

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v Toms*
[2006] QSC 298

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
TREVOR LEWIS TOMS
(respondent)

FILE NO: BS 4470 of 2006

DIVISION: Trial

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 20 October 2006

DELIVERED AT: Brisbane

HEARING DATE: 11-12 October 2006

JUDGE: Chesterman J

ORDER: **Upon release from prison, the respondent be subject to the following conditions until 8 November 2011 or further order of the Court.**

The respondent must:

- (i) **be under the supervision of a Corrective Services officer ('the supervising Corrective Services officer') for the duration of this order;**
- (ii) **report to the supervising Corrective Services officer at the Department of Corrective Services District Office closest to his place of residence within 24 hours of his release, and therein to advise the officer of the respondent's current name and address;**
- (iii) **reside at the accommodation currently agreed between the Chief Executive of Brisbane Boarders Inc and the Department of Corrective Services, and thereafter at such other places within the State of Queensland as approved by a Corrective Services officer by way of a suitability assessment;**
- (iv) **report to and receive visits from the supervising Corrective Services officer at such frequency as**

**determined necessary by the supervising
Corrective Services officer;**

- (v) notify the supervising Corrective Services officer of every change of the prisoner's name at least two business days before the change occurs;**
- (vi) notify the supervising Corrective Services officer of the nature of his employment, the hours of work each day, the name of his employer and the address of the premises where he is employed;**
- (vii) notify the supervising Corrective Services officer of every change of employment at least two business days before the change occurs;**
- (viii) notify the supervising Corrective Services officer of every change of the respondent's place of residence at least two business days before the change occurs;**
- (ix) not leave or stay out of the State of Queensland without the written permission of the supervising Corrective Services officer;**
- (x) not commit a serious sexual offence as defined in the *Dangerous Prisoners (Sexual Offenders) Act 2003* during the period for which these orders operate;**
- (xi) obey the lawful and reasonable directions of the supervising Corrective Services officer;**
- (xii) respond truthfully to enquiries by the supervising Corrective Services officer about his whereabouts and movements generally;**
- (xiii) notify the supervising Corrective Services officer of the make, model, colour and registration number of any motor vehicle owned by, or regularly used by him;**
- (xiv) abstain from the consumption of alcohol for the duration of this order;**
- (xv) abstain from illicit drugs for the duration of this order;**
- (xvi) take prescribed drugs as directed by a medical practitioner;**
- (xvii) submit to alcohol and drug testing as directed by a Corrective Services officer, the expense of which is to be met by the Department of Corrective**

Services;

- (xviii) attend on such psychiatrist or other mental health practitioner who has been approved by the supervising Corrective Services officer at a frequency and duration which shall be recommended by the treating psychiatrist or other mental health practitioner, the expense of which is to be met by the Department of Corrective Services;**
- (xix) permit any treating psychiatrist or mental health practitioner to disclose details of medical treatment and opinions relating to his level of risk of re-offending and compliance with this order to the Department of Corrective Services if such request is made in writing for the purposes of updating or amending the supervision order and/or ensuring compliance with this order;**
- (xx) attend any program, course, psychologist, counsellor or other mental health practitioner, in a group or individual capacity, by decision of the treating psychiatrist and the supervising Corrective Services officer, the expense of which is to be met by the Department of Corrective Services;**
- (xxi) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) by decision of the treating psychiatrist and the Supervising Corrective Services Officer, and permit the release of the results and details of the testing to the Department of Corrective Services, if such a request is made in writing for the purposes of updating or amending the supervision order, the expense of which is to be met by the Department of Corrective Services.**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – OTHER MATTERS – QUEENSLAND – respondent nearing end of 22 year term of imprisonment for rape – respondent has lengthy criminal history including three prior convictions for rape – whether the respondent is a serious danger to the community under s 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act 2003*

Dangerous Prisoners (Sexual Offenders) Act 2003, s 13

COUNSEL: Mr J Horton for the applicant
Mr S Hamlyn-Harris for the respondent

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

- [1] On 16 April 1986, in the Supreme Court in Townsville, the respondent pleaded guilty to three counts of rape and numerous counts of breaking and entering a dwelling house and stealing. The first rape was committed on 26 September 1985 in Tully; the second on 20 October 1985 in Mt Isa; and the third ten days later, on 30 October 1985, also in Mt Isa. There was a pattern to the offences. On each occasion the respondent followed a woman home, watched her undress and retire to bed, broke into the home, armed himself with a knife taken from the kitchen and raped the woman at knife point. He stole some items of property as he left.
- [2] Mr Justice Ambrose who sentenced the respondent said this about the offences:

‘The first ... rape occurred at Tully ... [I]t was a rape accompanied by indecent assault ... of a demeaning, humiliating and revolting kind ... The rape ... was done with a series of acts which must have terrorised the girl ... [who] has been left mentally and emotionally disturbed by her ordeal ... You also took money which you found in the flat.

The second rape occurred at Mount Isa a little over three weeks [later] ... You again followed your victim home ... You waited outside ... until you thought she was asleep. You mistakenly believed that she was alone ... As it happened, her husband ... was asleep in the flat ... you gained entrance ... by climbing ... onto the balcony ... You again searched the kitchen for a knife to ... overcome any resistance ... by the woman ... and you went into her bedroom ... She [got] up ... you followed her out of the bedroom and ... overpowered her in the kitchen ... and you forced her downstairs ... where you raped her ... This rape has had ... a terrible effect on the woman. It has placed severe strains on her marriage ...

The third rape was committed in Mount Isa ... and again you ... followed the same system ... except that you did not follow the woman home but you went back to the same block of flats where you had perpetrated the second rape to observe the movement of the woman ... you had raped ... before ... when you got back to that block of flats you saw ... the third victim ... moving ... in the flat ... below ... and you watched her for a time and waited until the lights were out ... You ... broke into the flat, selected a knife from the kitchen and ... went into her bedroom where you found her asleep.

You ... discovered ... that she had a child sleeping in the bedroom near her and you ... subjected her to ... a terrorising ordeal ... You placed a pillow over her face and cut her ... panties and ... top ... threatening her all the time with the knife and threatening ... that if

she did not co-operate ... an associate of yours ... in the bedroom with her child might do something ...

Using these inducements you had sexual intercourse with that woman.

On all three occasions ... you ... [stole] money from the flat occupied by each woman that you raped.'

- [3] The respondent was sentenced to an effective term of imprisonment of 22 years with a recommendation that he be considered for parole after having served nine years. The respondent was arrested and taken into custody on 3 November 1985. He has been in prison three weeks short of 21 years. With remissions earned over the period for good conduct he is due for release on 8 November 2006. The Attorney-General has applied for an order pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ('the Act') that the respondent be detained indefinitely in prison or, alternatively, that his release be subject to strict supervisory conditions.

- [4] Section 13 of the Act provides that:

'(2) A prisoner is a serious danger to the community ... if there is an unacceptable risk that [he] will commit a serious sexual offence –

- (a) if [he] is released from custody; or
- (b) if [he] is released ... without a supervision order ...

(3) On hearing the application, the court may decide that it is satisfied ... only if it is satisfied –

- (a) by acceptable, cogent evidence; and
- (b) to a high degree of probability;

that the evidence is of sufficient weight to justify the decision.

(4) In deciding whether a prisoner is a serious danger to the community ... the court must have regard to the following –

- (a) the reports prepared by the psychiatrists under s 11 ... and the extent to which the prisoner cooperated in the examinations ...
- (b) any other medical, psychiatric, psychological or other assessment ...
- (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
- (d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
- (e) efforts by the prisoner to address the cause ... of [his] offending behaviour ...

- (f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect ...
 - (g) the prisoner's antecedents and criminal history;
 - (h) the risk that the prisoner will commit another sexual offence if released ...
 - (i) the need to protect members of the community from that risk;
 - (j) any other relevant matter.'
- [5] If satisfied to the requisite standard that a prisoner would pose an unacceptable risk of committing a serious sexual offence if released the Court may order his continued detention or release 'subject to the conditions [the Court] considers appropriate.'
- [6] To summarise the section, the Court may only make an order under s 13 if there is acceptable cogent evidence showing to a high degree of probability that if released from custody there would be an unacceptable risk that the prisoner would commit an offence of a sexual nature involving violence, or against children.
- [7] The risk will be unacceptable if its magnitude is such that the Court is justified in denying a prisoner who has served his full sentence, his liberty, not because of anything he has done in the past, but because of what he might do in the future. The phrase, 'unacceptable risk' does not allow a greater precision of definition. The section requires the Court to balance the need to protect the community from violent sexual offences against a prisoner's right to be released when he has served his sentence and endured the full punishment which the law thought fit to impose for his transgression. It is no light thing to confine a man to prison for the whole of his life because he might re-offend. Unless the risk is unacceptable, too high to be accepted, in the interests of the community, the Court may not make an order for his continued detention or his ongoing supervision by Corrective Services officers.
- [8] It is apparent from the brief description I have given of the respondent's criminal conduct that his crimes were dreadful. They were calculated, predatory and violent. He violated women in what should have been the safety of their own homes and their own bedrooms. It was crime of the most serious kind, but the respondent has been severely punished for it. He has spent 21 years in jail when those sentencing him (there was an unsuccessful application for leave to appeal against sentence) thought that he would be released on parole after serving about ten years.
- [9] The respondent was 21 when he committed the offences. The evidence shows that he was then, and in his late adolescence, a wild delinquent. His family circumstances were unfortunate: his father abandoned his wife and their children when the respondent was an infant, and his mother struggled to cope with a large family. The respondent was led astray by an older brother who was a sadistic voyeur and molester who encouraged the respondent into acts of sexual violence and depravity. The respondent played truant from some schools, misbehaved at others, was expelled from others, and spent some time in a State institution for uncontrollable children. He stole, drove without a licence and whilst intoxicated, and abused alcohol and marijuana. He fitted the diagnostic criteria for anti-social personality disorder with the consequential disregard for the demands of civilised society and the rights of others observed in such people.

- [10] The question which the Court must address on this application is whether 21 years in prison have changed the respondent for the better and whether, at the age of 42, he has matured and changed sufficiently to allow his release into the community at the expiration of the full term of his sentence of imprisonment.
- [11] Section 11 of the Act requires a prisoner's examination by two psychiatrists who are to assess 'the level of risk that the prisoner will commit another serious sexual offence ... if released from custody; or ... released ... without a supervision order ...'. The respondent has been examined by Dr Lawrence and Dr Grant, both eminent forensic psychiatrists in whose opinions the Court is accustomed to place great confidence.
- [12] Dr Lawrence summarised her opinion in these terms:

'... [The respondent] comes from a severely socially disadvantaged and dysfunctional family and experienced this disadvantage throughout his childhood and early adolescence ... [His mother] appears to have had little control over the behaviour of the sons in her care ... the significant influence would also appear to be the early instruction ... by his older brother, to unlawful behaviour through Breaking and Entering and Stealing and, above all, some perverted sexual activity, including the voyeurism and the association of violence with sexual arousal, as well as disregard and disrespect for women other than as sexual objects, from an early age.

...

... at the age of 21 he ... perpetrated 3 significant rapes ... There is no evidence, at that time of his life, of empathy or remorse or awareness of the extent of his wrongdoing.

He was, however, capable of involving himself in a relationship with a ... mid-adolescent girl with the relationship lasting for about 5 years, though somewhat interrupted ...

Subsequently, he has involved himself in a relationship from ... prison ... subject to the inevitable restrictions ... His partner also appears to have suffered very significant social disadvantage ... Nevertheless, he appears to have developed a significant emotional attachment to this lady ... and gives convincing evidence of his meaningful and significant emotional response to her premature death by overdose some 8 years ago. This event is described by him as having meaning for him and having some influence on the change of his attitudes to his own behaviour, his life and his future.

During his 21 years in prison, he appears to have maintained a good work record but his periods on Community Release have, in the past, been marred by breaches characterised usually by the use of marijuana or a ... petty shoplifting offence. I note that there is no evidence of any breaches, including for substance abuse, for the last 5 years. This is consistent with his stated change in attitude and

acceptance of responsibility for controlling his substance abuse for appropriate reasons.

In addition to a good work record and the acquisition of various Vocational and Skills Certificates as evidence of his rehabilitation attempts in prison, he has undertaken the [Sexual Offenders Treatment Program] and completed this reasonably satisfactorily.

... [H]e does appear to have benefited from it, particularly with the development of the faculty of empathy and true reconsideration and re-evaluation of his offending behaviour, its nature and its effects. He appears to have accepted responsibility for his behaviour and of his obligation to control this in future. This is consistent with his current attitude.

His current presentation ... is thus of a man who has offended most seriously in a sexual way against women in the past but who has benefited from the rehabilitative efforts ... he has undertaken, as well as from his subsequent life experiences and, no doubt, increasing maturity.

There is no evidence of any mental disorder. I do not consider his history and presentation has been consistent with a Psychopathic Personality ... He certainly has evidence of an Anti-Social Personality Disorder ... based on his adolescence and early adult life, including his early years of behaviour in prison. However, he displays evidence of maturity such that I do not consider he currently suffers from strong evidence of Personality Disorder.

He has evidence of an ability to control his participation in intoxicating substances ... and ... this remains a risk factor for him.

...

It should be noted that [the respondent] has been exposed to many disappointments and setbacks during his period in prison. Whilst his initial sentence was considerable and consistent with the seriousness of his offences, and he has breached the rules and regulations on several occasions, it is worthy of note that he has earned remissions, Leaves of Absence and Community Based Work Release on a number of occasions without re-offending in any significant way. He also has been subjected to loss of remissions and withdrawal of privileges earned and now faces the prospect of indefinite detention, all due to changes in public policy or legislation. There is no evidence that these significant disappointments ... have provoked serious antisocial or aggressive responses ... In addition, he suffered the death of a woman whose relationship with him did appear to be of some significance and to cause him emotional distress. Again, there was no significant psychological decompensation nor any antisocial response ...'

- [13] Importantly Dr Lawrence concluded that the respondent constituted a:

‘low to moderate risk of re-offending in a sexual offence, if released. The primary risks and destabilisers are likely to be ... substance abuse ... increasing the risk of sexual acting out, particularly should there be other frustrations ... in his life. This could be counted by his attendance at Substance Abuse Programs and regular monitoring through ... Drug Screens ...

His limited social network is a further limiting factor ... However, he does appear to have been able to maintain the friendship and support of a group of people through the Prison Fellowship and his plans for release appear ... realistic and reasonable ...

On the positive side, he has apparently a good work ethic ... He has good intelligence and employable skills ... He displays insight and willingness to cooperate in any supervised release program.’

- [14] Dr Lawrence considered that ‘the risks are not such that [she] would recommend indefinite detention and that the low to moderate risk of re-offending could be contained by a supervision order with appropriate conditions.’

- [15] Dr Grant discussed with the respondent his attitude to re-offending and reported:

‘He looks back at his offending behaviour and sees it as quite foreign to him. He never expected that he would find himself in a situation of offending against women. ... After a few years in jail he began to think seriously about his sexual offending ... and he found it increasingly distressing. It was at that point that he sought treatment in the SOTP and his insight developed thereafter.

[The respondent] said that at the time of the offences he had ... no feelings for women and ... no feelings for anybody. He believes that his background “desensitized” him to sexually aberrant behaviour. His behaviour was ... shaped by his brother ... After a few years in prison he saw a program about rape victims which reduced him to tears and he then participated in the SOTP, looking for answers to his behaviour. Later he saw his relationship [with a woman who subsequently died] as an important part of his own rehabilitation, and her death shattered him. It gave him a greater appreciation of the preciousness of life and the need to work hard on rehabilitating himself.

...

[The respondent] readily admitted that he had difficulties with his behaviour when on previous leave of absence and work release programs. He recognises that he took far too much for granted and that he didn’t cope well with the freedom which he suddenly experienced. He did not conform to the requirements of his release at that time and responded inappropriately to financial and other stressors. He recognises now that he didn’t pay appropriate attention

to the seriousness of his situation and that he was ... irresponsible ... He feels that that has changed and he is now much more prepared for his release. For example, he has saved almost \$2,000 to assist him in adjusting to life outside prison and is much more aware of his needs and responsibilities when ... released.'

- [16] Dr Grant expressed his assessment of the respondent in these terms:

'... using overall clinical judgment [the respondent] would be seen as of moderate risk of violent sexual re-offending and moderate to high risk of some other less serious non-sexual re-offending. He will clearly be vulnerable to stressful situations when he leaves prison and will require a lot of social and personal support to overcome the effects of prolonged institutionalization. Any recurrence of alcohol or drug abuse would increase the risk of some kind of re-offending behaviour ...

The degree of risk would indicate that [the respondent] should be subject to a supervision order if ... released ...'

- [17] In oral evidence Dr Lawrence, in answer to the question whether the respondent currently suffers from an anti-social personality disorder said:

'... at the time he entered prison there would be ... no doubt that that would have been a diagnosis applied to him ... At that point I probably would have graded him at a level which qualified him as a psychopath ... but the subsequent development, his maturity, the passage of time, his experiences since and the way he presents at the present time ... raises some doubt as to whether that is an accurate description ...'.

- [18] Dr Grant was asked about the effects on the respondent of his participation in the Sexual Offenders Treatment Program. His answer was that the respondent:

'... was seen to have made significant gains as a result of that course ... There was a degree of empathy and understanding of his behaviour. He disclosed his behaviour well and came to some understanding as to its origins and I think that overall it was a reasonably positive exit report ...'

Dr Grant's own assessment was that the respondent had benefited from the program.

- [19] Importantly Dr Grant said that he thought that the respondent was open and honest in his responses to questions. He also thought that the respondent's older brother would have been 'a very significant influence' in inculcating in the respondent 'very negative ... very aggressive sexual attitudes towards women' but that malignant fraternal influence is now insignificant and has been overcome by the respondent's own improved attitudes. Dr Grant said:

'He realised that his attitudes were abnormal, that he needed some assistance, and he sought out the Sexual Offenders Treatment Program. I think that was the beginning of his attitudinal changes,

and he made further changes of maturation through his relationships with women ... particularly his last relationship with Michelle, who he had a great deal of affection and respect for and her death was a very traumatic thing for him. I think that ... underlined for him the values of relationships ...’.

[20] Dr Grant said later:

‘... he seems to be being open and honest about his sexuality now. He is not experiencing those impulses [sadism and voyeurism]. He sees it as very much something that happened in the past that he is ashamed of. When he has had work release in the past there has been no evidence that he has been offending in a sexual way ... So the evidence is that that is now a diagnosis which is more in the past than a way for the present ...’

[21] Counsel for both applicant and respondent had collaborated in preparing a draft supervision order setting out conditions which might be thought appropriate for the respondent. They were shown to Dr Grant who was asked whether they would address the risk of the respondent re-offending. He said:

‘I think it would go a long way to addressing the risk ... I don’t think you can ever entirely eradicate the risk, in that if [the respondent] wasn’t being totally honest and he was nurturing some violent sexual impulses, then a supervision order would not necessarily prevent him acting on those, but I think it would go quite a long way to assisting.’

[22] Dr Grant was asked about the appropriateness of the condition if, as he thought, the respondent had spoken frankly to him. Dr Grant said:

‘If he has been frank with us then I think the supervision order will be very helpful and will probably prevent any violent sexual reoffending at all, and would be very helpful in his adjustment to life outside prison and therefore would reduce the risk of other more minor anti-social behaviour, like stealing.’

[23] It should perhaps be pointed out that both psychiatrists regarded as quite unnecessary that any condition of the respondent’s release should prevent his coming into contact with children. He is not a paedophile and there is not the slightest evidence that he has ever or will ever constitute a danger to children. On the contrary there is evidence that he has exhibited paternalistic and protective attitudes towards children when his relationships with women brought him into contact with their offspring.

[24] Something should be said about the respondent’s behaviour in prison. It was referred to by Dr Lawrence and Dr Grant and assumed some importance in a report by Ms McEvoy which is yet to be discussed.

[25] Beginning in late 1994 the respondent was given weekend leave of absence, part of a program to equip him for release on parole. Occasionally he returned late to prison. His leave was subject to strict conditions as to where he went, what he did

- and where he stayed. On 24 March 1995 the respondent strayed from the conditions and was not at his designated residence. Accordingly his leaves of absence were revoked and he was returned to custody in the Arthur Gorrie Correctional Centre on 28 March 1995. He had been detained in the less secure Numimbah Correctional Centre.
- [26] On 19 June 1996 he was again allowed out of prison on a release to work program. He obtained employment at two places and worked industriously. However on 5 May 1997 he was again returned to secure custody following an incident on 3 May out of which he was charged with assault. The respondent had gone to a party to collect one of his partner's children. Those at the party were drunk and abusive and an altercation developed. The respondent was not involved and offered no violence but police were called, he was suspected of assault and arrested. The charge was subsequently withdrawn. However at about this time it emerged that earlier, in December 1996 while on leave of absence, the respondent had stolen some toiletries worth \$7.34 from Franklins at Caboolture.
- [27] Document 1 in Exhibit 7 is the respondent's 'custodial violations history'. It shows that there were seven occasions between 2 January 1990 and 5 November 2001 when the respondent disobeyed the lawful direction of a prison officer. Some of the infractions appear quite minor and one at least was a form of collective punishment for the misbehaviour of a few inmates. On six occasions between 15 November 1992 and 16 October 2001 the respondent was found to have ingested an illicit substance which was, I think, marijuana. Significantly the respondent has not infringed against prison discipline since 5 November 2001, a period of almost five years.
- [28] The respondent has compiled a creditable work history, both in prison and on release to work. He has been industrious and diligent and won the trust of his employers. He is regarded as reliable and dependable. Despite the entries in his 'custodial violations history' the respondent is regarded as a tractable and well behaved prisoner. He underwent lengthy periods of detention in open custody at Numbimbah without any instances of misbehaviour or attempts to escape, though the opportunity was there. On none of the occasions when the respondent was released from jail, on leave of absence or release to work, did he behave violently or commit any sexual misdemeanour.
- [29] The evidence does not satisfy the test for the application of s 13 of the Act. It provides no justification for an order that the respondent be detained indefinitely in prison. The applicant did however file an affidavit to which is annexed a report by Ms McEvoy, a psychologist which on its face would support the making of such an order.
- [30] Ms McEvoy deposes that in June 2005 she was requested by the general manager of Numimbah Correctional Centre 'to prepare a report differentiating the forensic and psychological factors impacting on [the respondent's] risk to the community should he be released.' She swore that 'because of [the respondent's] refusal to participate in an interview' she conducted a review of the prison files.
- [31] Following that review Ms McEvoy concluded that the respondent:

‘... is a predatory psychopath with sexually deviant paraphilia’s [*sic*] of sadism and voyeurism. This, in conjunction with the presence of a number of significant static risk factors the research has found increases a sexual offender’s risk of re-offending and with the absence of known mediating factors, effectively places him at a high risk of re-offending both generally and sexually once released into the community’.

- [32] One of the matters which Ms McEvoy took into account in reaching this conclusion was that on the occasion when the respondent’s leave of absence was cancelled because he was not at the designated residence:

‘Police found him in a car parked in the driveway of his sponsor. Considering his background and the likelihood that his sponsor would not wield any control over his behaviour, it is possible to infer that he may have been involved in voyeuristic acts during this time and possibly had been during his entire LOA program. However, there is no evidence to support this conjecture.’

- [33] The report contains this passage:

‘Due to [the respondent’s] refusal to participate in psychological assessment, psychometric testing, using the PCL-R ... was conducted without an interview as it was considered appropriate due to the wealth of file information and the author’s professional knowledge of the prisoner over a two and a half year period in open custody ... In relation to the use of the PCLR ... [the respondent’s] total score ... of 33 ... is above the cut-off point of 30 ... places him well within the range for the diagnosis of psychopathy. ...’

- [34] The report concludes:

‘Research into the recidivism rates and static risk factors associated with sexual offenders consistently reveals the general base rate of sexual re-offending is 40%. However, when the combination of sexual deviants, stranger victims, multiple prior sexual convictions, psychopathy and its associated anti-social lifestyle are present in a profile, as in the case of [the respondent’s] the risk increases to around 80% and remains relatively stable across time ... Mediating factors that have been validated to reduce his future risk include genuine compliance with treatment programs and the capacity to conform to community supervision and institutional living ... Unfortunately [the respondent] has not demonstrated any capacity in these domains.’

- [35] This bleak and condemnatory report has some disturbing features. The first is that it contains a serious dishonesty. It is not true that the respondent refused to participate in an interview as part of the assessment of his suitability for release into the community. Ms McEvoy’s statement to that effect, on oath in her affidavit, and in her report, is false and she must have known it to be false. It was corrected late and only when Ms McEvoy knew she was required to face cross-examination. The truth was, as she eventually explained, that the respondent was never asked to participate

in the interview which Ms McEvoy always intended to conduct by reference only to the prison files.

- [36] The respondent had refused to be interviewed some years earlier in connection with an application for release on a community-based order. His stated ground for refusing was that he had been unsuccessful in many applications for release despite recommendations from Corrective Services officers that he be so released. He indicated that rather than be disappointed again he would wait to be released when he had served his full term.
- [37] The portrayal of the respondent as a recalcitrant, uncooperative prisoner was damaging to the respondent's prospects of release. Ms McEvoy must have known that, but was prepared to maintain the falsehood.
- [38] The second disturbing feature is Ms McEvoy's readiness to indulge in speculation that the respondent indulged in paraphiliac behaviour when given leave of absence in 1996, ten years after he had been imprisoned. Such behaviour would have been cogent evidence of ongoing psychiatric disturbance which would have cast serious doubt on the respondent's suitability for release. There was no such evidence. Ms McEvoy was prepared to invent it.
- [39] The third feature is that Ms McEvoy focused her assessment and her psychometric testing of the respondent on his past conduct, and particularly his criminal and anti-social activity which culminated in his conviction and imprisonment in 1986. The relevant question was whether, 20 years later, the respondent should be released from prison or whether his release would be an unacceptable risk that he would commit further serious sexual offences. Ms McEvoy did not attempt that assessment but was still prepared to recommend strongly that the respondent should remain in prison.
- [40] Ms McEvoy had this to say:

‘So were you conducting a risk assessment in the same way ... that Dr Grant and Dr Lawrence ... were? - No ... I did not take into consideration current functioning. I didn't interview [the respondent]. So I was looking at historical factors rather than current factors.

Do you have any reason to disagree with their assessments in that regard or are you not in a position to say? - I don't think I am in a position to say because I wasn't able to do a one to one interview with him to determine the current functioning.’

- [41] Later she was asked:

‘... what evidence is there subsequent to [the respondent's] imprisonment in 1986 to show that he is a predatory psychopath with sexually deviant paraphilias of sadism and voyeurism ...? As I understand it his prison conduct which has led to remissions and then further action against him consists of coming back from leave late ... fairly consistently, on occasions having smoked marijuana; stolen ...

a bottle of shampoo ... and not being where he was supposed to be when he was telephoned by the Corrective Services officer. ...

Now what is there in that conduct that shows he is a predatory psychopath with sexually deviant paraphilias ...? - It doesn't actually. It is not related to him being predatory or sadistic or voyeuristic but it is part of the nature of a psychopathic personality to not be able ... to follow rules.

But is it your evidence that the man hasn't changed at all in 20 years in jail? - Oh no. I haven't done a current functioning on him. I haven't done an assessment on his current functioning to determine what change, if any, has happened. That was not the point of the review that I did.'

[42] This last answer is enough to show that Ms McEvoy's report should be disregarded because it does not address the only question of relevance the Court need answer in an application brought under s 13 of the Act.

[43] A comment can be made about Ms McEvoy's finding that the respondent remains psychopathic. Speaking of the diagnostic test which Ms McEvoy utilised Dr Grant said:

'It is very difficult to apply that scale when someone has been in prison for 21 years and it is not very clear whether you should apply it to what it was like 21 years ago or what it is like now ... If you would rate him as he is now he doesn't come out on that scale as being psychopathic. If you rate him as he is reported to have been 21 years ago then he does come out to be the psychopathic. It depends which of those ratings you incorporate in the other scales as to what the result is.'

[44] It will be recalled that neither Dr Grant nor Dr Lawrence assessed the respondent as being currently psychopathic. They both used the same psychometric test Ms McEvoy employed.

[45] I have said enough to indicate that I can place no confidence in Ms McEvoy's report. Indeed she herself concedes that it is of no assistance to the Court on the present application. It is difficult to see why the applicant should have put it into evidence or sought to rely upon it. It is deeply flawed.

[46] I propose to act upon the evidence of the psychiatrists whom the applicant chose to assess whether the respondent's release would give rise to an unacceptable risk to the community. They both say it would not. Neither supports his continued detention. There is, I think, objective evidence supporting their opinions. The respondent did not re-offend during the periods when he was in the community, either on release to work or leave of absence. He was irresponsible in his attitude to his obligations and dishonest in one petty particular but there was no sexual misconduct of any kind. That is the area of relevant risk and his conduct in that regard appears to have been blameless. In addition there has been no infraction of prison discipline for five years. His record before that was good, though not exemplary. His conduct in the last five years corroborates his statement to the psychiatrists that he has made a deliberate choice to exercise control over his

actions. The respondent has demonstrated a capacity for hard work. He has the offer of employment on release and the offer of accommodation from members of a group who provided him (and other prisoners) with friendship and support while in prison. They are members of a church whose Christian witness has taken them to jails to assist with the rehabilitation of inmates. The prospect of employment coupled with an offer of suitable accommodation and friendly support are important factors in reducing the risk of re-offending.

- [47] The respondent has very limited experience of living an independent life in the community. He has been in prison for 21 of his 42 years. He has not been given the benefit of any community-based release orders which might have facilitated his transition from the life of a prisoner to that of a free man. He has paid dearly for his irresponsibility in 1997. Since the theft of the shampoo he has been kept in prison for the last nine years. No-one in authority has been prepared to take responsibility for giving the respondent a second chance, despite the fact that none of his misbehaviours was of sexual impropriety or of violence. Whatever the reasons for the respondent's continued incarceration and the refusal of the Corrective Services authorities to assist in preparing the respondent for release into society the fact is that he has not had that preparation. His inexperience of life outside an institution is a factor in determining whether he should be subject to a supervisory order. Difficulty in adjusting to free life may increase the chances of the respondent committing a sexual offence.
- [48] But for this factor I doubt whether the applicant made out a case that the respondent would be a serious danger to the community in the absence of an order under s 13(5). The psychiatric evidence barely supports the conclusion that the respondent would be an unacceptable risk of committing a serious sexual offence if released without supervision. The risk of re-offending will be higher without supervision and Dr Lawrence and Dr Grant recommended such supervision. It is right, I think, that it should be imposed as a condition of the respondent's release. Dr Grant, in particular, thought that such an order would substantially reduce any risk there might be of the respondent's re-offending. The supervision provided for by the order will be of benefit to the respondent, as well as the community. It will assist him to integrate into the community. Because of the length of his imprisonment he will need that assistance.
- [49] I will therefore make an order in terms of the draft which became Exhibit 2 with the deletion of condition (xviii) which was that the respondent 'not visit premises licensed to supply or serve alcohol without the prior permission of the supervising Corrective Services officer.' It is a condition of the order that the respondent abstain from the consumption of alcohol. The further restriction would prevent the respondent from eating at a café or cafeteria, perhaps in a shopping complex, if the business were licensed. The condition would prevent the respondent attending a reception in the function room of a hotel.
- [50] The duration of the order should be five years. On the evidence if the respondent is to re-offend he will do so within that time. Accordingly I order that upon his release from custody and for a period of five years the respondent be subject to a supervision order on the following conditions, that he:

- (i) be under the supervision of a Corrective Services officer ('the supervising Corrective Services officer') for the duration of this order;
- (ii) report to the supervising Corrective Services officer at the Department of Corrective Services District Office closest to his place of residence within 24 hours of his release, and therein to advise the officer of the respondent's current name and address;
- (iii) reside at the accommodation currently agreed between the Chief Executive of Brisbane Boarders Inc and the Department of Corrective Services, and thereafter at such other places within the State of Queensland as approved by a Corrective Services officer by way of a suitability assessment;
- (iv) report to and receive visits from the supervising Corrective Services officer at such frequency as determined necessary by the supervising Corrective Services officer;
- (v) notify the supervising Corrective Services officer of every change of the prisoner's name at least two business days before the change occurs;
- (vi) notify the supervising Corrective Services officer of the nature of his employment, the hours of work each day, the name of his employer and the address of the premises where he is employed;
- (vii) notify the supervising Corrective Services officer of every change of employment at least two business days before the change occurs;
- (viii) notify the supervising Corrective Services officer of every change of the respondent's place of residence at least two business days before the change occurs;
- (ix) not leave or stay out of the State of Queensland without the written permission of the supervising Corrective Services officer;
- (x) not commit a serious sexual offence as defined in the *Dangerous Prisoners (Sexual Offenders) Act 2003* during the period for which these orders operate;
- (xi) obey the lawful and reasonable directions of the supervising Corrective Services officer;

- (xii) respond truthfully to enquiries by the supervising Corrective Services officer about his whereabouts and movements generally;
- (xiii) notify the supervising Corrective Services officer of the make, model, colour and registration number of any motor vehicle owned by, or regularly used by him;
- (xiv) abstain from the consumption of alcohol for the duration of this order;
- (xv) abstain from illicit drugs for the duration of this order;
- (xvi) take prescribed drugs as directed by a medical practitioner;
- (xvii) submit to alcohol and drug testing as directed by a Corrective Services officer, the expense of which is to be met by the Department of Corrective Services;
- (xviii) attend on such psychiatrist or other mental health practitioner who has been approved by the Supervising Corrective Services officer at a frequency and duration which shall be recommended by the treating psychiatrist or other mental health practitioner, the expense of which is to be met by the Department of Corrective Services;
- (xix) permit any treating psychiatrist or mental health practitioner to disclose details of medical treatment and opinions relating to his level of risk of re-offending and compliance with this order to the Department of Corrective Services if such request is made in writing for the purposes of updating or amending the supervision order and/or ensuring compliance with this order;
- (xx) attend any program, course, psychologist, counsellor or other mental health practitioner, in a group or individual capacity, by decision of the treating psychiatrist and the supervising Corrective Services officer, the expense of which is to be met by the Department of Corrective Services;
- (xxi) agree to undergo medical testing or treatment (including the testing of testosterone levels by an endocrinologist) by decision of the treating psychiatrist and the supervising Corrective Services officer, and permit the release of the results and details of the testing to the Department of corrective Services, if such a request is made in writing for the purposes of updating or amending the supervision order the expense of which is to be met by the Department of Corrective Services.