SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Sybenga* [2010] QSC 348
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **DANIEL PHILIP SYBENGA** (respondent)
FILE NO/S:	BS1206/08
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	16 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 – 2, 15 September 2010
JUDGE:	Douglas J
ORDER:	**Order that the respondent continue to be subject to the continuing detention order made by Martin J on 19 June 2009.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – where the respondent was ordered to be detained in custody for an indefinite period under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 – where the Attorney-General for the State of Queensland seeks an annual review of the continuing detention order – where the parents of the respondent are willing to supervise the respondent as an alternative to his detention in custody – whether the respondent should remain subject to the continuing detention order *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 13
COUNSEL:	T A Ryan for the applicant M A Green for the respondent
SOLICITORS:	Crown Law for the applicant Legal Aid Queensland for the respondent

[1] This is an annual review under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 of the respondent, Mr Sybenga's, continuing detention order made by Martin J on 19 June 2009[1] and confirmed by the Court of Appeal on 11 December 2009.[2] The main factual differences between the evidence considered by Martin J and the Court of Appeal and that before me are that the respondent is now back in prison rather than in the Wacol precinct and more emphasis has been placed for him on the possibility of his being supervised by his 63 and 69 year old parents as an alternative to his continued incarceration.

[2] He and his parents gave evidence about that possibility. Otherwise the respondent has continued to refuse to participate in the treatment programs recommended for him and to express worrying attitudes about his attitude to sexual relations with very young girls, even in the evidence he gave under cross-examination. The diagnoses of the psychiatrists remain similar to those they expressed earlier, that he poses a serious danger to the community if released, even with a supervision order, because of the high risk that he would offend again. Dr Beech said, however, that, although his preference in terms of clinical therapy would be that the respondent undergo a high intensity sexual offender program, any therapy would be better than his sitting in prison and not receiving any therapeutic benefit from custody.[3]

[3] That and other evidence laid the basis for the submissions by Mr Green for the respondent that the supervision offered by his parents provided a sufficient degree of protection for the community and an incentive for Mr Sybenga to undertake treatment as a condition of his release to their custody, the nature of the incentive being that he would be returned to custody if he refused to participate in the treatment proposed for him. That, he submitted, would result in a greater likelihood that Mr Sybenga's risk to the community would decrease in the longer term.

[4] The response to that submission by Mr Ryan for the Attorney-General was that it focussed on the therapeutic needs of the respondent rather than the paramount consideration mandated by the Act in s 30(4) as the need to ensure adequate protection of the community. In my view, for reasons I shall develop, that argument is correct and no supervision order should be made. Rather, there should be a continuing detention order because the community cannot be protected adequately from the respondent by a supervision order of the type proposed, at least while he resists the treatment that he should undergo.[4]

Background

[5] The background facts were generally not in contest and summarised usefully in the applicant's written submissions. The respondent is now 26 years of age. He was born on 3 October 1983. On 2 July 2004, when he was aged 20, he was sentenced in the Brisbane District Court to a term of 4 years imprisonment with a recommendation that he be eligible for parole after serving 16 months of that sentence. He pleaded guilty to 16 offences of indecent treatment of a child under 12 years. He was required in accordance with s 19 of the *Criminal Law Amendment Act* 1945 to report his address to police for 15 years. The full-time release date in

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1 *A-G (Qld) v Sybenga* [2009] QSC 161.
2 *A-G (Qld) v Sybenga* [2009] QCA 382.
3 See T1-36 ll 39-44.
4 See the analysis of the relevant considerations set out in the reasons of P D McMurdo J in *Attorney-General (Qld) v Sutherland* [2006] QSC 268 at [26]-[30].

respect of his sentence was 1 July 2008. He was not granted parole in relation to the sentence.

[6] His offending conformed to a pattern associated with trips to shopping centres with his parents and grandmother, to busy stores where he could find young girls who had been left alone by their parents. He looked for girls in areas where there were no security cameras. He picked girls who were no older than 5 years, because they would not understand what was going on, and would be unlikely to remember what he looked like. He committed the offences because he was obsessed with sex.

[7] Holmes JA summarised the nature of his offending as follows:[5]

> "Nine of the 16 offences with which he was charged involved his approaching small girls (up to the age of five or six) in public places, taking his pants down and masturbating in front of them. On two occasions he touched the pudenda of the children involved. The six remaining counts involved a child, aged between three and four, whom the appellant knew through family connections. He had touched her genitalia, exposed himself to her and prevailed upon her to masturbate him. Prior to his sentence, the appellant was assessed by an experienced forensic psychiatrist as suffering from a schizoid personality disorder, and exhibiting paedophilia."

[8] One of the children was actually a boy whom the respondent believed to be a girl. With one of his victims he confessed that he would have put his fingers in her vagina, and performed cunnilingus had he not been interrupted.

[9] The offences committed by him with the child whom he knew through his family occurred over about an 18 month period. On one occasion, after grabbing the complainant's buttocks, the respondent showed her pornographic magazines, hoping that she would have taken her own clothes off, and had it got to that stage, he would have performed cunnilingus on her. The learned sentencing judge described his behaviour as premeditated and predatory, escalating over time.

[10] The respondent has no criminal convictions other than those sexual offences. He is one of five siblings. He has two older brothers and two younger sisters, all of whom are either married with children or engaged to be married. Both his parents hold down respectable jobs. His mother practices as a doctor. The family are devout Christians and have seemingly provided a loving, stable and supportive environment for their children. There is no history of any emotional or physical abuse. He was reportedly bullied at school and his achievements were of an average to low standard. He completed grade 12 at age 17 and went to work for his father. He has experienced no significant relationships with a female of his own age. He states that his first sexual experience was when he was 4 years old with a girl of the same age.[6] There appears to be no history of drug or alcohol abuse by him but he had an early attraction to pornography.

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5 *A-G (Qld) v Sybenga* [2009] QCA 382 at [6].

6 Exhibit JML-2 to the affidavit of Joan Margaret Lawrence sworn 19 December 2007.

Earlier interim supervision order

[11] McMeekin J made an interim supervision order on 28 May 2008 pending a more thorough investigation of the respondent's treatment needs. That order continued until the delivery of the judgment by Martin J on 19 June 2009.

[12] During the period of the interim supervision order, the respondent remained under curfew conditions at the Wacol precinct. He demonstrated an unwillingness to engage in activities outside the precinct. During that time, he undertook numerous individual psychiatric treatment sessions with Dr Ken Arthur, a psychiatrist. Dr Arthur concluded that, despite the respondent's assertion that he had no ongoing sexual interest in children, the respondent adhered to the view that some children were able to give informed consent to sexual activity. Despite a large number of treatment sessions, Dr Arthur felt that he had yet to make any significant inroads into forming a strong therapeutic relationship with the respondent and that there was a chameleon-like quality in his attitude towards him.

[13] In a report dated 13 April 2009 Dr Arthur observed that the respondent had rarely left the Wacol Precinct, spent most of his time playing computer games, watching videos and socialising on a superficial level with other men in the precinct. He noted that the respondent continued to express distorted beliefs regarding the capacity for children to consent to sex and admitted to Dr Arthur that he did not think he would have the strength to resist paedophilic urges to expose himself, masturbate in front of children or touch them, were he in the position of not getting caught. Indeed, the respondent stated: "It's not enough to know that it's wrong to stop me. I really think I am dangerous."

[14] Overall, Dr Arthur considered that little progress had been made in his treatment of the respondent. He noted that the respondent continued to subscribe to distorted cognitions that justified his offending. Dr Arthur noted that the respondent displayed a high degree of dependency, expressed little motivation for fostering independence and appeared satisfied with his highly restricted lifestyle.

[15] The respondent declined to participate in the high intensity sexual offender treatment course. After attending some sessions, the respondent also withdrew from a group therapy program run by a psychiatrist, Dr Paul White, that his parents had arranged and which was thought to be the only reasonable alternative to the High Intensity Sexual Offenders Program ("HISOP") provided by the Department of Corrective Services. He expressed the opinion during such sessions that children over the age of two were able to give consent for sexual contact. Despite participation in group discussions on this point, the respondent's position remained unchanged. Further information recently provided by Dr Beech after the hearing in this matter suggests, however, that Dr White's program was most likely not of a nature that could properly be characterised as a sexual offender treatment program.[7]

[16] There were further reports available to Martin J including joint reports from up to five psychiatrists and affidavits from corrective services officers which included records indicating that, on 30 April 2009, the respondent disclosed to Ms Heidi Bird, a correctional officer: "[I] loved the thrill I felt when I committed my current

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[7] See ex 2.

crimes". The respondent also said to Ms Bird: "doing something wrong… the thought that someone might catch me or that I might be seen by someone was a rush … I am dangerous." The respondent, while laughing and shaking his head said that he would not trust himself with a child if unsupervised. He also reported that seeing Dr Arthur was a waste of time and only beneficial for someone who wants to change. The respondent said he did not wish to change and could not explain why he did not wish to change. He also informed Ms Bird that he would commit offences for the rush as it brightened up a dull day. **T**he respondent also said that if he was in a room with a child, he could not say that he would not reoffend and would most likely do it again.

Martin J's decision

[17] In his reasons Martin J set out in detail the psychiatric and other evidence before him. It is useful to repeat that summary here:[8]

> "**Behaviour in prison**
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> [10] One of the disturbing aspects of the respondent's behaviour emerged in prison. He was unwilling to undertake recommended programs. He remained resistant to undertaking a full assessment of his criminogenic needs and demonstrated a lack of motivation to address issues associated with his offending behaviours. He told counsellors that he saw no benefit in attending sessions of the cognitive skills program and further advised them that he liked the structured life in prison and did not want to be released. This attitude was continued by his refusal to make any application for release on parole.
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> **Expert evidence**
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> [11] Psychiatric reports were obtained for the earlier hearing before this court but new reports and addendum reports were obtained for the purposes of the current application. I will deal, briefly, with the evidence provided by those experts.
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> [12] Dr Michael Beech, psychiatrist, assessed the respondent's risk of offending sexually to be in that group of people who are at a moderate/high risk of reoffending. Dr Beech referred, in particular, to the statements that the respondent has made about his intentions. He said:
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> > "He has said to Dr Arthur I think in Dr Arthur's report that he has distorted beliefs that there might be some children that could consent. So that attitudes that he presents, I think, indicate that his risk is higher than you would normally think just based on actuarial measurements. The other thing is that this type of offending is of paedophilic nature and his victims have been outside the family, and so those offenders in general are at higher risk of offending than the general sex offender population."
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> [13] Questions were asked of Dr Beech about the high intensity sex offender program that is offered in prison. His view was that it would be of benefit to Mr Sybenga to enrol in and complete that program. The caveat he expressed was that as the respondent had quite

[8] *A-G (Qld) v Sybenga* [2009] QSC 161 at [10]-[25].

steadfastly refused to participate in that program while he was in prison it was probable that he would continue that behaviour in the future.

[14] One of the major problems in this case is the respondent's refusal to undertake treatment and to avoid treatment or making change. The respondent, himself, says that he would not trust himself with a child if unsupervised and that he thought that if someone might catch him or that he might be seen by someone, "it was a rush". Dr Beech was of the view that these comments by the respondent should be taken at face value because he has been open in the past about his offending. He thought that the respondent, if unsupervised, would be at high risk of reoffending in the next five years.

[15] Dr Beech also said:

> "So sometimes I think he makes these statements to gather and contain more control of him or more supervision, or to get more care, if he likes. … My worry is that in the community unsupervised he will actually feel anxious or he will want to return to prison or some form of custody or care and that he will escalate his behaviour by an overdose or by harming himself or going on a hunger strike or simply breaching the order in order that he will be taken into higher supervision, and I could foresee as the worst case scenario one option that he will consider that if he reoffends this would be the ultimate breach of his order and that would bring him back into custody."

[16] It became clear during Dr Beech's evidence that when he was referring to the respondent's being unsupervised he was referring, not just to a supervision order, but to actual personal supervision in the form of an escort. He noted that the current supervision order places the respondent in an area where he cannot offend, where he is subject to a curfew and where he is subject to escorted leave from that place. He could not foresee in the immediate future a circumstance where that level of escort or supervision could be reduced.

[17] Dr Beech was of the view that the current supervision order can adequately protect the community but it only does that by effectively imposing house arrest on the respondent.

[18] Dr Josephine Sundin, a psychiatrist, also gave evidence. She agreed that there were three possibilities in the way in which the respondent might reoffend sexually in the future. They are:

1. One should take at face value his comments that he has difficult or uncontrollable urges to sexually interfere with children.
2. He may reoffend in a way designed to return him to some sort of stricter environment such as imprisonment.
3. He may sexually reoffend simply as part of impulsive risk taking behaviour.

[19] One of the propositions that was agitated during the hearing was a change in the supervision order to allow for members of the

respondent's family to supervise him. Dr Sundin's view was that that was an onerous task for them to undertake and that it continued to reiterate the message of the last period of the supervision order that the respondent did not have to be responsible. In that way it increased his risk of reoffending. It also had the potential to alienate him from his family and thus alienate him from his most important primary support. Dr Sundin was very clear on the topic of supervision. She thought it was obvious that the respondent will comply with the supervision order so long as he is under the "eyeball" supervision of another adult, but that unless he is under such supervision then there can be no guarantee that he will not reoffend. Dr Sundin was asked:

> "Without him being escorted under a supervision order, without him being escorted everywhere that he went, what is the risk of him reoffending on supervision? - - Extraordinarily high.
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> And in what way in particular would you see that the risk of his reoffending would be most likely, what type of victim would be targeted as most likely? - - Unfortunately at this stage most likely it would be an opportunistic victim, a stranger child, and the victim would be chosen most probably by Daniel in order to gain access to being re-interned so that he could once again have his dependency needs met."

[20] In cross-examination Dr Sundin also expressed a view that the supervision that had been in place for the last 11 months had effectively created a mini prison - he does not leave the precinct unsupervised and he is, whenever away from that area, under the eyeball supervision of somebody. Dr Sundin was also asked about the respondent's failure to complete particular programs and she expressed the view that his likelihood of completing a program does improve the chances of his entering into a high intensity sexual offender's program. She said: "I grant you, you know, there is a good chance he may not complete a HISOP, but I don't think that we should let therapeutic nihilism prevent us from trying".

[21] Dr Sundin was also cross-examined about the prospects of a HISOP being conducted in the precinct. Her opinion was consistent with that of officers of the Department of Corrective Services, namely, that it could not be done. Her view was that you need to have "a contained safe environment to run something like a HISOP". I accept that it cannot be run within the prison precinct.

[22] Dr Joan Lawrence, another psychiatrist, was the final expert called. She assessed his level of risk of sexually reoffending as moderate to high. When asked about the respondent's comments that he could not trust himself with a child if unsupervised, she said that they had to be taken at face value and that this is a statement that he has made about himself. It indicated the risk was very considerable. From his statements, he is a high risk for reoffending. Dr Lawrence agreed, in cross-examination, that the supervision order in place had protected the community but they had not achieved anything in terms of making any progress in the respondent's ability to be an active

> member of the community. She also shared the view of other witnesses that if he was to commence a HISOP she had grave doubts about whether he would complete it.
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> **Other evidence**
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> [23] It became clear during the application that one of the significant issues was the capacity for the respondent to obtain appropriate treatment outside the prison. Officers of the Department of Corrective Services were called. They gave evidence, which I accept, that it would be impossible for a HISOP program to be conducted outside a prison. There were a number of reasons for that. Apart from the reasons identified by Dr Sundin, there is also the need for a minimum number of persons to take part in the program and they could not be adequately or easily obtained in the general community.
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> [24] The other problem is that the precinct is not intended for long-term accommodation. The purpose of the precinct is as a halfway house for persons to integrate into the community. This cannot occur if persons continue to live there on an indefinite basis. The other problems which arise with the respondent's current supervision order and the circumstances at the precinct is that he cannot leave the precinct except in the company of a supervisor. He is, according to one of the witnesses, the only person who is subject to having an ongoing escort program in place. That, though, is not the purpose of the precinct nor is it provided for generally within Corrective Services.
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> **Summary**
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> [25] The respondent presents as a person who is unwilling to take steps to reduce or eradicate his offending behaviour. His history discloses that he is unlikely to commence a program. If he does commence a program, he is unlikely to finish it. His behaviour and remarks are consistent with a person who wishes to be in a controlled environment and does not wish to take responsibility for his actions. It was suggested on his behalf that provision should be made for him in the precinct and that he should be the subject of continued supervision, that is, "eyeball" supervision when he leaves the precinct. The alternative was that he be under similar control by his parents. I accept the evidence that to do the latter would be likely to lead to the destruction of one of the most important relationships in his life."

Further psychiatric evidence

[18] The further evidence before me, as I have said, reflected views of the respondent very similar to those summarised by his Honour but the oral evidence in particular focussed on the possibilities raised by supervision under the control of his parents. Fresh reports had been obtained from Dr Sundin and Dr Beech before the hearing.

[19] Dr Beech interviewed the respondent on 21 April 2010. The respondent reported to Dr Beech that he remained resistant to the idea of recommencing the HISOP and would not pursue any treatment even if this was a condition of his release. The respondent recognised that a community placement may be possible if he were willing to pursue treatment but Dr Beech noted that the respondent had limited motivation for this and a limited desire to leave prison. The respondent explained

"it's just so cosy here" in the secure unit as opposed to his placement in the Wacol precinct.

[20] Dr Beech further noted that the respondent, following his return to prison, had declined the offer to see Dr Arthur for ongoing psychiatric treatment although, a few days prior to his interview with Dr Beech, the respondent had apparently agreed to recommence this.

[21] Dr Beech made the overall observation that he could not see that much had changed since Martin J's order in June, 2009. Although the respondent described a lessening, and indeed an absence of sexual interest in children, Dr Beech found this unconvincing. When pressed, the respondent described an excitement involving his original offences and the respondent himself considered that his feelings were probably simply dormant. Dr Beech observed that the respondent still has a limited insight into the nature of his distorted beliefs about children and the impact of his offending behaviour. He had no thought-through relapse prevention plan and his plans for release simply seemed to be that he would abide by a curfew and allow himself to be supervised by his parents.

[22] There are some indications, according to Dr Beech, that, if the respondent became stressed in the community, he might breach an order simply to return to custody. He believed that the respondent's risk of re-offending was still high and that as before, it could be managed only by continued close surveillance and escort but that there was no real evidence that the respondent was motivated to proceed beyond that.

[23] Dr Beech also met the respondent's parents on 29 June 2010. They told him that the respondent had expressed a clear desire to them to return home to live with them and that it is their belief that a return home would act as a catalyst to the start of his rehabilitation. Dr Beech believed that the respondent's parents were genuine in their commitment to their son and believes that they would be able to provide logistic support for him if released into their home.

[24] However, as Dr Beech himself observed, he could not clearly elicit in his interview with the respondent any indication he would commit to a plan to reside with his parents in conformity with the obligations of a supervision order and could see nothing from the respondent indicating he would participate in any suitable program. Ultimately, his opinion remained the same as that expressed in the previous report and Dr Beech observed that it would be his preference that there should be evidence from the respondent that he has agreed to participate in a treatment program, has committed to such a program and participated in one before it could be reasonably accepted that he would participate in a program in the community. His perusal of the affidavits filed for the respondent by him and his parents did not materially affect the views expressed in his earlier reports.

[25] Dr Beech said in his oral evidence that his preference was that Mr Sybenga undergo the HISOP. He went on to say, however, that "as time goes on with Mr Sybenga, we're getting to the stage where some therapy, any kind of therapy would be better than sitting in prison and not getting any therapeutic benefit from custody."[9] Before

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[9] See T1-36 ll.41-44.

then he had expressed the view that Mr Sybenga presented the same risk now as he did 12 months ago.

[26] When asked about the possibility of his being supervised at his parents' house, Dr Beech said that it was potentially sustainable but that there would be obvious stressors on that system including the possibility of some of his paedophilic fantasies coming back strongly to his mind. He also pointed to the apparently ambivalent attitude Mr Sybenga had portrayed from time to time about contact with his parents.[10] He also saw difficulties in the parents in effect acting as agents for the government in providing not only accommodation and support but also monitoring, surveillance and logistics support for their son. He perceived the possibility that they would have a dependent child living with them for many years who became passive and did not pursue any further progress in his therapy. He believed the respondent would be unlikely to embrace a commitment to therapy if he were staying with his parents.[11]

[27] He summarised the risks of supervision of Mr Sybenga at his parents' house as follows:

> "[T]he first is that over time his parents become complacent and, you know, they take their eye off the ball, if you like; the second risk is that even with the best of intentions and the best of will, it becomes too much of a stress for them. Someone – and I think it was particularly Mr Sybenga himself voiced his concern about the community pressures that might be placed on the family; and the third risk is that he would at home regress, become passive and dependent and then they would be stuck having to supervise him for many years. … That's not a risk to the community so much as a risk to the parents."[12]

[28] He was not as concerned as Dr Sundin about the effectiveness of supervision at the parent's house. He was more concerned, that, for example, in five years time the respondent would be in the same situation personally.[13] He expressed unease about the possible lack of progress of therapy for the respondent but acknowledged that his parents had put forward the idea that if he were ordered by a judge to do therapy that he would then paradoxically do it. He did not appear to be convinced that that view of the parents was based on a true understanding of their son's personality rather than hopeful conjecture but agreed that the only therapy that he had dropped out from was voluntary therapy organised for him by his parents with Dr White.[14]

[29] His view was that the realistic risk of sexual re-offending, if he were under a supervision order, would arise if he became stressed and offended in some way to get back into custody. He believed that that risk could be contained but the management of the risk was dependent on other people monitoring him and taking responsibility for him because he had not shown that he was motivated enough to commit to his own progress.[15]

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10 See T1-37.
11 See T1-38.
12 See T1-42 ll.46-60.
13 See T1-46 ll.39-51.
14 See T1-47 ll.10-40.
15 See T1-48 ll.20-35.

[30] He was also worried that, if the respondent were ordered to participate in therapy while living with his parents, he might not participate in the therapy past a certain point, a difficulty which arose when he was being treated by Dr Arthur previously. He was also concerned about the ability of the parents to supervise Mr Sybenga over a significant period of time, something which seems to me to be significant also, having regard to their age. As Dr Beech pointed out "only parents would do this".[16]

[31] Dr Sundin interviewed the respondent on 20 May 2010. The respondent informed her that he continued to believe that children can consent to sexual intercourse "if they're informed about the practicalities and the consequences". He believed that children from the age of three upwards could consent to intercourse with any aged person including an adult. The respondent did not express any awareness of the adverse emotional impact of adult child or sexual abuse. Dr Sundin noted that the respondent had dropped out of the HISOP that he had commenced following his return to custody. The respondent informed Dr Sundin that he did not believe he needed to do the program and he did not have a problem that the program was going to fix. The respondent asserted that he believed he could live offence free without doing any program and claimed that he was never told that there was an expectation that he participate in the HISOP to address his risk during this period of incarceration.

[32] Dr Sundin concluded that the respondent continued to present in a manner consistent with his previous presentations. The dominant feature of his clinical presentation was a young man with a schizoid personality disorder and an associated paraphilia, predominantly paedophilic. He reported a bewildering array of distorted beliefs regarding children's maturation and their capacity to consent and appeared to lack completely an awareness of the extent and inappropriateness of his belief systems pertaining to children. He justified his voyeuristic and subsequent paedophilic behaviour because of an absence of opportunity to have sexual intercourse with an adult when he was an adolescent. Dr Sundin found that lacked plausibility and was essentially illogical.

[33] She also pointed out that the respondent's dropping out from another sexual offenders' treatment program, Dr White's as well as the HISOP, statistically raised his risk of recidivism. She was challenged on this issue in cross-examination and believed that dropping out of more than one such program created a statistically higher risk of recidivism than merely dropping out of one program. She was unable immediately to bring to mind the studies relating to that issue but, given the further information received from Dr Beech in ex 2 that it was most likely that Dr White's program was not of a nature that could be properly characterised as a sexual offenders treatment program, I have not regarded this controversy as relevant to the decision I must make. What is clear is that the risk of recidivism is significantly reduced if an offender does participate in a program such as the HISOP.

[34] Dr Sundin said that he remained at high risk of lapsing back into his previous sexual offending behaviour unless extremely closely supervised and continued to recommend his participation in a HISOP although she recognised that the chances of his participation in such a program remained slight. As a preparatory alternative she suggested individual psychotherapy with Dr Arthur weekly for six months.

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16 See T1-50 l.60.

Based on the lack of any real change in his presentation over the past 12 months, Dr Sundin recommended that the safety of the community required that the respondent remain detained until such time as he demonstrates further maturation and develops some insight into his aberrant cognitions and chooses to engage in therapy.

[35] Dr Sundin, when examined orally, did not see the solution proposed of Mr Sybenga residing in his parent's home, in effect turning the home into a jail and his parents as jailers, as a sustainable situation over time.[17] She also believed that attempts by his parents to make him comply with treatment programs would place a great strain on their relationship. She said, significantly:[18]

> "I think it would place great strain upon the relationship. I think that it is very clear that Mr and Mrs Sybenga are trying to do their utmost to help their son, but put simply it appears that everyone else is trying to … take responsibility for Daniel's behaviour. There doesn't seem to be a lot of evidence of Daniel taking efforts to be responsible for his own behaviour, particularly responsibility for enacting change that others can be confident in."

[36] She agreed that there would be a greater prospect for success of his completing a course if it was "mandated" and that, if he were restricted to living at the family home where no children were allowed, that it would be more likely that he would breach a supervision order in some more easily assessable way than by reoffending against children.[19] She also agreed that one of many ways in which he could breach a supervision order would be by refusing to attend therapy or counselling.[20]

[37] Dr Sundin did not believe, however, that the location of his placement was such a big issue for him as an incentive to complete any program such as the HISOP. She believed his strongest motivator was to avoid dealing with and having to address his uncomfortable issues.[21] She also felt that his participation in a program was actually more likely to be a source of tension between him and his parents and that he would not find home so much more comfortable that he would then find the wish to remain there would motivate him to participate in a program sufficient to overcome his patterns of avoidance.[22]

[38] In that context she maintained her previous view that his parents were his most important primary support and that the relationship with them was too important to risk placing the onus upon them of making them act as his "eyeball supervisors".[23] She also believed that the task of providing 24 hour, 7 days a week supervision by the parents would be quite onerous and she was concerned whether they had the capacity to provide that level of supervision although she believed they would do their utmost to do so. She emphasised, however, that it reinforced the idea that others should take responsibility for Mr Sybenga where instead he should be taking responsibility for his behaviour before he is released into the community.[24] Thus she did not think that his parents could stop him acting out in every situation.

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17 See T1-9 ll.1-5.
18 See T1-9 ll.31-38.
19 See T1-18 ll.1-20.
20 See T1-19 ll.4-6.
21 See T1-24 ll.12-18.
22 See T1-24 ll.41-19.
23 See T1-25 l.50 to T1-26 l.9.
24 See T1-28 ll.10-26.

[39] Mr Sybenga gave evidence himself and was cross-examined and confirmed the view that he had previously expressed to psychiatrists that children as young as three could consent to sexual activity with adults if they were properly informed. He thought that there seemed to be some logic to that. He did not see it as a view as distorted as the psychiatrists who had spoken to him had described it.[25] He agreed that he had become quite comfortable at the Wolston Correctional Centre and at the Wacol Precinct when he stayed there.

[40] His views about the possibilities of his reoffending seemed to me to be unrealistic. He had not made a relapse prevention plan and agreed that he had "given the slip" to his parents previously when committing some of the offences for which he had been imprisoned.[26]

[41] He also admitted, during his cross-examination, to an incident where he had, in effect, played the "peeping Tom" by going up to a window of a house near his parents' home to look in on a young naked woman. He entered the property and approached the window hoping to have a sexual experience with the woman because he believed she was tempting him. When she noticed him she apparently became angry and he ran away but he told police that he had visited the property on numerous occasions including once when he entered the house, went into the woman's bedroom, stole some of her underwear and masturbated there.[27] Those events occurred before his imprisonment.

[42] He also agreed that he should be doing the HISOP but said that he was not confident that he could complete it. Tellingly he also said that he felt that if he was able to progress through a program his other beliefs were just going to die and he would be "killing off one logical way of thinking that I have".[28]

[43] He was also cross-examined about an occasion when he expressed reluctance in December 2008 to return home which he explained by saying that another high profile sexual offender had recently been publicised on television so much that he did not want people from his parents' neighbourhood "rocking the roof of their house".[29] The respondent's parents live on half an acre of property which is fenced. There are younger boys aged 11 and 14 who are children of one of their neighbours but the evidence did not suggest that they were likely to be at risk.

[44] The respondent's mother, who is a medical practitioner, said that she did not anticipate that any resistance by her son to treatment would cause potential strain on her relationship with him. I am sceptical of that view given that she understood that her son's exiting a course ordered for him would be a breach of a supervision order. She hoped that the rules or strictures on supervision of her son would be relaxed as time went on and agreed that she and her husband would have to keep Mr Sybenga under surveillance the whole time. She rationalised that approach by saying "if all the monitoring devices are in place, we are prepared to divulge any breaches, Daniel is prepared to abide by his conditions, I can't see why that very strict curfew, 24 hour curfew would be maintained for the next how many years."[30]

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25 See T1-56-T-57.
26 See T1-60 ll.44-48.
27 See T1-63 to T-64.
28 See T1-66 ll.1-20.
29 See T1-66 ll.34-55.
30 See T1-74 ll.23-27.

[45] The respondent's father's evidence was similar to that of his mother and I accepted them both as parents who are genuinely concerned about their son and were willing to do their best to support him by supervising him. It did seem to me, however, as Mr Ryan submitted, that they had not fully worked out in their own minds the practical details about how to supervise him on a day to day level and the implications if such supervision were to continue over a long period. Their evidence did not address simple issues such as how their supervision would work if both were asleep or if one or both of them were ill. Nor had they worked out a strategy to deal with any attempts at manipulation by their son of them, a possibility they recognised.[31]

Submissions

[46] Mr Ryan argued that the respondent's risk of sexual re-offending remains high and that he would require "eyeball" supervision and escort if released under a supervision order which makes the administration of such an order impracticable.

[47] He submitted accurately that the respondent has not taken adequate steps to address his substantial treatment needs since 19 June 2009 and that his distorted thinking regarding children and general lack of insight persist. He argued that the respondent had not demonstrated any strong desire to leave prison. There is evidence from the respondent that he does now wish to leave prison to live with his parents but that evidence must be viewed as equivocal given his previous behaviour and apparent preference for remaining confined on other occasions.

[48] Mr Ryan also submitted that the obligations that would be cast upon the respondent's parents to supervise him, while he remains untreated, are beyond their capabilities and could lead to the eventual destruction of their relationship with the respondent. That relationship remains one of the few strong relationships that the respondent has with other people.

[49] He argued that the respondent could not be trusted not to leave his parent's house and to abide by the conditions of a supervision order based on his past conduct including the episode where he entered the woman's house and masturbated. He also referred to the respondent's lack of insight into his problems illustrated again in his cross-examination and that, until he completed the HISOP, he was too dangerous to be released into the community as an untreated sexual offender.

[50] He criticised the lack of detail provide by the respondent's parents in respect of their plans to look after him and submitted that none of them took into account problems that may arise such as sickness and the other exigencies of life that arise from time to time. He argued that the parents lacked the necessary training and experience to manage someone with the degree of sexually deviant thinking of the respondent particularly when it remained untreated. He also submitted that it was unlikely that the respondent would engage meaningfully in a course of treatment if he were released to his parents' custody.

[51] He also argued that any view that rationalised the respondent's release under supervision on the basis that the worst case scenario would be that he would breach the order without reoffending and then be returned to custody would subvert the

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[31] See T1-82 ll.1-36.

principle expressed in s 30(4) of the Act that the paramount consideration was the need to ensure adequate protection of the community. He relied, in particular, on Dr Sundin's view that the respondent should not be released until after he had completed the HISOP program which is only available in prison.

[52] Mr Green's submissions were, essentially, that there was simply no evidence that a supervision order could not operate to protect the community adequately. He relied upon the respondent's compliance with the previous supervision order made by McMeekin J and Dr Sundin's acceptance that, if he were confined to his family home, where no children were allowed, that it was more likely that, if he were to breach the order, it would be in some other easily accessible way rather than a repetition of his previous offending behaviour.

[53] He also submitted that there would be a motivation in the respondent to undergo therapy while subject to a supervision order because of the threat that, if he breached the order, he could be returned to prison, a threat that would not apply to any direction, for example, that he undergo treatment in prison. He also drew comfort from Dr Beech's view that there may be benefits from a medium intensity program able to be conducted in the community rather than if the respondent is left sitting in prison not getting any therapeutic benefit from custody. He relied upon evidence from both Dr Beech and Dr Sundin to the effect that they did not see that it was likely that he would run away from home to seek out a child although Dr Sundin said that she thought it was possible that he may take advantage of reduced vigilance to masturbate in front of a child.[32]

[54] Mr Green submitted, therefore, that the evidence supported the conclusion that a supervision order was likely to ensure adequate protection of the community and relied on the conclusion of the Court of Appeal in *Attorney-General (Qld) v Francis*[33] that:

> "If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[55] He also argued that it was likely that, if treated, the respondent's problems would decrease over time and he would pose less of a risk to the community. For those reasons he submitted that it was appropriate to make a supervision order.

Conclusion

[56] That the respondent is a serious danger to the community in the absence of a division 3 order under the Act was not in issue and I am prepared to affirm that order, being satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to affirm the decision.[34]

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32 See T1-18 ll.1-21.

33 [2007] 1 Qd R 346, 405 at [39].

34 See s 30(2) of the Act.

[57] While superficially plausible from the point of view of the attempt to rehabilitate the respondent, the submission that the supervision offered by his parents would provide a sufficient degree of protection for the community and an incentive for Mr Sybenga to undertake treatment as a condition of his release to their custody ignores the actual danger he presents to the community and the real limitations on the type of supervision the parents can provide.

[58] His aberrant views about the logic of his behaviour towards young girls remain firmly entrenched. He does not wish to relinquish them and has rejected treatment which he recognises he needs. His past history reflects his ability to offend opportunistically, the excitement he obtains from such offending and his own recognition of the risk that he poses. The psychiatric evidence was that he should be taken at his word when he said that he would not trust himself with a child if unsupervised and I cannot be confident that his attitude, in the absence of treatment, has changed since he told Dr Beech that previously.[35]

[59] His parents are not appropriate supervisors, both because of the concern whether they can provide adequate security at their home and because of their lack of training and experience, effectively as jailers, but also because the relationship they have with the respondent is important and likely to be put at risk if they are required to fulfil that role.

[60] Importantly, from the point of view of the need to ensure the adequate protection of the community, the evidence is that he should undergo a HISOP before he is released. That was Dr Sundin's firmly expressed view and Dr Beech's clear preference. It is based on uncontroversial evidence that participation in such a program is likely to reduce significantly the risk that the respondent will re-offend. Dr Beech's other evidence that any therapy would be better than his sitting in prison and not receiving any therapeutic benefit from custody seemed to me to be clearly focussed on the respondent's therapeutic needs rather than the need to ensure community protection.

[61] If the respondent truly wishes to reduce the danger he presents to the community so that he can leave prison, one part of the solution lies in his own hands. He should pursue the treatment available to him that he has, so far, rejected. The course recommended by Dr Sundin that he resume therapy with Dr Arthur and then undertake the HISOP seems likely to be the most sensible thing that he could do to advance his own interests.

Order

[62] Accordingly I order that the respondent continue to be subject to the continuing detention order made by Martin J on 19 June 2009.

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[35] See *A-G (Qld) v Sybenga* [2009] QSC 161 at [14] extracted at [18] above.