SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Qld v Dodge* [2012] QSC 277
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Applicant) **v** **MARTIN FRANCIS DODGE** (Respondent)
FILE NO/S:	BS No 6735 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2012
JUDGE:	Ann Lyons J
ORDER:	**1. That the application for an Order under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) be set for hearing at 10.00am on 17 December 2012;** **2. That pursuant to s 8(2)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) the Respondent undergo examinations by two psychiatrists named by this Honourable Court, being Dr Michael Beech and Dr Donald Grant who are to prepare independent reports, which are to be prepared in accordance with s 11 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld); and** **3. That there be liberty to apply.**
CATCHWORDS:	*Acts Interpretation Act* 1954 (Qld), s 14B *Criminal Code Act* 1899 (Qld), s 218A(1) *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 5(1), s 5(6), s 8(2)(a), schedule *Penalties and Sentences Act* 1992 (Qld), s 9(5), s 9(6) *Attorney-General for the State of Queensland v Phineasa* [2012] QCA 184

Attorney-General for the State of Queensland v SBD [2010] QSC 104
R v Finch; ex parte A-G (Qld) [2006] QCA 60
R v McGrath [2005] QCA 463
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476

COUNSEL: J M Horton with B A Hall for the Applicant
C Reid for the Respondent

SOLICITORS: Crown Law for the Applicant
Legal Aid Queensland for the Respondent

ANN LYONS J:

This application

[1] The Respondent was convicted in 2010 of a number of offences including an offence pursuant to s 218A(1)(b) of the *Criminal Code Act* 1899 (Qld) ("the *Criminal Code*") of using the internet to expose a person under the age of 16 years to an indecent matter.

[2] The Applicant contends that the Respondent is therefore a prisoner under Queensland's dangerous prisoner sexual offender legislation and seeks orders for the appointment of two psychiatrists to examine him to ascertain if he is a serious danger to the community and should be subject to either a supervision order or a continuing detention order.

[3] The Respondent, however, maintains that the legislation does not apply to him as he has not been convicted of a sexual offence against a child because the offence he was convicted of pursuant to s 218A(1)(b) involved a covert police officer who had assumed the identity of a 14 year old boy.

The Offences

[4] On 25 May 2010 the Respondent pleaded guilty before Dick DCJ to the following charges:

(a) distributing child exploitation material contrary to s 228C(1) of the *Criminal Code*;
(b) possessing child exploitation material contrary to s 228D of the *Criminal Code*; and
(c) using the internet to expose a person under the age of 16 years to an indecent matter contrary to s 218A(1)(b) of the *Criminal Code*.

[5] The Respondent was sentenced on Counts 1 and 2 to imprisonment for a period of four years. In respect to Count 3 he was sentenced to imprisonment for a period of 18 months. The sentences were to be served concurrently and the 489 days he had spent in pre-sentence custody was declared as time already served under the sentence.

[6] In late 2008, the Respondent was observed at an internet café in Fortitude Valley. He appeared to be chatting to teenage boys online and photographs of teenage boys were seen on the computer screen by a number of witnesses. A complaint was

made. Police attended and took details of the Respondent's user name and MSN profile.

[7] The Schedule of Particulars indicates that on 6 January 2009 a police officer from Taskforce Argos assumed the identity of a 14 year old boy and began chatting to the Respondent online. Believing the police officer to be a 14 year old boy, the Respondent asked the police officer a number of sexually explicit questions. During the course of the conversation the Respondent discussed details of oral sex and masturbation, indicating that it was "really good when someone else is doing it for you". Whilst the conversation was ongoing police attended an internet café and continued their investigations. There was no indication that the two 'boys' in fact met at any time. On 21 January 2009 police executed a search warrant at the Respondent's residence. A USB stick containing a number of photographs of teen and pre-pubescent males was also discovered.

The *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("DPSOA") Regime

[8] Whilst this application is for orders under s 8(2)(a) of the DPSOA for the Respondent to be examined by two psychiatrists, it is clear that such orders can only issue if the Court is satisfied that the Respondent is a 'prisoner' for the purposes of the legislation and that there are reasonable grounds for believing that the 'prisoner' is a serious danger to the community in the absence of a supervision or detention order.

[9] The orders sought by the Applicant pursuant to s 8 are therefore only authorised by s 5(1) 'in relation to a prisoner', as defined by the DPSOA.

[10] Section 5(6) defines 'prisoner' to mean:

> "… a prisoner detained in custody who is *serving a period of imprisonment for a serious sexual offence*, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section.[1]

[11] The term 'serious sexual offence' is defined in the DPSOA dictionary as an offence of a sexual nature, whether committed in Queensland or outside Queensland:

> (a) involving violence; or
> (b) *against children*.[2]

[12] It is clear that the Respondent did not actually perpetrate any violence upon the children depicted in the child exploitation material that he possessed and distributed.

[13] It is conceded by the Applicant that Counts 1 and 2 do not qualify as serious sexual offences.

[14] Whilst the Applicant accepts that there was no actual child involved as the 'child' was in reality a police officer the Applicant argues that Count 3 is a serious sexual

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1 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 5(6) (emphasis added).
2 Ibid, Schedule, Dictionary (emphasis added).

offence despite that fact because it was an offence of a sexual nature committed against children.

[15] Accordingly, in this application a preliminary question arises as to whether the offence here involves an "offence of a sexual nature committed against children" which triggers the DPSOA. If the Respondent is not a 'prisoner' as defined by the DPSOA then there is no basis for making the orders sought.

Section 218A of the *Criminal Code*

[16] The Respondent was charged under s 218A(1)(b) of the *Criminal Code.* Section 218A of the *Criminal Code* provides:

> **"218A Using internet etc. to procure children under 16**
> (1) Any adult who uses electronic communication with intent to—
> (a) procure a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to engage in a sexual act, either in Queensland or elsewhere; or (b) expose, without legitimate reason, a person under the age of 16 years, *or a person the adult believes is under the age of 16* years, to any indecent matter, either in Queensland or elsewhere; commits a crime.
> …
> (6) Also, for subsection (1)(a), it does not matter that, by reason of circumstances not known to the adult, it is impossible in fact for the person to engage in the sexual act.
> (7) For subsection (1), it does not matter that the person is a fictitious person represented to the adult as a real person."

[17] For an offence to be committed pursuant to subsection (1)(a), it is not necessary to prove that the adult intended to procure the person to engage in any particular sexual act. For the purposes of subsection (1)(a), it does not matter that it is impossible in fact for the person to engage in the sexual act or that the person is a fictitious person represented to the adult as a real person.

[18] For subsection (1), if there is evidence that the person was represented to the adult as being under the age of l6 years, in the absence of evidence to the contrary that is proof that the adult believed the person was under that age. It is a defence to a charge under this section to prove the adult believed on reasonable grounds that the person was at least 16 years old.

[19] The question which needs to be answered in this case is this: "did the respondent commit an offence of a sexual nature against children when he asked sexually explicit questions of the police officer in contravention of s 218A(1)(b) of the *Criminal Code*?"

Can an offence 'against children' be committed when there is no 'real' child present?

[20] A similar issue arose in the 2005 Court of Appeal decision of *R v McGrath* ("*McGrath*"),[3] where a covert police officer was also involved. The question in that case was whether an offence under s 218A(1)(a) of the *Criminal Code* of using the internet with intent to procure a child under 16 to engage in a sexual act was properly described as an offence which was committed *in relation to* a child under 16 for the purposes of s 9(5) of the *Penalties and Sentences Act* 1992 (Qld) ("the PSA"). Section 9(5) of the PSA provides that in sentencing an offender for an offence of a sexual nature committed 'in relation to a child' under 16 years, the principles mentioned in s 9(2)(a) of the PSA (that a sentence of imprisonment should be a sentence of last resort and that a sentence that allows the offender to stay in the community is preferable) do not apply; and the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

[21] Mackenzie J (with whom de Jersey CJ and Williams JA agreed) examined in great detail the nature of an offence under the s 218A, as follows:

> "[33] Leaving aside the legislative history and other extrinsic material, it is, in my view, significant that s 218A is an unusual section in that *it is an intention to procure a child under 16 to engage in a sexual act or to expose a child under 16 to indecent matter and using the internet with one of those intents that are central to the offence*. The elements of the offence are that a person uses the internet and that at the time of using it, he has either an intent to procure a child under 16 to engage in a sexual act, or to expose a child under 16 to indecent matter. *Viewed in that way, as a matter of construction, the fact that the offender actually communicates with a child under 16 or believes that he is doing so is really only part of the evidence to prove that one of the necessary intents existed.* It is the fact that he communicates by means of the internet with someone who is or is believed to be under 16 that demonstrates one or both of the intentions that are elements of the offence.
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> [34] In that respect, the offence is different from those where the offence is constituted by a particular act, without any discrimination between whether an adult or a child is the victim, for example s 349, and cases where it is a circumstance of aggravation to commit it if the victim is a child under a specified age, for example s 209. Presumably the use of the word "committed" in s 9(5) is intended to remove the availability of s 9(2)(a) in cases where one of those kinds of offences is committed in respect of a child as opposed to an adult. Some offences, principally in Ch 22, have an essential element defined by reference to the age of the victim. Section 9(6) would plainly apply to them.
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> [35] The essential purpose of s 218A is to criminalise conduct where people use the internet with one of the required intents in relation to a child under 16. The notion that the

[3] [2005] QCA 463.

> punishment regime may depend on whether a person actually communicates with a child under 16 or is misled into believing he is doing so, is, in the circumstances, based on an analysis of s 218A that confuses what is required to prove the offence. *There is, on proper analysis, no reason to conclude that for punishment purposes there is any basis to subdivide offenders into different regimes, by reference to whether or not contact was made with an actual child under 16.* All offenders fall under the same sentencing regime, with assessment of the impact of individual factors within that regime providing for differentiation between their punishments.
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> [36] For the reasons given, the meaning of the phrase *"offence of a sexual nature committed in relation to a child under 16" in s 9(5) includes offences under s 218A irrespective of whether or not an actual child under 16 is the recipient of the offender's communication. Since the essence of the offence is using the internet with one of the two intentions, and what is done by the offender to demonstrate his intention is done, so far as he is subjectively concerned, in relation to a child under 16, the offence is properly described as one committed in relation to a child* under 16 for the purposes of s 9(5)."[4]

[22] In 2006 the Court of Appeal again considered the operation of s 9(5) and s 9(6) of the PSA and the meaning of the term 'in relation to a child' in *R v Finch; ex parte A-G (Qld)* ("*Finch*").[5] The relevant question was whether the provisions of s 9(5) applied to a Respondent who had pleaded guilty to one count of knowingly having in his possession child abuse computer games (rather than an offence under s 218A). Williams JA held (with Keane and Muir JJA concurring) as follows:

> "[18] The extent of operation of s 9(5) and (6) was considered by this Court in *R v McGrath* [2005] QCA 463. The offence in question there was under s 218A(2)(b) of the Code of using the internet with intent to expose a child under 16 to indecent matter. In a carefully reasoned judgment Mackenzie J concluded that s 9(5) applied so as to make s 9(2)(a) inapplicable, although there was in that case no actual child under 16 involved. The offender believed he was communicating with a child under the age of 16 years and in consequence in terms of s 9(5) there was an "offence of a sexual nature committed in relation to a child under 16".
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> [19] On the hearing of this appeal counsel for the Attorney-General submitted that the offence here was also one within the scope of operation of s 9(5). However, it is difficult to conclude that the offence here was "committed in relation to

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4 Ibid, [33]-[36] (emphasis added).

5 [2006] QCA 60.

> a child under 16 years". Whilst the expression "in relation to" is generally given a wide meaning, there is *certainly no identifiable child under 16 years with respect to whom this offence was "committed"*. In my view it is unhelpful to say that the images depict children under the age of 16 years.
>
> [20] In the circumstances, I would conclude that in the absence of specific statutory provision, s 9(5) of the *Penalties and Sentences Act* 1992 (Qld) does not apply to an offence under s 26(3) of the Act."[6]

[23] Counsel for the Respondent relies on the decision in *Finch* and on the decision of Peter Lyons J in *Attorney-General for the State of Queensland v SBD* ("*SBD*")[7] to argue that, in this case, no offence has been committed against a child. In that decision his Honour indicated that in his view trading images of child pornography on the facts of that case did not amount to a serious sexual offence against a particular child.

[24] In this regard I note that like the decision in *Finch*, which involved possession of child abuse computer games, the relevant charge in *SBD* involved the obtaining and disseminating of a number of images of child pornography for sexual gratification. In neither case was there an approach to a particular 'child' whether actually under 16 or not. The essence of those charges was the possession and dissemination of items. I also note that his Honour held:

> "[70] The expression "in relation to" used in s 9(5) envisages a less direct connection between the offence and a child, than the expression "against". That case provides, in my view, considerable support by way of analogy for the submission made on behalf of the Respondent.
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> [71] It seems to me that the question whether an offence involving child pornography is an offence of a sexual nature "against children" will depend upon the facts said to constitute the offence. Where, for example, a person charged with the offence of the indecent treatment of a child under the age of 16, had procured the child to engage in sexual activity which was then photographed, it may well be the case the offence is an offence against that child, and that it comes within the definition of a serious sexual offence.
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> [72] On the other hand, it seems to me that where a person obtains pornographic material involving children, in the production of which that person has played no role, and that person uses the material to obtain sexual gratification from that person's dealings with another adult, it does not seem to me that that involves the commission of a serious sexual offence, as defined in the DPSOA. The connexion between

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6 Ibid, [18]-[20] (emphasis added).

7 [2010] QSC 104.

> the offending conduct and any particular child seems to me to be too remote to come within the statutory provision.
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> [73] On that basis, I am of the view that any future offence to which Dr Sundin referred by her statement that "(the respondent) may be unable to resist his paedophilic drives and once again become absorbed in trading child pornographic images for scenes of bestiality" is not a serious sexual offence for the purposes of the DPSOA.
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> [74] With respect to the competence of the application, on the same basis it seems to me that the offences of possessing child exploitation material and distributing child exploitation material (at least to the extent that they relate to material which the respondent obtained by means of the internet, intended for use, and used, for the purpose of obtaining sexual gratification from adults) do not constitute serious sexual offences."[8]

[25] I would endorse his Honour's view in relation to the difference between the words 'in relation to' and the word 'against'. I also consider that the word 'against' requires a stronger connection between an offender and a child than the words 'in relation to' implies. In this regard I note that the various definitions of 'against' in the Oxford Dictionary almost invariably require a temporal connection, as follows:

> (a) Directly opposite; facing, in front of, in full view of.
> (b) In the sight of, in presence of; with.
> (c) Towards, with respect to, in regard to.
> (d) More generally: Towards the front of, near, adjoining.
> (e) In a direction facing; towards, forward to, to meet.
> (f) Of motion into contact; pressure upon.
> (g) Of motion or action in opposition to.
> (h) In the opposite direction to the course of anything, counter to.
> (i) Implying adverse motion or effort.

[26] Having considered those definitions, I consider that a person on a computer directly communicating with a child in a sexual way is actually 'directly opposite' or 'in the presence of' the child' in such a way that they must be considered to be committing offences which are offences against that child. They are not simply sexual offences generally but rather there is an offence *against* that particular child at the end of the computer in the full sense of the word. In my view, the actual child has been affected or corrupted by the adult's actions and has been exposed to an indecent matter. The actions of the adult perpetrator are having an impact on the child victim. They have in the very least been sexualised or corrupted in some way by the adult.

[27] Accordingly, I consider that if the Respondent asked the sexually explicit questions of a real child instead of a covert police officer then there would no doubt that he had committed a sexual offence against that child. The Respondent would have exposed a child under 16 to an indecent matter. That is quite different to simply possessing a whole range of images of children he has never met and never had any

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8 Ibid, [70]-[74].

contact with. Those who possess or disseminate items of child pornography may never make an actual approach to a child. They may simply obtain gratification from looking at images of children.

[28] It would seem to me therefore that there is a major factual distinction between the decisions in both *Finch* and *SBD*, which involved possession or distribution of items of child pornography where no particular child was involved (whether real or otherwise) and the case here where the Respondent not only possessed and distributed child exploitation material but also used the internet *intending* to target a child under 16. It would seem to me that the Respondent indeed poses a very real risk to children as he is seeking out children (but is not always successful if police officers become involved) and is not just possessing or distributing images. I accept that he intended to expose a child under 16 to an indecent matter but he did not achieve that purpose on the particular occasion that he was monitored by police in January 2009.

[29] If one examines the elements of an offence pursuant to s218A(1)(b) the offence can be committed if the adult uses electronic communication with intent to either expose "a person under the age of 16 years, *or* a person the adult believes is under the age of 16 years" to any indecent matter. There are therefore two possible ways the Respondent could have contravened subsection (1)(b). One clearly involves an offence against a child; the other clearly relates to an offence that actually involves an adult. The words of the section would appear to indicate that the latter offence is only committed if there is an adult involved and not a child.

[30] Can it therefore be argued that the Respondent in this case has been convicted of an offence of a sexual nature committed against a child? There is no doubt that the word 'against' must be construed strictly.

[31] In *Attorney-General for the State of Queensland v Phineasa*,[9] Muir JA, with whom White JA and Philippides J agreed, outlined the serious nature of the provisions of the DPSOA and the history of the legislation. His Honour in particular referred, with approval, to the statement of principle of Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth*:[10]

> "[41] To similar effect, is the following statement of principle of Gleeson CJ in *Plaintiff 5157/2002 v The Commonwealth*:
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> > "... courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or .freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost,

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9 [2012] QCA 184.

10 (2003) 211 CLR 476 at 492.

> but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'."[11]

[32] His Honour also referred to s 14B of the *Acts Interpretation Act* 1954 (Qld), which permits reference to the Minister's second reading speech as an aid to construction which indicated that "there are likely to be very few of these applications" and that the "law has been carefully drafted to confine its operation".[12] His Honour continued:

> "[43] It is stated in the explanatory notes to the *Dangerous Prisoners (Sexual Offenders) Bill* 2003:
>
> > 'This Bill effectively addresses these concerns by enabling the Supreme Court to order the post-sentence preventive detention or supervision of sex offenders who pose a serious danger to the community if released at their sentence expiry date.
> >
> > …
> >
> > There is currently a gap in the law when it comes to the protection of the community from dangerous sexual offenders. The law does not presently provide a mechanism whereby the community can be protected from a potentially dangerous individual, who is not mentally ill for the purposes of the mental health legislation and who has not committed a criminal offence (that is other than an offence for which the individual has already been sentenced).
> >
> > These amendments address that inadequacy by providing for a mechanism whereby prisoners who, if released, *pose an unacceptable risk of committing a further offence of a sexual nature, may be detained when it is appropriate to do so for the protection of the community. It is the need to protect the community* which is the paramount reason for the introduction of the Bill."[13]

[33] His Honour also indicated that the Court must give effect to the clear words of the section:

> "[44] Such aids to construction cannot be substituted for the text of the Act. The court must 'give effect to the will of Parliament as expressed in the law'. And although 'The meaning of the text [of an Act] may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy', it is ultimately the text, 'construed according to

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11 Above n 9, [41].
12 Hansard, 4 June 2003 at 2581.
13 Above n 9, [43].

> such principles of interpretation as provide rational assistance in the circumstances of the particular case', which is the controlling factor.
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> [45] In this case, the construction which in my view is suggested by the language of the Act is, at worst, consistent with that pointed to by the aids to construction just discussed. Indeed, that construction is amply justified by the words of the Act without resort to extrinsic materials or other aids to construction."[14]

[34] There is no doubt that in *McGrath*, McKenzie J was considering the provisions of s218A(1) to ascertain if offences of a sexual nature had been committed *'in relation to children'* in order to determine whether particular provisions of the PSA had been triggered. I accept that in the present case the words under consideration are whether offences of a sexual nature have been committed '*against children'* and that generally a stronger connection is required for an act to be committed 'against' a child as opposed to 'in relation to a child'. However, once the elements of s218A(1) are understood in the way analysed by McKenzie J in *McGrath*, it is in my view abundantly clear that the offence committed by the Respondent is indeed an offence 'of a sexual nature *against* children' because of his subjective intention at the time. His intention was to commit an offence of a sexual nature against a child and the elements of s 218A(1) were satisfied. I consider that offences committed pursuant to s 218A(1) should be considered to be offences of a sexual nature not just in relation to children but that, in addition, such offences should also be considered to be offences of a sexual nature against children.

[35] Having considered the provisions of s 218A(1) of the *Criminal Code*, as construed by the Court of Appeal in *McGrath*, I consider that an offence pursuant to s 218A(1) is indeed an offence that is aimed at penalising sexual offending *against* children, even if there is no actual child involved because there was in fact an intention to offend against a particular (albeit mistaken) child. As McKenzie J indicated in *McGrath*, the essence of the offence under s 218A(1) is using the internet with an intention either to procure a child to engage in a sexual act or to expose a child to an indecent matter and that what an offender does subjectively to demonstrate either of those intentions is therefore done, so far as the offender is concerned, in relation to a child under 16.

[36] Section 218A(1) section also indicates that irrespective of whether there is a real child or a covert police officer involved the culpability of the Respondent is the same.

[37] Significantly, irrespective of whether there is a real child involved or a covert police officer the risk that the Respondent poses to the community is the same. The risk the Respondent poses to the community does not alter because his victim did not actually turn out to be 14 years old. The Respondent is a risk to the community by his actions, namely that he has been convicted of an offence pursuant to s 218A, because he intended to expose a child to sexually indecent material.

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[14] Ibid, [44]-[45].

[38] Accordingly the Respondent's use of the internet with intent to expose a child to indecent matter is an ‘offence’, ‘of a sexual nature’, ‘against children’ because he was acting with the requisite intent. He was convicted of that offence. He is therefore serving a period of imprisonment for sexual offences against children. He is a ‘prisoner’ to whom the provisions of the DPSOA apply. Furthermore, he is indeed a prisoner who, if released, poses an unacceptable risk of committing a further offence of a sexual nature. The Respondent is an offender to whom the legislation is intended to apply.

[39] Counsel for the Respondent concedes that if the Respondent is a prisoner to whom the DPSOA applies then the order sought for his examination by two psychiatrists should be made as there are reasonable grounds to believe the Respondent is a serious danger to the community in the absence of a Division 2 order.

[40] There will be orders in terms of the draft which has been submitted by Counsel for the Applicant.