30(1), s 30(3), s 30(4), s 31, s 43

Attorney-General for the State of Queensland v Lawrence [2008] QSC 230, related
Attorney-General for the State of Queensland v Yeo [2010] QCA 69, considered
Attorney-General (Qld) v Lawrence [2011] QCA 347, cited
Attorney-General (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324, cited
Attorney-General (Qld) v Lawrence [2010] 1 Qd R 505; [2009] QCA 136, related
Attorney-General (Qld) v Lawrence [2014] QSC 77, related
House v The King (1936) 55 CLR 499; [1936] HCA 40, considered
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, cited
R v Ford (2009) 201 A Crim R 451; [2009] NSWCCA 306, cited

COUNSEL: P Dunning QC SG, with J B Rolls, for the appellant
J Allen for the respondent

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

[1] **THE COURT:**

Background

The respondent has been continuously in jail since December 1983. His criminal history was summarised by Chesterman JA in an earlier decision as follows:

> "[6] His criminal history begins with an appearance in the Ipswich Children's Court on 9 May 1978 when he was charged with the aggravated assault on a male child under the age of 14 on 4 May 1978. The appellant was admonished and discharged. He next appeared on 2 November 1978 in the Ipswich Magistrates Court charged with another aggravated assault of a male child under the age of 14. He was sentenced to two years' probation.

(The date given for the offence was 20 December 1978 which must be incorrect given the date of his appearance.) He appeared again in the Ipswich Magistrates Court on 23 February 1979, this time charged with the aggravated assault of a female child under the age of 17, the day before, 22 February. He was sentenced to three years' probation and ordered to undergo any psychiatric treatment which the probation officer might direct including treatment as an inmate of a psychiatric hospital. On 23 December 1980 he appeared for a third time in the Ipswich Magistrates Court. The charge this time was aggravated assault on a male child under the age of 14 on 21 December. He was fined $75.

[7] On 3 September 1981 he appeared before the Brisbane District Court charged with conspiracy to commit a crime and assault with intent to steal with the threatened use of violence whilst armed and in company. The offences were committed on 11 April 1981. At the time the appellant was an involuntary patient in Wolston Park Hospital from which he absconded with three other patients. They caught a taxi and decided to rob the driver. One of them held a knife to the driver's throat. He was not harmed and refused to give up his takings. The appellant was sentenced to four months' imprisonment and required to undergo a further three years' probation.

[8] Having served the imprisonment he was returned to Wolston Park Hospital where, on 26 December 1983, he and another patient killed a fellow patient, a woman. On 7 February 1985 the appellant was sentenced to 15 years' imprisonment for manslaughter. That verdict rather than one for murder was returned on the basis of diminished responsibility. The appellant had compelling sexual fantasies about rape and murder. The young woman was killed as an enactment of the fantasies.

[9] In August 1991 the appellant escaped from custody. He had been allowed to leave the gaol to attend a tennis competition and did not return. He was found after a few days and on 3 September 1991 sentenced to one year's imprisonment, cumulative upon the 15 years, for escaping lawful custody.

[10] On 4 April 2002 in the Brisbane District Court he was convicted of rape and sexual assault with a circumstance of aggravation on 14 October 1999. It was a sodomitic attack on a fellow prisoner. He was sentenced to seven years' imprisonment for the rape and three years for the assault, to be served concurrently. An earlier conviction had been quashed and the appellant was retried in 2002. By the time he was convicted and sentenced the second time his previous sentences had expired. He was, however, kept in gaol and remanded in custody. That time, from 7 February 2001 until 4 April 2002, was declared to be time served under the sentence.

> [11] The term of imprisonment imposed for the manslaughter expired on 6 February 2000. The year's imprisonment for escaping expired 12 months later. The seven years imposed for rape expired on 7 February 2008…".[1]

[2] The seven year term of imprisonment which expired in February 2008 was the last of the respondent's terms of imprisonment. Since then he has been detained under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act"). The Act provides that a prisoner is a "serious danger to the community" if there is an unacceptable risk that the prisoner will commit a serious sexual offence if the prisoner is released from custody or released from custody without a "supervision order" (an order releasing a prisoner from custody subject to requirements stated in the order which the Court considers appropriate): s 13(2). If the Court is satisfied that a prisoner is a serious danger to the community in the absence of a "division 3 order" (a supervision order or a "continuing detention order" detaining a prisoner in custody for an indefinite term for control, care or treatment) the Court is empowered by the Act to make either of those orders: s 13.

[3] The respondent was first detained in custody under the Act by order made by a judge in the Trial Division on 3 October 2008.[2] The evidence, including the evidence of psychiatrists who examined the respondent at that time that he was at a high risk of violent sexual offending if released into the community, persuaded the judge that the respondent was a serious danger to the community if released without a division 3 order being made, and the evidence then was "insufficiently detailed and precise to permit the confident formulation of requirements for a supervision order… [and] [i]n the absence of such requirements a supervision order would not ensure adequate protection of the community."[3] This Court dismissed an appeal against that order[4] and the High Court refused the respondent's appeal from that decision.[5]

[4] The Act requires that there be regular reviews of a prisoner's continued detention under a continuing detention order: Pt 3. Section 27(2) requires the Attorney-General to make any application that is required to be made to cause the reviews to be carried out. Such reviews have been conducted. An order made in the Trial Division on 4 October 2011 that the respondent be released under supervision[6] was set aside by this Court on appeal on 2 December 2011.[7] The High Court refused an application for special leave to appeal from that decision,[8] so that the respondent remained in detention. On 6 December 2012 a judge in the Trial Division ordered that the respondent remain in detention under the original continuing detention order made on 3 October 2008.[9]

The orders under appeal

[5] This appeal concerns orders made upon the Attorney-General's application of 29 October 2013 under s 27 of the Act for the most recent annual review of the

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1 *Attorney-General v Lawrence* [2010] 1 Qd R 505 at 506 – 507 [5] – [11].
2 *Attorney-General for the State of Queensland v Lawrence* [2008] QSC 230.
3 [2008] QSC 230 at [69].
4 *Attorney-General v Lawrence* [2010] 1 Qd R 505.
5 *Lawrence v Attorney-General for the State of Queensland* [2009] HCATrans 244.
6 *Attorney-Genera1 for the State of Queensland v Lawrence* [2011] QSC 291.
7 *A-G (Qld) v Lawrence* [2011] QCA 347.
8 *Lawrence v Attorney-Genera1for the State of Queensland* [2012] HCATrans 247.
9 *Attorney-General for the State of Queensland v Lawrence* [2012] QSC 386.

continuing detention of the respondent. (The hearing of that application was delayed by resolution of constitutional questions which were decided in December 2013.[10]) After hearing the Attorney-General's application in February 2014, on 2 May 2014 a judge in the Trial Division made an order affirming the decision made on 3 October 2008 that the respondent is a serious danger to the community in the absence of an order pursuant to Part 2 Division 3 of the Act. The judge ordered that the continuing detention order made on 3 October 2008 be rescinded and that the respondent be released from custody on 2 May 2014 and from that time until 2 May 2029, be subject to the following requirements:

"The respondent must:

(i) be under the supervision of an authorised Corrective Services Officer for the duration of this order;

(ii) report to an authorised Corrective Services Officer at the Queensland Corrective Services Probation and Parole Office closest to his place of residence within 72 hours of the day of release from custody and at the time advise the officer of the respondent's current name and address;

(iii) report to, and receive visits from, an authorised Corrective Service Officer at such time and at such frequency as determined by Queensland Corrective Services;

(iv) notify and obtain the approval of the authorised Corrective Services Officer for every change of the respondent's name at least two business days before the change occurs;

(v) notify an authorised Corrective Services Officer of the nature of his employment, or offers of employment, the hours of work each day, the name of his employer and the address of the premises where he is or will be employed;

(vi) seek permission and obtain approval from an authorised Corrective Services Officer prior to entering into an employment agreement or engaging in volunteer work, paid or unpaid employment;

(vii) reside at a place as approved by a Corrective Services Officer by way of a suitability assessment;

(viii) not reside at a place by way of short term accommodation including overnight stays without the permission of the authorised Corrective Services Officer;

(ix) not leave or stay out of Queenslasnd without the written permission of an authorised Corrective Service Officer;

(x) not commit an offence of a sexual nature during the period of this order;

(xi) not commit an indictable offence during the period of this order;

(xii) comply with every reasonable direction of a Corrective Services Officer under section 16B of the Act given to him;

(xiii) comply with every reasonable direction of a Corrective Services Officer that is not directly inconsistent with a requirement of the order;

(xiv) respond truthfully to enquiries by a Corrective Services Officer about his whereabouts and movements;

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[10] *Attorney-General (Qld)* v *Lawrence* (2013) 306 ALR 281.

(xv) not have any direct or indirect contact with a victim of his sexual offences or a relative of the victim;

(xvi) notify an authorised Corrective Services Officer of the make, model, colour and registration number of any vehicle owned by or generally driven by him, whether hired or otherwise obtained for his use;

(xvii) attend upon and submit to assessment and/or treatment by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by an authorised Corrective Services Officer at a frequency and duration which shall be recommended by the treating professional, the expense of which is to be met by Queensland Corrective Services;

(xviii) agree to open communication and full co-operation between himself and the treating person and that if either party deems it advisable for that party to contact an authorised Corrective Services Officer;

(xix) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) as deemed necessary by the treating psychiatrist or an authorised Corrective Services Officer, and permit the release of the results and details of the testing to Queensland Corrective Services, if such a request is made for the purpose of amending the supervision order or for ensuring compliance with this order, the expense of which is to be met by Queensland Corrective Services;

(xx) attend and participate in any program or course conducted by a psychologist, counsellor, or other professional, in a group or individual capacity, as directed by an authorised Corrective Services Officer in consultation with any treating medical, psychiatric, psychologist or other mental health practitioner where appropriate, with any expense of such program to be met by Queensland Corrective Services;

(xxi) submit to and discuss with an authorised Corrective Services Officer a schedule of his planned and proposed activities on a weekly basis or at such other intervals as directed by an authorised Corrective Services Officer;

(xxii) develop a risk management plan in consultation with a treating psychologist or psychiatrist and discuss it as directed with an authorised Corrective Services Officer;

(xxiii) not initiate or maintain any supervised or unsupervised contact with any child under 16 years of age, except with the prior written approval of an authorised Corrective Services Officer;

(xxiv) not join, affiliate with, attend on the premises of or attend at the activities carried on by any club or organisation in respect of which there are reasonable grounds for believing there is either child membership or child participation without the prior written permission of an authorised Corrective Services Officer;

(xxv) not visit or attend the premises of any place where there is a dedicated children's play area or child minding area without the prior written approval of an authorised Corrective Services Officer;

(xxvi) not without reasonable excuse be within 100 metres of a school or child care centre without the prior written approval of an authorised Corrective Services Officer;

(xxvii) not be on the premises of any shopping centre, without reasonable excuse, between 8am to 9:30am between 2:30pm and 4:30pm on school days other than for the purpose of:

a. approved employment; or

b. attending an approved bona fide pre-arranged appointment with a Government agency, medical practitioner or the like without the prior written approval of an authorised Corrective Services Officer;

(xxvii) comply with every reasonable curfew direction or monitoring direction of a Corrective Services Officer;

(xxix) abstain from the consumption of alcohol unless with the prior written permission of an authorised Corrective Services Officer;

(xxx) abstain from the consumption of all intoxicating substances; and

(xxxi) submit to any form of drug and alcohol testing including both random urinalysis and breath testing as directed by an authorised Corrective Services Officer, the expense of which is to be met by Queensland Corrective Services."

The appeal

[6] The Attorney-General has appealed against the orders rescinding the 3 October 2008 continuing detention order and ordering that the respondent be released from custody on 2 May 2014 and from that time until 2 May 2029 be subject to the requirements set out above. The Attorney-General accepted that the appeal could succeed only if he established an error in the primary judge's decision. He argued that the primary judge erred in the ways asserted in the grounds of appeal:

"(a) the discretion of the primary judge under Section 30(4) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") miscarried by reason that the primary trial judge failed to take into account in assessing whether the community could be adequately protected by the release on condition… that it would be difficult, if not impossible, absent the respondent's self-report, to assess whether the respondent would experience deviant sexual fantasies if and when released into the community;

(b) the discretion of the primary judge under Section 30(4) of the Act miscarried by reason that the primary judge failed to take into account, in the assessment of whether the community could be adequately protected the respondent's release on condition having regard to the extent of the risk and the catastrophic consequences of the risk materialising;

(c) there was no basis upon which the learned primary judge could have found the supervision order would adequately protect the community; and
(d) the decision is:
  (i) contrary to the evidence;
  (ii) unsupported by the evidence; and
  (iii) unreasonable
(e) on the evidence, the learned primary judge erred in making an order for the release, on condition, of the respondent pursuant to s30(3) of the Act;
(f) the learned trial judge failed to give detailed reasons for the making of the supervision order pursuant to Section 30(3) of the Act."

[7] The Attorney-General's arguments under those grounds of appeal emphasised the provisions in ss 30(3) and (4) of the Act. Section 30 applies if on the hearing of a review under s 27 (or a review for which the prisoner has applied under s 28) the Court affirms the decision that the prisoner is a serious danger to the community in the absence of a Div 3 order: s 30(1). Subsections 30(3) and (4) provide:

"(3) If the court affirms the decision, the court may order that the prisoner –
  (a) continue to be subject to the continuing detention order; or
  (b) be released from custody subject to a supervision order.
(4) In deciding whether to make an order under subsection (3)(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."

Summary of the primary judge's reasons

[8] Before discussing these grounds of appeal it is useful to summarise relevant aspects of the primary judge's reasons.

[9] After referring to the respondent's criminal history, orders made under the Act, and the critically relevant provisions of the Act, the primary judge referred to the emphasis placed by counsel for the Attorney-General upon the word "ensure" in the expression in s 30(4)(a) of the paramount consideration being "the need to ensure adequate protection of the community". The primary judge accepted that the word "ensure" must be given effect, but pointed out that "what must be ensured is the *adequate* protection of the community" and that "the Act does not contemplate that such orders should be "watertight" or (put another way) risk free…".[11]

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11 [2014] QSC 77 at [15], citing *Attorney-General v Francis* [2007] 1 Qd R 396 at 405 [39].

[10] The primary judge referred to the respondent's admissions that in the 1983 offence of manslaughter the respondent effectively fulfilled a fantasy of a sadistic sexual nature, choosing a new victim when the particular victim he had in mind was not available, and observed that it was doubtful whether, as the respondent said, he had not experienced such fantasies for many years and that he had the means to control them should they re-emerge. The primary judge then referred to the earlier judgments in which it was held that it was necessary that the respondent be detained under the Act to ensure adequate protection of the community. Those judgments had referred to the evidence given in the past of psychiatrists, including Dr Lawrence and Dr Grant, about the high risks of the respondent committing a life-threatening violent sexual offence, as well as the need to treat with the utmost caution the respondent's assertions that he no longer experienced fantasies of a sadistic sexual nature and the difficulty of objectively assessing whether or not the respondent was having such sexual fantasies.[12] The primary judge observed that in the present matter the evidence was different, particularly in relation to the opinions provided by Dr Lawrence and Dr Grant, and also by a psychologist, Dr Madsen, and extensively summarised their evidence.[13]

[11] The primary judge referred to Dr Madsen's evidence that between the time of his report in November 2012 and the time of his most recent report in November 2013 he had seen the respondent approximately fortnightly for therapy and conducted a number of assessments over those sessions. Dr Madsen noted that on actuarial tools, the respondent would score highly for risks of offending and that at the time of his offending there had been "problems with sexual self-regulation [and that] [i]n addition to dominant deviant sexual interests and arousal to violence, there were marked antisocial and psychopathic features to his personality, not least a problematic level of impulsivity".[14] The primary judge noted that Dr Madsen contrasted that with the present; Dr Madsen reported that the respondent "does not appear impulsively aggressive, reckless or display other evidence of poor self regulation…does not obviously appear to endorse pro-offending attitudes, nor from his self report is there 'evidence' of sexual deviancy, although it was not clear whether this had dissipated, is lying dormant or he simply is being dishonest about the frequency and intensity of his deviant fantasies. Mr Lawrence was well able to acknowledge a hypothetical risk for himself, although he felt fairly confident that he would not reoffend."[15] After referring to the respondent having engaged well in the one-to-one treatment and that the quality of his work was reasonable, Dr Madsen concluded that the respondent's "presentation within sessions and… progress within the prison environment suggests that his behaviour has stabilised somewhat and he has developed some personal strengths (most notably, his work ethic, good self regulation)", but that "[c]oncerns remain regarding sexual deviancy and his capacity to conceptualise risk factors and risk management strategies".[16]

[12] For about 30 years Dr Lawrence has reported upon the respondent's mental state. Dr Lawrence stated that her opinion at the present time had changed to an extent which she would not previously have anticipated. She wrote that:

> "12.4 In my most recent and current risk assessment of Mark Lawrence, I believe that there is evidence of change in his

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12 *A-G (Qld) v Lawrence* [2011] QCA 347 at [97] – [99]; *Attorney-General for the State of Queensland v Lawrence* [2012] QSC 386 at [59], [63].

13 [2014] QSC 77 at [21] – [40].

14 Report of Dr Madsen, 4 November 2013, at [34].

15 Report of Dr Madsen, 4 November 2013, at [35].

16 Report of Dr Madsen, 4 November 2013, at [49].

> understanding, belief systems and ability to understand his own behaviour, as well as his emotional and impulsive responses greater than previously, and that he has also learnt strategies to assist him in managing those emotional responses and drives in an appropriate and prosocial fashion.
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> 12.5 As he himself acknowledges, the most significant agent of change for him, and in my opinion, has been the individual therapeutic interventions and counselling he has received from Psychologist, Dr Lars Madsen, in the prison situation over the past 2 years. This individual counselling has, in my opinion, been such as to amplify his understanding, and the incorporation into his psychic functioning of that understanding of concepts, previously addressed in the group Sexual Offending Programs which he has undertaken (HISOP and SOMP) in recent years. It is apparent that he has benefited from the establishment of a therapeutic relationship with an individual Psychologist, skilled in the treatment of sexual offenders, including those with some intellectual limitations.
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> …
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> 12.7 I believe also that credit must also be given to Mark Lawrence himself, since the psychological changes which he has apparently achieved can only reflect his motivation and active involvement in those therapeutic endeavours. He himself appears to recognise the need for, and willingness to continue with, those endeavours if he were to be released on a Supervision Order. In my opinion, it is vital that they should continue if he were to be released under a Supervision Order."[17]

[13] Dr Lawrence referred to the respondent having consistently shown "pro social attitudes and behaviour" and in the last five years having undertaken intensive therapeutic programs which "would appear to have been able to effect evidence of change in emotional and cognitive states as well as improving, through cognitive means, his apparent ability to manage the more aberrant and harmful of his moods and impulses". She concluded that the respondent's level of risk of offending violently or sexually had more likely than not moderated, that the respondent appeared to have benefited significantly from receiving individual counselling for his sexual offending issues from Dr Madsen, and that "the evidence suggests that a high risk of re-offending based primarily on historical past factors has been modified by recent therapeutic changes to lower the risks now to a moderate level."[18] Dr Lawrence reported her belief that "a Supervision Order could be compiled in such a way as to ensure that the level of risk can be supervised and monitored adequately",[19] and that, in contrast to her previous opinion, she believed "that a Supervision Order could be constructed for Mark Lawrence such as to monitor and supervise his return to the [community]."[20]

[14] In oral evidence Dr Lawrence agreed that it was likely that the respondent would still experience deviant fantasies and that if they were not well controlled or avoided

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17 Report of Dr Lawrence, 31 October 2013, at [12.4] – [12.7].
18 Report of Dr Lawrence, 31 October 2013, at [14.7].
19 Report of Dr Lawrence, 31 October 2013, at [13.7].
20 Report of Dr Lawrence, 31 October 2013, at [14.8].

by him it was possible that he could act upon them again. She acknowledged that he would have a motivation to present himself well to professionals; but she nonetheless believed that "there had been evidence of real change or greater understanding of his difficulties and evidence of very genuine attempts to deal with his problems", and, while she could be wrong in that assessment, "one would hope that one's clinical knowledge and skills can be applied to be of assistance in these matters".

[15] Dr Grant reported that over the preceding 12 months the respondent, with the assistance of treatment he had undergone, had "become more willing to discuss [his] fantasies and their relevance to future offending and more open to working on strategies to deal with such fantasises should they become more prominent in the future". Ultimately, Dr Grant concluded in his report that:

> "Overall, in my opinion, the actuarial high risk of reoffending as exhibited on formal instruments is reduced by dynamic factors such as his age, lessons he has learnt from treatment and his current response to therapy, to a moderate level of risk which has the potential to be reasonably contained by a strict program of supervision and support outside custody. … The major issue will be monitoring Mr Lawrence's fantasy life and detecting recurrence of any prominent sexual sadistic fantasies. Mr Lawrence does appear to have become somewhat more open about discussing such fantasies and I believe that if his treatment continues to be satisfactorily progressed and his supervision be delivered by experienced and dedicated personnel, it is likely that he will report the recurrences of risky sexual fantasies. Whilst this cannot be guaranteed, I believe that he has now reached the point where the risk is containable by appropriate supervision and treatment in the community."[21]

[16] The primary judge referred to Dr Grant's oral evidence, including the following passage:

> "In his oral evidence, Dr Grant agreed that a supervisor could not tell whether these fantasies were occurring and that to a large extent, there would be a reliance upon honest and consistent reporting by the respondent about those matters. And it was possible that the respondent might not be so candid about these matters if they had the potential to bring an end to his supervised release. Dr Grant added that "hopefully, he can understand that talking about them is going to be necessary in terms of achieving long-term adjustment in the community".[22]

[17] The primary judge was satisfied that the respondent remained a serious danger to the community in absence of a Div 3 order. The primary judge then turned to the question whether the respondent should be released under supervision. The primary judge referred to the effect of the Act that the burden of proving that the community will not be adequately protected by a prisoner's release on supervision is on the Attorney-General.[23]

[18] The primary judge observed that the Attorney-General's case was not as strong as the cases which resulted in orders for continuing detention of the respondent in

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21 Report of Dr Grant, 28 October 2013, at p 15.

22 [2014] QSC 77 at [40] (footnotes omitted).

23 [2014] QSC 77 at [42], referring to *Attorney-General v Lawrence* [2010] 1 Qd R 505 at 512 [33].

previous judgments; there had been a "marked shift" in the opinions of Dr Lawrence and Dr Grant.[24] After referring to Dr Lawrence's evidence that it was unlikely that the occurrence of deviant sexual fantasies by the respondent had been eliminated entirely, and her evidence that the respondent now appeared to be genuinely minded to control the risk from those fantasies and was developing means to do so, the primary judge observed that it was the uncertainty whether the respondent would remain willing and able, outside the custodial environment, to avoid the development of such fantasies and their potentially dangerous consequences which resulted in some ongoing risk that the respondent would commit a serious sexual offence and perhaps a life-threatening offence.[25] The primary judge noted that it was relevant that there was "no means for reading the respondent's mind as to the extent to which he experiences the onset and controls of the influence of deviant fantasies" and that it was "possible that even his treating psychologist would be unable to detect some dangerous development in that respect". The primary judge then observed that "the importance of ongoing therapy as provided by Dr Madsen is just that: it would be therapeutic for him to develop or further develop strategies for managing this risk."[26] The primary judge also acknowledged the consideration that the potential consequences of further offending could be "most serious".[27]

[19] The primary judge held that the opinions of Dr Lawrence and Dr Grant, which overall were supportive of an order for supervised release, should be given substantial weight. The primary judge acknowledged that the opinions admitted that it was possible that the respondent had not yet developed the motivation and ability to control his sexual and other behaviours, but noted that this was contrary to Dr Lawrence's and Dr Grant's own perceptions about the respondent and that Dr Lawrence had explained that her view was assisted by her clinical knowledge and skills.[28] The primary judge regarded it as remarkable that the psychiatrists had changed their views since the previous review such that each believed that "the level of risk is moderate and able to be "contained" (as Dr Grant put it) by an appropriate supervision order", and the primary judge observed that this too was now the effect of Dr Madsen's evidence.[29] After acknowledging that it was for the Court to determine questions of fact about the respondent's willingness and ability to manage his aberrant behaviour with the assistance of appropriate supervision and as to the extent of the risk of re-offending, and that the Court was not bound to accept the evidence of the three professionals, the primary judge found that there was no reason not to accept their evidence. In that respect the primary judge noted that each of the professionals had had the benefit of assessing or treating the respondent for some years, that each had substantially revised earlier opinions, and that Dr Lawrence's evidence had particular weight because of her very long experience in assessing the respondent.[30]

[20] The primary judge concluded as follows:

> "[50] Section 30(4) of the Act provides that the paramount consideration is the need to ensure adequate protection of the community. The court must consider whether that protection

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24 [2014] QSC 77 at [43].
25 [2014] QSC 77 at [44].
26 [2014] QSC 77 at [45].
27 [2014] QSC 77 at [46].
28 [2014] QSC 77 at [47].
29 [2014] QSC 77 at [48].
30 [2014] QSC 77 at [49].

> can be reasonably and practicably managed by a supervision order: s 30(4)(b)(i). The effect of the opinions of at least each of the psychiatrists is that that protection of the community can be reasonably and practicably managed by a supervision order. But again, this is a question for the court. It is a question upon which the Attorney-General bears the onus, as was said in 2010 in the respondent's case in the Court of Appeal … This question ultimately requires a value judgment by the court about what risk should be accepted against the alternative of the deprivation of a person's liberty.
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> [51] Upon the evidence which I have discussed, I am persuaded that adequate protection of the community can be reasonably and practicably managed by a supervision order. Section 30(4)(b)(ii) requires the court to consider whether requirements under s 16 of the Act can be reasonably and practicably managed by Corrective Services officers. There was no argument about this matter. In particular, it was not argued for the Attorney-General that there would be some management difficulty in relation to the conditions of supervision which are required by s 16.
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> [52] For these reasons I am persuaded to rescind the continuing detention order and make an order for the respondent's supervised release. There was no argument about the terms of the supervision order being according to a draft handed up by counsel for the respondent. There will be an order according to that draft."

The test on appeal from a decision under s 30(3) of the Act

[21] Section 31 of the Act confers a right of appeal upon the Attorney-General or a prisoner in relation to whom a decision of the court under the Act has been made. Section 43(1) describes the nature of the appeal as an appeal by way of re-hearing. Without limiting the powers that the Court of Appeal has in its civil jurisdiction,[31] section 43(2) confers upon the Court of Appeal various powers, including all of the powers and duties of the court that made the decision appealed from, the power to draw inferences of fact, not inconsistent with the findings of the court, and the power, on special grounds, to receive further evidence as to questions of fact.

[22] In *Attorney-General (Qld) v Lawrence*,[32] Muir JA (with whose reasons Fraser and White JJA agreed) discussed the applicable legal principles in an appeal under these provisions:

> "[27] This is an appeal from orders made in the exercise of a discretion by a judge based on findings of fact made by the judge. An appellate court is not empowered to set aside such orders merely because they were not ones the appellate court would have made had it been exercising the discretion. Before an appellate court can interfere it must be shown that

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31 The Act, s 43(3).

32 [2011] QCA 347 at [27] – [33].

the primary judge acted on a wrong principle, failed to take a material consideration into account, took into account an immaterial consideration or that the result "is unreasonable or plainly unjust."

[28] In considering the validity of the primary judge's findings it is necessary for this Court to make due allowance for the benefits enjoyed by the primary judge in seeing the witnesses and in presiding over a trial in which the evidence, both oral and written, unfolded over time and was subjected to contemporaneous scrutiny and analysis.

[29] In *Fox v Percy*, Gleeson CJ, Gummow and Kirby JJ, discussing the circumstances in which an appellate court should interfere with a trial judge's findings of fact, said:

> "… the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.
>
> … In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable' or 'contrary to compelling inferences' in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion."

[30] After referring to the nature of an appeal by way of re-hearing, their Honours said:

> "The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share.

> Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

[31] In *Devries v Australian National Railways Commission*, Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."

[32] Gleeson CJ, Gummow and Kirby JJ, in their reasons in *Fox v Percy*, referred to *Devries* as one of three cases in which the High Court had reiterated:

> "... its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not."

[33] Their Honours observed that those three decisions "were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges."

[23] The Attorney-General challenged the description of an appellate court's powers in the first quoted paragraph. That paragraph reflects the well known passage in *House v The King*[33] which Muir JA cited. The Attorney-General argued that it "applies the rubric of *House* too emphatically"[34] and that, for the purposes of a decision under s 30(3) of the Act to release a prisoner on a supervision order, if the Court of Appeal considering the matter at first instance would have come to the view that a supervision order would not have been appropriate in view of the provision in s 30(4)(a) that the paramount consideration is the need to ensure adequate protection of the community, then it will be no answer to an Attorney-General's appeal that it was open to the primary judge to come to a different view.

[24] That argument should not be accepted. As the Attorney-General accepted, the Attorney-General's appeal can succeed only upon error by the primary judge being

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33 (1936) 55 CLR 499 at 505.

34 Appellant's amended outline of argument, at [12].

demonstrated.[35] In *Attorney-General for the State of Queensland v Yeo*[36] Muir JA explained why the principles in *House v The King* concerning appellable error were applicable in an appeal of the present kind:

> "[42] As the assessments the primary judge was required to make "call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the Order involves the exercise of a judicial discretion". The circumstances in which an order made in the exercise of a judicial discretion may be interfered with by an Appellate Court are well settled.
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> [43] In the joint reasons of Mason and Deane JJ in *Norbis v Norbis*, it was said:
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> > "The principles enunciated in *House v The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal." (citation omitted)
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> [44] In *House v The King*, Dixon, Evatt and McTiernan JJ explained the nature of "appellable error" as follows:
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> > "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant

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35 See *Attorney-General for the State of Queensland v Yeo* [2010] QCA 69 at [41] per Muir JA (McMurdo P and Chesterman JA agreeing), citing *Fox v Percy* (2003) 214 CLR 118, *Norbis v Norbis* (1986) 161 CLR 513, and *Attorney-General v Francis* [2007] 1 Qd R 396. See also *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 – 204 [13] – [14].

36 [2010] QCA 69 at [42] – [44].

> matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court at first instance. In some such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[25] The Attorney-General referred to statements by Campbell JA in *R v Ford*[37] to the effect that some decisions which may be described as "discretionary" in particular senses of that term[38] do not attract the constraints on appeal described in *House v The King* and the mere fact that a decision requires the weighing and balancing of a variety of factors does not necessarily preclude an appeal court from being in as good a position as a trial judge to make the decision.[39] As a general proposition that seems uncontroversial, but an order made under s 30(3) of the Act is "discretionary" in the sense in which that term was used in *House v The King*. Section 30(3) provides that in the defined circumstance the court "may" make either a continuing detention order or a supervision order and, as was held in *Attorney-General v Francis*[40] (which was applied in *Hocking v Attorney-General for the State of Queensland*[41]), the decision whether to make such an order "call[s] for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right."[42] The considerations which require such value judgments may not be limited to those which are specified in s 30(4), but those specified considerations plainly do involve value judgments about which no particular opinion may be regarded as uniquely right. The principles in *House v The King* concerning appellable error apply in this appeal.

Ground (a): the discretion of the primary judge under Section 30(4) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") miscarried by reason that the primary trial judge failed to take into account in assessing whether the community could be adequately protected by the release on condition…that it would be difficult, if not impossible, absent the respondent's self-report, to assess whether the respondent would experience deviant sexual fantasies if and when released into the community

[26] Under appeal ground (a) the Attorney-General argued that the primary judge failed to take into account the difficulty or impossibility, absent the respondent's self-reporting, of assessing whether the respondent would experience deviant sexual

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37 (2009) 201 A Crim R 451 at 475 – 476 [78] and 478 [84] (Howie and Rothman JJ found it unnecessary to consider these matters).

38 See *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138 – 140 [37] – [40].

39 As to the latter statement, see also *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [31] – [36].

40 [2007] 1 Qd R 396 at 402 [34].

41 [2012] QCA 65 at [59], [64].

42 *Norbis v Norbis* (1986) 161 CLR 513 at 518.

fantasies. The primary judge did take that consideration into account. The primary judge found in terms that it was relevant that there was "no means for reading the respondent's mind as to the extent to which he experiences the onset and controls of the influence of deviant fantasies" and that it was "possible that even his treating psychologist would be unable to detect some dangerous development in that respect": see [18] of these reasons. This ground of appeal appears to overlap to an extent with appeal grounds (c) – (e), so that the discussion relating to those grounds is also relevant here.

Ground (b): the discretion of the primary judge under Section 30(4) of the Act miscarried by reason that the primary judge failed to take into account, in the assessment of whether the community could be adequately protected [by] the respondent's release on condition having regard to the extent of the risk and the catastrophic consequences of the risk materialising

[27] Under appeal ground (b), the Attorney-General argued that the risk to which the community would be exposed by the respondent's release was the commission of an offence which could have catastrophic consequences. The primary judge took this relevant consideration into account in many places in the reasons, including in the primary judge's express reference to the relevance of the consideration, discussed earlier in the reasons, "of the potential consequences of further offending" which "could be most serious": see [18] of these reasons.

Ground (c): there was no basis upon which the learned primary judge could have found the supervision order would adequately protect the community; Ground (d): the decision is (i) contrary to the evidence, (ii) unsupported by the evidence and (iii) unreasonable; Ground (e) on the evidence, the learned primary judge erred in making an order for the release, on condition, of the respondent pursuant to s 30(3) of the Act

[28] Appeal ground (e) does not identify any particular error beyond those asserted in appeal grounds (c) and (d). In relation to these grounds, the Attorney-General's arguments may be summarised as follows. The Attorney-General relied upon the adverse assessments by the psychiatrists of the respondent's mental state in previous reviews under the Act, including the most recent review before that by the primary judge. The Attorney-General argued that the primary judge failed to properly consider evidence that any improvement in the respondent's reported condition depended solely upon what he told the treating psychiatrists (and psychologists), that any improvement was not capable of objective assessment, and that there was no way to ascertain whether or not changes observed during such assessments were truthful, lasting and durable. The Attorney-General argued that the primary judge did not properly take into account any unreliability of the respondent's reporting, that the primary judge should have entertained doubts about whether or not the stated improvement was genuine, and that in the absence of evidence by the respondent himself the primary judge was required to rely upon the impressions of the psychiatrists and psychologists of the respondent. The Attorney-General argued that: the respondent's release would expose the community to an unknown and unknowable risk of the commission of an offence which could have catastrophic consequences; that there could be no supervision of the respondent because manifestation of the risk (by the deviant fantasies) would be wholly internalised and incapable of objective assessment; and that self-disclosure was relied upon to ensure compliance but self-disclosure might not always be in the respondent's interests and in the past he had been motivated to act in his own interests.

[29] The Attorney-General argued that, on the evidence, supervising Corrective Services officers would be unable to identify matters which objectively would indicate a heightening of the risk presented by reactivation of the respondent's deviant sexual fantasies, the primary judge did not properly consider how the supervision order could be effective in such circumstances in discharging the "statutory requirements of s 30(4) of the Act",[43] and the primary judge erred by failing to have adequate regard to the absence of objective criteria to ascertain whether the respondent's risk of re-offending was heightened by a reoccurrence of deviant sexual fantasies by placing too much weight upon the improvement in the respondent's presentation as perceived by the examining psychiatrists. The Attorney-General argued that it was unreasonable for the court not to have recognised that adequate protection of the community could not be ensured by the release on supervision of a sexual sadist with anti-social personality disorder who was at a moderate risk of the commission of extremely serious offences, which could possibly lead to death.

[30] To address these arguments it is necessary first to mention three important conclusions reached by the primary judge which the Attorney-General did **not** challenge. First, the Act does not contemplate that a supervision order should be "risk free". The Act did not permit the primary judge to proceed on the basis that the paramount consideration is the need to ensure "the protection" of the community. As the primary judge pointed out, the Act instead requires that paramount consideration be given to the need to ensure the "adequate" protection of the community (see [9] of these reasons). Secondly, the Attorney-General bears the burden of proving that the community will not be adequately protected if a prisoner is released on supervision (see [17] of these reasons). Thirdly, there had been a "marked shift" in the opinions of Dr Lawrence and Dr Grant, who, together with the remaining professional witness, Dr Madsen, now supported release on supervision (see [18] of these reasons).

[31] Furthermore, Dr Grant and Dr Lawrence gave unchallenged evidence that there were no conditions in the supervision order which were inappropriate and that no suitable conditions had been omitted.[44] As was also submitted for the respondent, there was a rational explanation for the significant reduction in the risk of reoffending which the professional witnesses found; Dr Lawrence – who had a remarkably lengthy experience of assessing the respondent's mental state – attributed the improvement to Dr Madsen's reasonably intensive therapy, which had resulted in the strategies adopted by the respondent being "internalised", and to the moderation of the respondent's psychopathic personality disorder as he aged (which was consistent with evidence that this does occur in such cases). Clearly, the expert evidence was markedly more favourable to the respondent than the evidence which had resulted in continuing detention orders at the earlier hearings under the Act.

[32] The Attorney-General emphasised his argument that there was no logical explanation of how adequate protection of the community could be ensured or reasonably and practically managed when there was no way of being sure that the respondent would truthfully report any sexual fantasies he experienced. The primary judge did not overlook that issue. In making the value judgments whether "adequate" protection of the community could be ensured under s 30(4)(a) and reasonably and practically managed under s 30(4)(b)(i), the primary judge acknowledged the evidence that even the respondent's treating psychologists might be unable to

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43 Appellant's amended outline of argument, at [31].

44 Transcript, 14 February 2014, at 1-32 and 1-47.

detect the dangerous onset of deviant sexual fantasies involving a risk that the respondent would commit a serious sexual offence. However the primary judge also took into account the psychiatrists' evidence of the usefulness of ongoing therapy (as provided for in the supervision order, particularly in paragraphs (xvii) – (xx)). Furthermore, whilst the primary judge correctly acknowledged the possibility that the respondent had not sufficiently developed the motivation and ability to control his sexual behaviours, the primary judge accepted the evidence to the contrary effect given by Dr Lawrence and Dr Grant.

[33] Contrary to the Attorney-General's argument, the absence of any more or less foolproof way of verifying the truth of future reports by the respondent about his state of mind – including whether he was experiencing any sexual fantasy – does not itself mean that it was not open to the primary judge to find that adequate protection of the community could be ensured and reasonably and practicably managed under the supervision order. The psychiatrists did not suggest that the terms of the supervision order providing for ongoing therapy were designed to secure certainty about the state of the respondent's mind. That could not be a realistic proposition in any case. The importance for the psychiatrists of the provisions of the supervision order requiring the respondent to submit to psychiatric and psychological assessment and treatment was instead that it "would be therapeutic for [the respondent] to … further develop strategies for managing this risk [the risk of a dangerous development in the onset of deviant fantasies]" (see [18] of these reasons). The primary judge carefully analysed the evidence, including the expert evidence on that issue, and was persuaded that adequate protection of the community could be ensured and reasonably and practicably managed by the supervision order which contained those provisions for ongoing therapy (see the conclusions in [50] – [51] of the primary judge's reasons, quoted in [20] of these reasons).

Evidence of risk

[34] However that reasoning was critically dependent upon a conclusion that the respondent's mental state had already improved to such an extent that upon release into the community the respondent could adequately manage the risk of a dangerous development in the onset of deviant fantasies, such that he would be able to do so in the future with the benefit of continuing therapy. In that respect it is necessary to consider the arguments for the Attorney-General that the primary judge failed to properly consider that the experts' evidence of an improvement in the respondent's mental state depended solely upon the truthfulness of the respondent's statements to those experts and that, having regard to the unreliability of the respondent's reporting, in the absence of evidence by the respondent himself the primary judge erred by not finding that the respondent's release would expose the community to an unknown and unknowable risk of the commission of an offence which could have catastrophic consequences.

[35] The primary judge was alert to the respondent's failure to give evidence. The primary judge said:

> "The respondent's willingness and ability to manage his aberrant behaviour, with the assistance of appropriate supervision, and in turn the extent of the risk of his reoffending, are questions of fact for determination by the court. The respondent did not give evidence in this hearing. But it is unlikely that such evidence would have placed the court in a better position to determine those factual questions

> than the position it enjoys with the benefit of the evidence of these three professionals, and it was not submitted otherwise. Whilst the court is not bound to accept their evidence, in this case there is no reason not to do so. Each has had the benefit of assessing or (in Dr Madsen's case) treating the respondent for some years. Each has seen fit to substantially revise her or his earlier opinions. The evidence of Dr Lawrence has particular weight because of her very long experience in assessing the respondent."[45]

[36] The respondent supported that reasoning. In addition to developing an argument that the primary judge's conclusions were supported by the experts' evidence, the respondent argued that: the psychiatrists admitted that, contrary to their own perceptions, there was a prospect that the respondent's self reported improvement was not genuine; it was not unusual that psychiatric opinions in such a context were informed to a large degree by a respondent's presentation upon assessment; as the primary judge noted with respect to Dr Lawrence,[46] views about the genuineness of the respondent's reporting were assisted by clinical knowledge and skills; the primary judge was mindful of the issue whether or not the respondent's self reported improvement was genuine; and it was open to the primary judge to find that it was unlikely that evidence by the respondent would have placed the Court in a better position to determine the respondent's genuineness than the position the Court enjoyed with the benefit of the evidence of the expert witnesses.

[37] In considering these competing arguments it is necessary to determine the extent to which the expert evidence upon which the primary judge relied depended upon the truthfulness of the respondent's account to the psychiatrists, as opposed to the psychiatrists' independent clinical assessments.

Dr Madsen's evidence

[38] Dr Madsen's report[47] included evidence about his treatment of the respondent since 4 June 2012. The treatment comprised about between 25-30 sessions in which the respondent underwent therapy.[48] In paragraphs 35 and 36 of his report Dr Madsen referred to changes in the respondent's attitude:

> "At this time, there is evidence that he has some capacity to form and sustain relationships with others within the custodial environment. His behaviour within the prison also appears to have stabilised somewhat, and he does not appear impulsively aggressive, reckless or display other evidence of poor self regulation. At this time Mr Lawrence does not obviously appear to endorse pro-offending attitudes, nor from his self report is there 'evidence' of sexual deviancy, although it was not clear whether this has dissipated, is lying dormant or he simply is being dishonest about the frequency and intensity of his deviant fantasies. Mr Lawrence was well able to acknowledge a hypothetical risk for himself, although he felt fairly confident that he would not reoffend.

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45 [2014] QSC 77 at [49].

46 [2014] QSC 77 at [47].

47 Report of Dr Madsen, 4 November 2013 (AB 221).

48 By the time of his report dated 12 November 2012 there had been seven sessions: *R v Lawrence* [2012] QSC 386 at [53]. Then an additional 18 – 23 sessions until his 2013 report: Report of Dr Madsen, 4 November 2013, at [3], [6] and [9]. Up until his giving evidence there had been an additional five or six sessions: Transcript, 14 February 2014, at 1-11.

> Of course, a remaining concern is Mr Lawrence's long history of persisting sadistic sexual interest. It warrants specific attention because of its link with risk, particularly serious harm, to the victim. Mr Lawrence reports that he rarely masturbates, and that when he does he will utilise conventional consenting sexual fantasies. Mr Lawrence claimed that the intensity and frequency of his deviant fantasies reduced about 6 or 7 years ago. He claimed that since this time he has generally attempted to avoid masturbating to these thoughts."[49]

[39] Dr Madsen identified the deviant fantasy process as involving the abduction, rape and then murder of a young provocatively dressed adult female in an isolated location. The murder of the victim was an important part of the fantasy, as was the fear generated in the victim. Triggers for those fantasies in the past had included "low/negative mood states and possibly having 'opportunity' (i.e. actually observing attractive females that 'match' the fantasy profile)."[50] The triggers also included feelings of hostility and desire for 'vengeance'. In addition movie and television shows where rape was depicted could also trigger these types of fantasies. Then Dr Madsen said:

> "Mr Lawrence reports that he is able to manage these fantasies when he experiences them now, through a range of processes including, distraction (i.e. focusing on another activity, playing playstation, painting) and communicating with others. He reported that he avoids watching movies that show high levels of violence.
>
> As I have highlighted earlier Mr Lawrence appears very anxious discussing his fantasies. I also noted within our sessions that he occasionally verbalised frustration with the concerns that continue to get raised regarding this matter. He feels that he has been unfairly judged because he has been open and 'honest' about his fantasies. **In short, he is acutely aware of the potential negative consequences to himself should he disclose experiencing deviant fantasies presently. This self interest, to a degree, is understandable and obviously complicates the picture in terms of understanding Mr Lawrence's 'true risk'.** Having said this, it is fair to point out that Mr Lawrence has discussed his deviant fantasies and the 'types of things' that trigger these. **He has not claimed that he never has these thoughts, however, states that the frequency and intensity of such is much less than previously in his life."**[51]

[40] Dr Madsen concluded in paragraph 49 of his report:

> "Mr Lawrence's presentation within sessions and also his progress within the prison environment suggests that his behaviour has stabilised somewhat and he has developed some personal strengths (most notably, his work ethic, good self regulation). Concerns remain regarding sexual deviancy and his capacity to conceptualise risk factors and risk management strategies."[52]

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49 Report of Dr Madsen, 4 November 2013, at [35] and [36].

50 Report of Dr Madsen, 4 November 2013, at [37].

51 Report of Dr Madsen, 4 November 2013, at [37] and [38] (emphasis added).

52 Report of Dr Madsen, 4 November 2013, at [49].

[41] It is evident from those passages that on the respondent's own self-reporting to Dr Madsen the respondent still experienced sadistic sexual fantasies, though perhaps not as frequently as in the past, that Dr Madsen was concerned that the respondent may not have been truthful in his account about the sadistic sexual fantasies and that the respondent was acutely aware of the negative impact to himself should he disclose that he was experiencing those fantasies. When Dr Madsen gave evidence he was asked a number of questions directed to those issues. One question related to paragraph 10 of his report, where Dr Madsen opined that the respondent "seemed to answer all questions in a forthright and candid manner", but at times Dr Madsen nevertheless "was under the impression that he was likely engaging in positive impression management".[53] Dr Madsen detailed how some fantasies, particularly the fantasies that were quite deviant and sadistic, would be described in very clear and specific terms, whereas at other times he would relate fantasies that were quite predictable. Dr Madsen said:

> "So, he would go from describing – and I'll give you an example – he'd go from describing having very detailed fantasies of stalking and hurting and killing a young woman and when I would say, well, when you think about sexual fantasies now how – you know, how have things changed and then [the respondent] would describe, well, I would – I would think about meeting a woman, going out for dinner and having consensual sexual contact at the end of the evening. **And I found those kinds, or those kinds of descriptions, seemed – seemed prepared and – and seemed a little bit for my benefit than they seemed real for [the respondent].**"[54]

[42] Dr Madsen considered those descriptions to be prepared and that "it was a bit too good to be true. I mean, I hope it is true, but, of course, it's difficult to know …".[55] When asked when, in the 16 months that Dr Madsen had been treating the respondent, the prepared answers had become apparent, Dr Madsen said it was probably "all the way through in the work that we've done. So [the respondent] has always sort of consistently stated that they are the kinds of fantasies that he has now, as opposed to the deviant or violent ones."[56] Dr Madsen acknowledged the difficulty of assessing whether or not the "prepared fantasies" were true. He said that he was not able to assess that and: "I mean, at the end of the day it's – it's what goes on in – in someone's fantasy world. So it's very, very difficult to be able to evaluate the nature or the content of those kinds of thoughts."[57]

[43] The importance of the fantasies, so far as Dr Madsen was concerned, was related to the sexually deviant fantasies which the respondent had experienced very intensely in his past. Dr Madsen expressed it this way:

> "So when we think about his risk in the future, his risk in the community should he be released, then … having these kinds of thoughts, these kinds of fantasies would, of course, be problematic and of concern, because in the sense that they provide the motivation and the drive to perhaps act them out. And because [the respondent] has acted on them previously, I would be extremely concerned that if he

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53 Report of Dr Madsen, 4 November 2013, at [10].
54 Transcript, 14 February 2014, at 1-6 (emphasis added).
55 Transcript, 14 February 2014, at 1-7.
56 Transcript, 14 February 2014, at 1-7.
57 Transcript, 14 February 2014, at 1-7.

> was experiencing these kinds of thoughts in an intense way currently, because of that."[58]

[44] Thus, Dr Madsen frankly recognised that he was unable to assess whether he was being told the truth about the fantasies, but that if the respondent was still experiencing the sadistic sexual fantasies then that would be a matter of extreme concern. Dr Madsen returned to that issue in the context of the respondent's ability to cope with the stress of a changed environment, should he be released under supervision. Having referred to the fact that the transition would cause a period of high risk, of maybe six to nine months,[59] and whilst he did not know for certain how the respondent would cope, nonetheless he expected he would be able to cope, Dr Madsen then said:

> "With, I guess, [the respondent's] offending … I suppose is … the complicated bit. Because a large – a large part of what seems to have driven his offending in the past with his fantasies and his desire to have this – this outcome, you know, killing and … killing a woman, we may not necessarily see an increase in his risk of doing that because a lot of that might be just driven by the fantasies that he would be experiencing himself … that, of course, is very difficult to measure."[60]

[45] Dr Madsen agreed that it would be impossible to measure whether the respondent was experiencing the deviant fantasies, and the fact that he might be experiencing them might not be observable to anyone.[61]

[46] In cross-examination Dr Madsen was asked about the framework of his treatment, and the concentration upon strategies in response to deviant sexual fantasies. He was asked:

> "So it's really not so much a question of whether or not Mr Lawrence might have a fantasy in the future but it's how he cognitively responds to that?--- That's right."[62]

[47] In response to questions in cross-examination, Dr Madsen reiterated that it was not possible to read minds, in the sense of detecting whether someone is having a fantasy but not disclosing it. However, Dr Madsen agreed that if a prisoner was having a fantasy and not disclosing it, that prisoner "might well present a much greater risk than someone who's prepared to discuss them and work on addressing them".[63] In that context Dr Madsen said the respondent's apparent openness in discussing those matters with himself, and other professionals, was "an encouraging sign".

Discussion - the primary judge's analysis of Dr Madsen's evidence

[48] The primary judge quoted paragraph 35 of Dr Madsen's report[64] in which Dr Madsen referred to evidence that the respondent "has some capacity to form and sustain relationships with others". This was evidently derived from the prison reports, but it is also a topic upon which the respondent made his own self report.

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58 Transcript, 14 February 2014, at 1-7 – 1-8.
59 Transcript, 14 February 2014, at 1-9.
60 Transcript, 14 February 2014, at 1-10.
61 Transcript, 14 February 2014, at 1-10.
62 Transcript, 14 February 2014, at 1-11.
63 Transcript, 14 February 2014, at 1-13.
64 [2014] QSC 77 at [22], set out at [38] above.

Whilst it may be partly observation or a conclusion based on the evidence of others, it is sourced in part in the truthfulness of the respondent's account. The paragraph continues with an observation about the respondent's non-endorsement of "pro-offending attitudes" which may be correctly characterised as an observation or assessment, but it too is dependent upon the truthfulness of the respondent's account. The last sentence of that paragraph directly depends upon the truthfulness of the respondent's account. The particular significance of the last sentence is the expression by the respondent that "he felt fairly confident that he would not reoffend". On any view that is dependent upon the truthfulness of the respondent's account.

[49] The primary judge then referred to Dr Madsen's evidence that the respondent was acutely aware of the potentially negative consequences to himself if he disclosed his fantasies.[65] That opinion was clearly dependent on the truthfulness of the respondent's account.

[50] The last section of Dr Madsen's report to which the primary judge referred concerned the respondent's performance in the treatment sessions.[66] The primary judge quoted paragraph 49 of the report. The first part of that paragraph concerns an assessment of how the respondent presented in his treatment sessions, and his progress within the prison environment, offering the opinion that those matters suggested that the respondent had developed some personal strengths. Those matters are clearly matters of assessment, although based in part (the reference to his progress within the prison environment) on the truthfulness of the respondent's account. However, paragraph 49 of the report contained this sentence: "Concerns remain regarding sexual deviancy and his capacity to conceptualise risk factors and risk management strategies". Those concerns were expressed in relation to two matters which were dependent upon the truthfulness of the respondent's account. In particular, the question of "risk management strategies" and whether they would be effective, are very much questions dependent upon the truthfulness of the respondent's account.

[51] The primary judge then referred to the oral evidence of Dr Madsen[67] about the respondent's fantasies over time. Those matters are dependent upon the truthfulness of the respondent's account. Dr Madsen's view, as recorded by the primary judge, was that he would be "extremely concerned… if he was experiencing these kinds of thoughts in an intense way currently …". The last part of Dr Madsen's evidence related to the fact that the respondent's behaviour had stabilised over the period he had been in custody, but that it was difficult to know how he would react when removed from that environment. Those matters are clearly matters of assessment and opinion.

Dr Lawrence's evidence

[52] Dr Lawrence had seen the respondent on a number of occasions for the purpose of assessing him under the Act. There had been five reports previous to the report presented to the learned primary judge. In addition, Dr Lawrence had had some role in assessing the respondent in 1983 when he was tried for the rape and murder of a young woman in the Wolston Park Hospital.

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65 [2014] QSC 77 at [23], set out at [39] above.

66 [2014] QSC 77 at [24]; Report of Dr Madsen, 4 November 2013, at [48].

67 [2014] QSC 77 at [25], partly set out at [43] above.

[53] In her interview of the respondent for the purpose of producing the latest report, Dr Lawrence recorded what she had been told as to the occurrence of any fantasies:

> "He denies absolutely that he has any deviant fantasies at the present time and volunteered that, if he is exposed to something which could trigger these deviant fantasies, for instance, a scene on TV, particularly a rape scene, he either turns it off or walks away. He said that he **is now using strategies to deal with his deviant fantasies** and that this has emerged as a result of working with [Dr Madsen]."[68]

The respondent reiterated to Dr Lawrence that he had not had any deviant fantasies for some time, probably years.[69]

[54] Dr Lawrence detailed her observations and actuarial assessments of the respondent, and in particular that the actuarial assessment suggested some moderation in the respondent's lack of remorse or guilt and lack of empathy. As to that Dr Lawrence added:

> "Whilst one must retain some caution in this appraisal in the light of [the respondent's] very evident desire to present himself as positively as possible in order to achieve supervised release, and he is clearly capable of comprehending what he must say and do to achieve that end, it was my clinical opinion at my last interview that there had been some integration of those understanding and concepts of those issues into [the respondent's] cognitive and emotional processes. This contrasted with my opinion when seen previously when his statements regarding remorse, guilt and empathy appeared rote and superficial."[70]

[55] In her discussion and opinion Dr Lawrence revealed that her assessment of the respondent had changed, and to an extent that she would not have previously anticipated. The most significant agent for change was the therapeutic intervention and counselling from Dr Madsen. In that respect Dr Lawrence said that the "continuation and support of this therapeutic relationship is of central importance and significance" to the future management of the respondent.[71] However, Dr Lawrence subsequently qualified her opinion in this way:

> "The "elephant in the room" (so to speak) remains the issue of the continuance in frequency and the nature of [the respondent's] deviant fantasies. We are entirely dependent on his own articulated statements for any assessment of these. He is quite aware of this and understands their significance. His motivation for change and for release is strong and commendable but one must remain cautious about the degree of veracity of his statements regarding his deviant fantasies. Currently, he asserts no such deviant fantasies "for years". He indicates strategies for dealing with potential precipitants of fantasies and claims to use them successfully. If this [is] valid, the risk is reduced. If he [has] falsely represented this very personal experience, the risk remains high and unknowable."[72]

[56] That qualification was, not surprisingly, the focus of a deal of evidence by Dr Lawrence. She was asked to comment on the significance of the deviant fantasies, and having identified that they were of a sadistic nature involving rape and murder, and were acted out by the respondent in 1983, Dr Lawrence said:

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68 Report of Dr Lawrence, 31 October 2013, at [8.6] (emphasis added).
69 Report of Dr Lawrence, 31 October 2013, at [8.17].
70 Report of Dr Lawrence, 31 October 2013, at [11.2.2].
71 Report of Dr Lawrence, 31 October 2013, at [12.6].
72 Report of Dr Lawrence, 31 October 2013, at [12.8].

> "… So they – it was the acting out of a fantasy. I think that sets the scene for the extent and high level of risk associated with these, what we call just – to use the expression, deviant fantasies. **Whilst I think they have been present since, it's unlikely that they just disappeared throughout his life, and it's likely that they are present or could continue to be present and if they are continuing to be present, unless they are well-controlled and so forth, avoided by him, it is always possible that – and there is – that is the risk that he could act on those fantasies again at some point in time.** The risk, obviously, of carrying out those events, again, would be, as I think has been called catastrophic, and I agree with that assessment but the – so when we're trying to calculate, **if you like, or describe the risks that [the respondent] presents at the present time, it is important to have some understanding of how frequent his masturbatory fantasies are, whether they are deviant, and the extent and nature of those fantasies, so we can understand – as part of the understanding of what the actual risk is or what are the factors that might contribute to the risk that he would act out on those fantasies again, but they are fantasies and there's no way that an external observer is going to be able to get access to those fantasies unless [the respondent] verbalises them and describes them to somebody.** If he chooses to do – to do that, it is, of course, helpful to our assessment, but he may well be having the fantasies and **choosing not to reveal them to others and there's no way we can access those fantasies and therefore accurately or reasonably so calculate the risk of his acting on his fantasies if we don't know that they're there.** So what I'm saying is that we all have fantasies and particularly masturbatory fantasies are very private, personal, and it's up to the individual to tell somebody else if they're present or not."[73]

[57] After Dr Lawrence said that she had noticed over time that there had been evidence of real change or greater understanding of the respondent's difficulties, and evidence of genuine attempts to deal with those problems, there was this exchange:

> "Because it's true, is it not, that you're in no better position than anyone else in assessing whether or not what he says is right?--- Not really. One would hope that one's clinical knowledge and skills can be applied to be of assistance in these matters, and that that might be better than Jo Blow on the street so to speak. But we certainly don't read minds as I often remind people.
>
> And then that's – that's why, in the second sentence in paragraph 12.8, you say that – and I quote, "We are entirely dependent on his own articulated statements for any assessment of these". Being a reference to the nature and frequency of the deviant fantasises that he suffers from? --- That's correct.
>
> So, when you say we, you include yourself in that category?--- Very much so. All – all psychiatrists I'm talking about.
>
> Well, also-- ? - - - And psychologists."[74]

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73 Transcript, 14 February 2014, at 1-18 – 1-19 (emphasis added), summarised at [2014] QSC 77 at [32].

74 Transcript, 14 February 2014, at 1-20, partly summarised at [2014] QSC 77 at [32].

[58] Dr Lawrence also emphasised the difficulty of detecting whether or not the respondent was descending into deviant sexual fantasies. In the context of whether someone from Corrective Services could make that assessment her answer was:

> "Not unless he was really revealing them or they had … an individual who is fully aware of all the circumstances and is alert to the significance of these fantasies, if over a period of time you know that individual well, you may be able to pick up minor changes in conversation, behaviour, attitudes, comments, that sort of – and non-verbal stuff that might alert you to some change going on, and lead to further enquiries. So, you may – that person may be able to access the presence of these deviant fantasies. But essentially, there's no real way of – of knowing except if you ---
>
> If--- ?- - - were told about them."[75]

[59] Dr Lawrence considered that periodic assessment of the respondent, even as regularly as once a week, presented its own problems because:

> "things could happen suddenly, or there may be some event which destabilises [the respondent] in the … outside world and stimulates, if you like, the re-emergence of the fantasies and increases the risk of acting on them."[76]

[60] Dr Lawrence was referred to the statement in paragraph 12.8 of her report that if the respondent had falsely represented his experience in terms of dealing with fantasies, then the risk remained high and unknowable. She said:

> "But if he's not telling the truth, if it's been a … positive impression management strategy on his part then we just don't know… whether… the risk would be reduced. He could just be telling us something that isn't correct and … if the deviant fantasies are there and stresses increase and he dwells on those, they could, ultimately, be acted out."[77]

[61] Dr Lawrence was taken to a passage in her report in 2011[78] where she had commented upon the respondent's reliability and truthfulness. That was explored in this passage of the evidence:

> "And there was further evidence. And if I just take you through, anyway, the … views that you express here in 6.1. You say that, "[the respondent] cannot be regarded as a reliable historian. Throughout his history, he has … it has been demonstrated that he's capable of significant distortions of the truth, lying, denial, minimalisation and speechless arguments in regards to his offending behaviour"?--- Yes.
>
> You said that?--- Yes.
>
> Is that still accurate?--- I think it was – well, think it's still true to say you can't be sure that he's a reliable historian, but I think that there was less evidence of … that as far as I could tell in my last assessment.
>
> How does that impact then with the view that – that we're reliant of [sic] the … report of improvement based on what he has said?--- Well,

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75 Transcript, 14 February 2014, at 1-21.

76 Transcript, 14 February 2014, at 1-22, partly summarised at [2014] QSC 77 at [33].

77 Transcript, 14 February 2014, at 1-23.

78 Exhibit 1 (Report of Dr Lawrence, 16 May 2011), (AB 65).

> I think it's still true that we … are dependent … on his statement and I think it's true that … we can't be … 100 per cent certain that he's telling us the truth, the whole truth and nothing but the truth … in regard to matters which will impact on him.
>
> And you … still maintain that he can't be regarded as a reliable historian?--- Not 100 per cent reliable, no."[79]

[62] In cross-examination Dr Lawrence identified the basis for her subjective opinions about the respondent, including that they were based on her own expertise, as well as the respondent's history, including prison records and the completion of programs, and observations during interviews. She was asked to comment upon the question whether the respondent did in fact have strategies for dealing with the deviant fantasies and his claims to be using those strategies successfully. Specifically she was asked whether the evidence of Dr Madsen could lead one to greater confidence that the respondent was correct when he said he had the strategies and could use them successfully. Dr Lawrence's answer was that: "I believe there is some evidence that he is using them successfully in the current circumstances, but to some extent we're still reliant on his statements about all of that."[80]

[63] Dr Lawrence's evidence emphasised the importance of two matters to the question of risk. The first was whether a truthful account had been given by the respondent of his experiencing the sadistic sexual fantasies at the current time and his methods for dealing with them. The second was the inability to detect when the respondent might be experiencing those fantasies if he did not honestly reveal them. The impact upon risk, according to Dr Lawrence, was that if the respondent was being truthful then the risk had moderated from previous assessments, but that if he was not being truthful then the risk remained high and unknowable. The prospect of evaluating or assessing whether the respondent was experiencing any sadistic sexual fantasy was made harder by the fact that one could not express confidence that he was likely to tell the truth, given his past record of distorting the truth, lying, denial and minimalisation of his offending behaviour. Dr Lawrence's view was that even though a psychiatrist such as herself might be able to apply her clinical knowledge and skills, and thereby be in a better position than the ordinary person, members of Corrective Services did not have any tools or equipment to assess whether or not the respondent was descending into deviant sexual fantasies, unless he honestly revealed it.

Discussion: the primary judge's analysis of Dr Lawrence's evidence

[64] Dr Lawrence's evidence played a major part in the primary judge's conclusions. The primary judge commenced with that part of Dr Lawrence's evidence where she recounted having met the respondent for more than two hours, and what the respondent reported to her.[81] It included a statement about his strategy to manage deviant fantasies should they occur (which he denied). The effectiveness of such a strategy was clearly dependent upon the truthfulness of the respondent's account.

[65] The primary judge recorded Dr Lawrence's explanation of the method of assessment,[82] and then set out the central parts of her opinion, from paragraphs 12.3

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79 Transcript, 14 February 2014, at 1-27.
80 Transcript, 14 February 2014, at 1-32.
81 [2014] QSC 77 at [27].
82 [2014] QSC 77 at [28].

to 12.7 of her report.[83] As mentioned earlier in these reasons, her opinion differed markedly from that which she had previously expressed. The primary judge relied upon paragraphs 12.4, 12.5 and 12.7 of her report. In paragraph 12.4 Dr Lawrence expressed her view that there had been evidence of change in the respondent's understanding, belief systems and ability to understand his own behaviour, as well as his emotional and impulsive responses. Those are matters of assessment, but based at least in part upon the truthfulness of the respondent's statements. For example, the last part of paragraph 12.4 was a comment upon the fact that the respondent had "learnt strategies to assist him in managing those emotional responses and drives in an appropriate and prosocial fashion". To the extent that that comment refers to the respondent's ability to invoke strategies to manage the sadistic sexual fantasies, it must depend upon the truthfulness of the respondent's account.

[66] In paragraph 12.5 of her report Dr Lawrence referred to the benefits of the counselling by Dr Madsen. She referred to that as "the most significant agent of change". She expressed the view that the counselling had been such as to amplify the respondent's understanding, and incorporation into his psychic functioning, of that understanding of concepts, previously addressed in sexual offending programs. She then expressed the view that the respondent had benefited from that therapeutic relationship. All of those matters are matters of assessment or opinion, based on her interview and review of the evidence.

[67] In paragraph 12.7[84] Dr Lawrence gave credit to the respondent "since the psychological changes which he has apparently achieved can only reflect his motivation and active involvement in those therapeutic endeavours". That reflects an observation or assessment on the part of Dr Lawrence. She went on to say of the respondent: "He himself appears to recognise the need for and willingness to continue with, those endeavours if he were to be released …". That reflection depends upon the truthfulness of the respondent's account.

[68] The primary judge then referred to the caveat expressed in paragraph 12.8 of Dr Lawrence's report by saying that "the uncertainty of whether the respondent is being truthful in saying that he does not experience deviant fantasies and has 'strategies for dealing with potential precipitants' of such fantasies which he has used successfully".[85] That was a reference to paragraph Dr Lawrence's statement the "elephant in the room" remained the issue of the continuance in frequency and the nature of the respondent's deviant fantasies. She acknowledged that "We are entirely dependent on his own articulated statements for any assessment of these". She went on to express the need for caution "about the degree of veracity of [the respondent's] statements regarding his deviant fantasies". She concluded paragraph 12.8 by stating:

> "He indicates strategies for dealing with potential precipitants of fantasies and claims to use them successfully. If this [is] valid, the risk is reduced. If he [has] falsely represented this very personal experience, the risk remains high and unknowable."

The last part of paragraph 12.8, which focuses on the invoking of strategies to deal with the fantasies, and the effectiveness of those strategies, depended upon the truthfulness of the respondent's account.

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83 [2014] QSC 77 at [29]. Paragraphs 12.4, 12.5 and 12.7 of the Report of Dr Lawrence are set out at [12] above.

84 His Honour did not quote paragraph 12.6 of the Report of Dr Lawrence, 31 October 2013.

85 [2014] QSC 77 at [30]. Paragraph 12.8 is set out at [55] above.

[69] The primary judge then dealt with Dr Lawrence's evidence about the respondent's revealing pro-social attitudes and behaviour in various areas. She went on to note that the respondent's involvement in intensive therapeutic programs aimed at sexual offending behaviour, "would appear to have been able to effect evidence of change in emotional and cognitive states as well as improving, through cognitive means, his apparent ability to manage the more abhorrent and harmful of his moods and impulses."[86]

[70] Thus far Dr Lawrence's evidence in this passage expresses an assessment based upon her own observation and (probably) the prison reports. The primary judge then quoted paragraph 13.7 of Dr Lawrence's report, where she expressed the view that the respondent's level of risk of offending violently or sexually had moderated "as a result of these efforts". That is a reference to the product of the intensive therapy and change in attitude leading to the respondent's "apparent ability to manage the more aberrant and harmful of his moods and impulses". Insofar as that refers to the ability to invoke and apply the strategies to deal with the sadistic sexual fantasies, it depends upon the truthfulness of the respondent's account. No doubt the conclusion as to the level of risk being moderated is a matter of assessment by Dr Lawrence, but it depended upon the respondent's ability to implement the strategies, which in turn depended upon the truthfulness of the respondent's account. That is reflected also in the next part of Dr Lawrence's report quoted by the primary judge at this point namely, paragraphs 14.7 and 14.8.

[71] The primary judge noted Dr Lawrence's evidence as to the likelihood that the respondent would still experience deviant fantasies, stating "so that if they were not well controlled or avoided by him, it was possible that 'he could act on those fantasies again at some point in time'".[87] Then, having acknowledged the motivation to put himself in the best light to lessen the impact of the Act on him, the primary judge continued:

> "Nevertheless, Dr Lawrence believed that 'there had been evidence of real change or greater understanding of his difficulties and evidence of very genuine attempts to deal with his problems.'"

That passage related to the evidence at page 1-20 of the trial transcript paraphrased at [57] of these reasons. The reference to "evidence of very genuine attempts to deal with his problems", includes the implementation of the strategies to deal with the sadistic sexual fantasies. That, in turn, depended on the truthfulness of the respondent's account.

Dr Grant's evidence

[72] In Dr Grant's report[88] he recorded what he had been told by the respondent about whether the respondent was experiencing deviant sexual fantasies at the current time:

> "In regard to deviant sexual fantasies of violent rape or murder, [the respondent] says that they are not currently occurring. He said that since his relationship with Peter those deviant fantasies have gone. He felt that his relationship with Peter made him "complete" and he lost interest in his deviant fantasies. **However, he told me that it would be possible for such fantasies to return in the future under certain circumstances. He indicated that it could be that when he is watching television he might see a violent rape scene**

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86 [2014] QSC 77 at [31]. Summarised at [13] above.

87 [2014] QSC 77 at [32].

88 Report of Dr Grant, 28 October 2013 (AB 136).

> **and that might trigger off a fantasy. However, if this occurs he deals with it immediately by turning the television off or changing the channel or doing something different. He actively resists masturbating to fantasies of such scenes that he might see, as masturbating would "reinforce old habits".** He thought also that his deviant fantasies could return if he was feeling very stressed for some reason, or not really remaining vigilant or paying attention to what he is doing in life.
>
> [The respondent] told me that, if in the future fantasies returned and he started to masturbate to them, he would be very concerned because he would see that as behaviour that reinforced the fantasies and could bring back previous violent behaviour. He said if this happened he would immediately talk to his case officer and to Lars Madsen or also he could talk to other support people. He feels that he can now communicate about these matters, whereas in the past he used to keep himself."[89]

[73] Dr Grant referred to his diagnosis of the respondent as being one of Sexual Sadism and an underlying Antisocial Personal Disorder with prominent psychopathic traits.[90] There was no other evidence of significant psychiatric disorder and the respondent was able to function in the prison environment. The sadistic sexual fantasies were, in Dr Grant's opinion, the major issue of consideration for the respondent. Dr Grant said:

> "The major concern in terms of future offending revolves around the recurrence of sadistic sexual fantasies, **[the respondent's] ability to detect and deal with those fantasies, and the ability of supervision and therapy to both recognise the presence of fantasies and assist him in dealing with them. Clearly, if [the respondent] was to act on those sadistic sexual fantasies the results could be quite catastrophic. The challenge for treaters and supervisors in the future would therefore be to have sufficient confidence in their relationship with [the respondent] that he would report fantasies and cooperate with efforts in controlling them.** His current positive engagement in therapy is encouraging and in my opinion there can be somewhat more confidence that he could be safely managed in the community under appropriate management."[91]

[74] In his evidence-in-chief Dr Grant was asked how does a supervisor detect the presence of the fantasies, and his answer was:

> "Well, hopefully within a relationship which is an ongoing trusting relationship where a rapport has developed and – and [the respondent] feels able to talk to that person, that he will undertake discussion of those issues and – and report honestly about whether he's having fantasies, to what extent they're occurring, how he's dealing with them, and so on."[92]

[75] Dr Grant expanded on that answer in terms that the supervisor ought to be male, and experienced in dealing with people with personality disorders and sexual problems,

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89 Report of Dr Grant, 28 October 2013, at p 6 (emphasis added). The reference to "Peter" was to another inmate with whom he had had a sexual relationship for some eight months.

90 Report of Dr Grant, 28 October 2013, at p 13.

91 Report of Dr Grant, 28 October 2013, at pp 14 – 15 (emphasis added).

92 Transcript, 14 February 2014, at 1-35.

and form a relationship with the respondent "so that he feels able to talk frankly about how he is feeling, … how it's going along, and what's happening with his fantasies and his sexual life."[93] This would then lead the supervisor to look for alterations in the way in which the respondent was reporting these things and whether the supervisor could "get a feeling that [the respondent] is being open and honest or whether they feel that he's being guarded, suspicious or withholding information …".[94]

[76] Dr Grant accepted the possibility that the respondent might not be totally frank in responses to the supervising officer and was asked whether Corrective Services might have some means of telling whether they were being told the truth by the respondent:

> "Is that able to be done in [the respondent's] case? - - - Not to the same extent as with, say, some other sexual offenders. So, for example, if you're supervising a person with paedophilia you may, in the process of your supervision, be gathering information about relationships, contacts they have. You'll have other information from where they've been, … and so on from electronic tracking. You can check … where they're going and possibly who they're meeting. And … you can also have them checked for drugs and alcohol, if that's an issue in terms of risk. With [the respondent], drugs and alcohol is not an issue that's affecting risk. He's not usually – you don't expect that he'll be grooming a victim like a paedophile might be. If a victim was to exist in the future, it would likely be … not a close relationship to [the respondent], although it might, it could be, but those kind of precursors that you might see to a sex offence might not be so obvious in [the respondent's] case, if it's driven by powerful fantasies."[95]

[77] On the question whether the supervisor might be able to tell when the fantasies were occurring Dr Grant responded: "… you're reliant, to a large extent, on him being honest and consistent in his reporting about his fantasies."[96] Dr Grant's own experience of the respondent was that "at times he is an unreliable historian".[97] When that question was developed, the following evidence was given by Dr Grant:

> "[The respondent], would he have the ability to, if you like, mislead a supervisor or... her into believing that that person had his confidence?--- He may well do. I mean, **this is a problem in treating any kind of sexual offender. You are reliant on their – their reports to a large extent of what is going on in their mind and what fantasies and impulses they are experiencing and unless they can tell you that, it's very hard to help them with control strategies, et cetera.**
>
> But in this instance, … do you agree with what Dr Lawrence said that it's the fantasies which are the precursor to the offending?--- Yes, I think that it's important to think about the pattern of that. It's not as if he's going to have one fantasy and is likely to go out and act on that fantasy on that day. The pattern that usually happens with

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93 Transcript, 14 February 2014, at 1-36.
94 Transcript, 14 February 2014, at 1-36.
95 Transcript, 14 February 2014, at 1-36.
96 Transcript, 14 February 2014, at 1-38.
97 Transcript, 14 February 2014, at 1-38.

> such sex offenders is that they have powerful fantasies which build up and build up and are more and more kind of urgent – if you like – and associated with high sexual drive, associated with those fantasies and maybe multiple masturbations to those fantasies then rehearsing of acting out on those fantasies in real life in their mind. And perhaps even rehearsing movements in the community or something might be involved, and then eventually, losing control of that and acting on those fantasies in – in a real life situation. So, it's not usual for someone just to have a fantasy and then go act on it. It's – it's the kind of build-up that's important.
>
> **All right. Well, accepting that chain of events occurs---?--- Yes.**
>
> **---how does a supervisor know about it if [the respondent] doesn't tell him?--- Well, he probably – probably wouldn't. So, you are reliant in treating any sex offender on their willingness to engage in that process, their willingness to be honest in – in what they're experiencing what the impulses are and their willingness to engage in control strategies for that."**[98]

[78] Dr Grant candidly accepted that the respondent confronted a dilemma in that the disclosure of sadistic sexual fantasies might lead to his supervision ending.[99] That dilemma was complicated, Dr Grant accepted, by the fact that unless the respondent truthfully revealed what he was experiencing, one would not know whether he was experiencing fantasies and at what point of intensity they were. In that respect Dr Grant said that if the respondent "was experiencing these things and he's determined that he wasn't going to talk about them, then it would be very difficult to manage".[100] Then, turning to the question of risk, Dr Grant was referred to the evidence of Dr Lawrence, namely that if it was true that the respondent had controlled the fantasies then the risk was reduced. He was then asked: "If he is falsely representing the existence of the fantasies, the risk is unmalleable. Do you agree with that?--- Yes."[101]

[79] Dr Grant agreed that the outcome of the respondent's offending might be "catastrophic",[102] and said:

> "Absent [the respondent's] self report, is there any real way of detecting recurrence of any prominent … sexual sadist fantasies which are defined in the second last paragraph of your report?--- **In the end, he has to tell you what's happening. You might detect changes in behaviour, changes in the way he communicates, which indicates that he is not being open. But you wouldn't know unless he tells you what's happening in his mind."**[103]

[80] In cross-examination Dr Grant was taken to part of his report which recorded that the respondent "denied active fantasies", but was "willingly accepting the fact that they could return in the future", and discussed ways in which he would deal with them.[104] As to that the following exchange occurred:

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98 Transcript, 14 February 2014, at 1-39 (emphasis added).
99 Transcript, 14 February 2014, at 1-40.
100 Transcript, 14 February 2014, at 1-41.
101 Transcript, 14 February 2014, at 1-42.
102 Transcript, 14 February 2014, at 1-43.
103 Transcript, 14 February 2014, at 1-43 (emphasis added).
104 The passage is in the Report of Dr Grant, 28 October 2013, at p 15.

> "And likewise, the first paragraph on page 13 of your report, you give your impression as to his increased willingness to acknowledge the significance of fantasies and his need to deal with them appropriately?--- Yeah. He seemed to be more open in that regard, whereas before he'd sort of tend to say no, they don't occur anymore, they haven't been there for a long time and so on, **but now he's able to admit that they do occur at times, although he takes efforts to try to ensure that they get dealt with quickly and he doesn't let them develop. So he seemed all right when – about that situation when I saw him that time."**[105]

[81] The difficulties with the respondent's honesty, or lack thereof, with his supervisors, and their problems in assessing what he was experiencing, received further comment by Dr Grant during cross-examination. He was asked about whether any conditions in the draft supervision plan were inappropriate, or whether any had been omitted, and the following exchange occurred:

> "Were there any conditions in that draft plan which you felt to be inappropriate or any suitable conditions which you felt had been omitted from such a draft plan?--- No, I thought it was appropriate. **I thought that the requirement that he be – was it honest or – that he communicated – he be honest and open to his supervisors, I'm not sure whether that's what was – but I felt it's – it's a very important thing for him to be able to do, but I'm not sure how it's going to be monitored.**
>
> Yes. How does one assess whether it's---?--- Yes. How does one assess---
>
> ---complied? Which number or condition is that?--- Let me see. Where is it? "Respondent truthfully to inquiries about" – oh, that's about his whereabouts and movements. **There's another thing – "Agree to open communication and full cooperation between himself and the treating person and that if either party deems it advisable for that party to contact an authorised Corrective Services officer." That's part of it. So agree to open communication and full cooperation, how do you assess whether there's open communication? Might be an issue.**
>
> So there's really an element of aspiration rather than regulation in that condition?--- **Yes, I mean, I – I think that it is very important for him to be open and communicate well. So I don't object to those being in the supervision order. I'm just not too sure how you could always make a judgment about whether there's been a---**
>
> Yes. Any other comments on the terms of the draft plan?--- No, I think it looks fine otherwise. Thank you."[106]

Discussion: the primary judge's analysis of Dr Grant's evidence

[82] Dr Grant's evidence was not given as extensive treatment as that of Dr Lawrence. The primary judge quoted a passage from page 14 of Dr Grant's report[107] which referred to two things. The first was that over the last 12 months the respondent had become more willing to discuss his fantasies and their relevance to future offending.

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105 Transcript, 14 February 2014, at 1-45 (emphasis added).

106 Transcript, 14 February 2014, at 1-47 – 1-48 (emphasis added).

107 [2014] QSC 77 at [35].

The second was that the respondent has become "more open to working on strategies to deal with such fantasies should they become more prominent in the future". The second aspect is dependent upon the truthfulness of the respondent's account. The primary judge then turned to Dr Grant's evidence that the major concern in terms of future offending revolved around the recurrence of sadistic sexual fantasies, "the respondent's ability to detect and deal with them, and the ability of supervision and therapy to both recognise the presence of fantasies and assist him in dealing with them". The ability of the respondent to detect and deal with the fantasies refers to his implementation of the strategies to avoid their consequences. That depended upon the truthfulness of the respondent's account in that respect. As Dr Grant noted, it was part of the "major concern in terms of future offending".

[83] The primary judge quoted a passage from page 15 of Dr Grant's report, in which Dr Grant expressed an opinion that the actuarial high risk of reoffending had been reduced by "dynamic factors such as his age, lessons he has learnt from treatment and his current response to therapy" to a moderate level of risk.[108] The reference to "lessons he has learnt from treatment" includes the strategies that the respondent would need to identify and deploy in the event that sadistic sexual fantasies recurred. Therefore that aspect depended upon the truthfulness of the respondent's account. Dr Grant expressed the view that the major issue "will be monitoring [the respondent's] fantasy life and detecting recurrence of any prominent sexual sadistic fantasies". That was very much dependent upon the truthfulness of the respondent's account.

[84] Dr Grant expressed his conclusion that the risk was now "containable", on the basis that the respondent had become more open about discussing the fantasies, and if his treatment continued satisfactorily, and his supervision was delivered by experienced and dedicated personnel, "it is likely that he will… report the recurrences of risky sexual fantasies". That evidence also depended upon the truthfulness of the respondent's account.

Discussion – conclusion as to risk

[85] The primary judge proceeded upon the basis that the respondent may well still be experiencing deviant sexual fantasies;[109] the primary judge put the unknown element evident from Dr Lawrence's evidence in this way:

> "Therefore, the unknown is not so much whether the respondent will experience the onset of these fantasies but rather whether he will remain willing and able, outside the custodial environment, to avoid their development and their potentially dangerous consequences."

[86] The primary judge's acceptance that a supervision order was nevertheless appropriate was substantially based upon the opinions of Dr Lawrence and Dr Grant. Thus, the primary judge said:

> "The opinions of Dr Lawrence and Dr Grant must be given substantial weight. Overall they are supportive of an order for supervised release. Their opinions do admit of the prospect, contrary to their own perceptions about the respondent, that he has not yet developed the motivation and the ability to control his sexual and other behaviour. But as Dr Lawrence said, her view is assisted by her clinical knowledge and skills.

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[108] [2014] QSC 77 at [38]. The passage is set out at [15] above.

[109] [2014] QSC 77 at [44].

> It is remarkable that each of the psychiatrists has so changed her or his view since the previous review of the respondent's detention that each believes the level of risk is moderate and able to be "contained" (as Dr Grant put it) by an appropriate supervision order. As I see it, that is also now the effect of Dr Madsen's evidence."[110]

[87] However, whilst Dr Lawrence and Dr Grant, and Dr Madsen for that matter, could give opinion evidence about their assessment of the respondent and his motivation and ability to control his sexual and other behaviour in the face of his concerning fantasies, they could not give probative evidence upon the question whether the respondent had truthfully informed them of his own state of mind with reference to which they had formed those opinions; and as we have explained, the experts' opinions were based upon the truthfulness of the respondent's accounts in important respects.

[88] Resolution in the respondent's favour of the questions relating to his ability to manage the risk of re-offending associated with his concerning fantasies necessarily required acceptance of the relevant aspects of the respondent's accounts upon which the expert evidence was based. That was quintessentially an issue for the primary judge. The Act intrudes upon the liberty of the subject, the offender, because of the exceptional circumstance that the offender has been found to be a serious danger to the community in the absence of a Div 3 order. The expressed rationale for that intrusion is the need to ensure adequate protection for the community from that risk. Where the nature and extent of the risk, and therefore the assessment of the issue of adequate protection, depends in a material way upon a prisoner's account to an expert witness, it is the Court, not an expert, which must make the necessary findings about the truthfulness of the account. The experts' opinions on the issue may be helpful, but they cannot be determinative.

[89] Each of the experts accepted that if the respondent's account was untruthful in particular respects then the respondent presented a continuing high risk of serious danger to the community. Dr Madsen said that he would be "extremely concerned" if the respondent was experiencing the fantasies because they were the motivation and drive to act them out in the past.[111] That concern was based, at least in part, upon the acknowledged difficulty of detecting whether the respondent might be experiencing those fantasies, which was itself dependent upon whether he would be truthful in that respect.[112] Dr Lawrence expressed the view that the risk was reduced if the respondent was truthfully relating the continuation, frequency and nature of his deviant fantasies.[113] On the assumption that he was being truthful about those matters and in his responses to the treatment administered by Dr Madsen, then the risk was moderate rather than high. As Dr Lawrence agreed, "[i]f he has falsely represented this very personal experience the risk remains high and unknowable".[114] Dr Grant said that if the respondent was not being truthful about those matters, "it would be very difficult to manage",[115] and if he was falsely representing the existence of the fantasies "the risk is unmalleable".[116] Yet, although at times the respondent did disclose his deviant fantasies, the respondent

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110 [2014] QSC 77 at [47] and [48].
111 Transcript, 14 February 2014, at 1-7 to 1-8.
112 Transcript, 14 February 2014, at 1-10.
113 Transcript, 14 February 2014, at 1-18.
114 Transcript, 14 February 2014, at 1-23.
115 Transcript, 14 February 2014, at 1-41.
116 Transcript, 14 February 2014, at 1-42.

told both Dr Lawrence and Dr Grant, contrary to the basis upon which the primary judge assessed the risk, that he was not experiencing the fantasies.[117]

[90] That evidence underscores the importance in this case of the relationship between the truthfulness of the factual foundation for the experts' opinions and the assessment of risk. The statement by the primary judge in paragraph [49] of his Honour's reasons (see [35] of these reasons), that it was unlikely that evidence by the respondent "would have placed the court in a better position to determine those factual questions than the position it enjoys with the benefit of the evidence of these three professionals", involved an assumption that the giving and testing of evidence by the respondent could not further assist the court in determining the extent to which the respondent's accounts were true and reliable. In our respectful opinion, there was no basis in the evidence for such an assumption; it is contrary to a basic premise upon which the courts operate and the day to day experience of the courts. The primary judge erred in that respect and also by either assuming the truthfulness of the respondent's accounts to the experts (other than the respondent's accounts that he was not experiencing fantasies, which the primary judge did not accept), or relying upon the evidence of the experts on that topic. It is therefore necessary for this court to reconsider the matter afresh.

[91] As the primary judge accepted, upon the basis that the respondent would continue to experience his fantasies, the respondent was a serious danger to the community in the absence of a supervision order or a continuing detention order. The paramount consideration in deciding which of those orders should be made was the adequate protection of the community. In relation to that consideration the following circumstances are significant. Firstly, the psychiatrists and the primary judge proceeded on the basis that the respondent did continue to experience deviant fantasies of the kind with which his previous offending was associated. Secondly, no provision of a supervision order could provide a reliable means of ensuring that the development of such fantasies upon which the respondent might act could be detected after the respondent was released. Thirdly, the psychiatrists assessed that the respondent was at a moderate risk of re-offending. Fourthly, a significant factor upon which the psychiatrists relied in bringing the level of risk associated with the fantasies down from high to moderate was the respondent's willingness and ability to manage those fantasies by deploying and maintaining strategies to contain them. This factor was premised to a significant extent upon the truthfulness of the respondent's accounts to the psychiatrists, but those accounts were self-serving, they were not verified by evidence from the respondent or by any reliable evidence, and there were substantial grounds for doubting their truthfulness (including that the psychiatrists and the psychologist themselves harboured concerns about their truthfulness). Fifthly, the consequences of the realisation of the risk of re-offending were potentially of the utmost seriousness. Taking these considerations into account, our conclusion is that adequate protection of the community could not be ensured by the respondent's release under a supervision order. Only a continuing detention order could adequately protect the public. The appropriate order is that the respondent continues to be subject to the continuing detention order.

Ground (f): the learned trial judge failed to give detailed reasons for the making of the supervision order pursuant to Section 30(3) of the Act

[92] Although that conclusion means that the appeal must be allowed, it is appropriate to consider the remaining ground of appeal.

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117 See [53] and [72] of these reasons.

[93] Section 17 of the Act requires a court which makes a continuing detention order, an interim detention order, a supervision order, or an interim supervision order to give "detailed reasons for making the order" at the time when the order is made. The summary in [8] – [20] of these reasons reveals that the primary judge did give detailed reasons for making the supervision order. The Attorney-General argued, however, that the primary judge's reasons for making the supervision order were inadequate because they did not explain how a supervisor could adequately detect the presence of aberrant fantasies if the respondent did not report them and because the reasons did not identify any mechanism by which the supervisor could, by enquiry of the respondent, identify whether the respondent was experiencing such fantasies.

[94] The Attorney-General's argument assumed that the primary judge's order was premised upon an assumption that supervisors would possess some more or less foolproof way of verifying the presence or absence of a particular state of the respondent's mind. That assumption was incorrect. The primary judge's reasons upon this point were to the effect that adequate protection of the community could be ensured and reasonably and practicably managed by a supervision order because of the expert witnesses' evidence of a demonstrated improvement in the respondent's mental state (including his willingness to discuss, and his wish and ability to regulate his response to, the development of sexual fantasies) and of the usefulness of ongoing therapy to maintain and further improve the respondent's mental state (such as would be provided under provisions of the supervision order). That very brief summary of the primary judge's reasons does not do justice to the primary judge's much more extensive analysis, but it is sufficient to explain why the Attorney-General's argument should not be accepted.

Disposition and orders

[95] In the result, the appellant has demonstrated that the learned primary judge fell into error, and that, on the evidence, the only appropriate order was a continuing detention order. The orders are as follows:

1. The appeal be allowed.
2. The orders of the learned primary judge made on 2 May 2014 be set aside.
3. The respondent, Mark Richard Lawrence, continue to be subject to the continuing detention order made on 3 October 2008.