SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Watt* [2012] QSC 291
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **HANS LESTER WATT** (respondent)
FILE NO:	2298 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	26 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2012, 23 August 2012 and 12 September 2012
JUDGE:	Peter Lyons J
ORDER:	**1. The application is dismissed.** **2. The respondent be released forthwith.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – STATUTORY POWERS AND DUTIES – EXERCISE – GENERAL MATTERS – where, in 2001 respondent was convicted of rape and was sentenced to a term of imprisonment which expired on 12 August 2012 – where the applicant applies for an order pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) that the respondent remain in detention, or alternatively, that the respondent be released subject to a supervision order – whether there is an unacceptable risk that if the respondent is released from custody he will commit a serious sexual offence - standard to which risk must be established - need to evaluate psychiatric evidence *Dangerous Prisoners (Sexual Offenders) Act 2003*, ss 11, 13 and schedule *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, considered *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, applied *Project Blue Sky v ABA* (1998) 194 CLR 355, considered

COUNSEL: J Horton for the applicant
C Reid for the respondent

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

[1] On 8 November 2001, the respondent was sentenced to a term of imprisonment which expired on 12 August 2012.[1] The applicant has applied for an order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (*DPSOA*) for the further detention of the respondent. A significant issue in the application is whether there is an unacceptable risk that if the respondent is released from custody (whether with or without a supervision order being made) he will commit a serious sexual offence.[2]

Background

[2] The respondent is a full-blooded Aboriginal male, now 42 years of age. Except when in custody, he has lived on Mornington Island throughout his life.

[3] Mornington Island was described by Professor Nurcombe, who had been there in the 1970s, as a place of "terrible social disintegration". Professor Nurcombe said that the respondent had been raised "as an amoral person". Dr Lawrence described him as "asocial", consistent with his upbringing. He does not recognise many of the values and constraints generally accepted in Australian communities.

[4] The respondent had a poor record of attendance at school. He is illiterate and innumerate. The respondent has a poor work history, with little real employment from about the time he was 19 years of age.

[5] In his teenage years, the respondent inhaled petrol. He started drinking beer at age 17, and regularly (prior to his incarceration) drank in order to get drunk. He also smoked marijuana when living on Mornington Island. There is some inconsistency in the reporting of the age at which he commenced to smoke marijuana.

[6] The respondent has been assessed as having a low IQ. This is possibly associated with mental retardation and/or brain damage.

[7] There is inconsistency in the reporting as to the membership of the respondent's family. It is unclear whether he has any living sibling. His parents are both dead.

[8] The respondent had a long term relationship with an Aboriginal woman, which lasted for about 12 years. He has had other relationships, as well as casual sexual encounters, two of which resulted in children, both daughters. The respondent indicated that one daughter would now be about 20, and the other possibly nine or 10 years old.

[9] The respondent has a significant criminal history. Much of his offending might be described as property related, though some involved the possession of firearms. His offending also includes an assault in 1996. Further assaults were committed in

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1 An order was made for his further detention under s 9A of the *DPSOA*.

2 See s 13(2) of the *DPSOA*.

November 1999, December 1999, and 14 January 2000, against a person who was, or, it would seem, had been, his domestic partner until late in 1999. He also has two convictions for breaches of a domestic violence order, being the assaults in December 1999 and January 2000. He committed a further assault (on his niece, then aged 20) in April 2000. The assault in November 1999 was a common assault. The three subsequent offences occasioned bodily harm.

[10] The offence for which the respondent is now in custody is the rape of a three year old girl on 11 August 2001 (*principal offence*). The respondent was intoxicated at the time. The offence caused significant physical injury to the victim.

[11] The circumstances of this offence are highly unusual. It occurred shortly after the death of the respondent's mother. The respondent's account of the offence is to the effect that the victim's grandmother insulted him and/or his mother at this time; and that he carried out the offence as an act of revenge. Each of the psychiatrists, who gave evidence, having interviewed the respondent, accepted this explanation for the offence. They each concluded that the respondent was not a paedophile, nor affected by any other form of paraphilia.

[12] While in prison the respondent's conduct has, at least in recent years, been reasonably good. His prison record reveals four major misconduct breaches, apparently involving fighting or serious threats to another prisoner. There have, however, been no breaches since 2007. His work history in the prison is not particularly good. Nevertheless, he is not infrequently described as compliant and well behaved.

[13] The respondent has undertaken the Getting Started Preparatory Programme for Sexual Offenders, and the Ending Offending Core Programme; both with limited success. The applicant had agreed to undertake the Sexual Offenders' Programme for Indigenous Males (*SOPIM*), but later withdrew his agreement, apparently because delays meant that the programme would not be completed before his release date.

Statutory provisions

[14] The circumstances in which the order sought by the applicant might be made are indentified in s 13 of the *DPSOA*, which includes the following:

> "(1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).
>
> (2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—
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> (a) if the prisoner is released from custody; or
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> (b) if the prisoner is released from custody without a supervision order being made.
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> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
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> (a) by acceptable, cogent evidence; and
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> (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 as mentioned in subsection (1), the court must have regard to the following—

(aa) any report produced under section 8A;

(a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;

(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;

(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 or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

(g) the prisoner's antecedents and criminal history;

(h) the risk that the prisoner will commit another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter.

…

(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)."

[15] A critical question raised by s 13(2) is whether the respondent will commit "a serious sexual offence" if released. The expression is defined as follows:

"***serious sexual offence*** means an offence of a sexual nature, whether committed in Queensland or outside Queensland—

(a) involving violence; or

(b) against children."

[16] Before dealing with that question, it is necessary to say something further about the evidence from the psychiatrists.

Psychiatric evidence

[17] The difficulties with the present case are particularly apparent from the evidence of Professor Nurcombe. In his report, Dr Nurcombe expressed the view that if the respondent were abstinent from alcohol and marijuana, the risk of sexual reoffending is low; although under the influence of alcohol and marijuana, the risk

of sexual offending "would be only ***moderate***". If it involved a child, the damage would be grave.

[18] Like the other psychiatrists, Professor Nurcombe used actuarial instruments including those which provide assessments of the risk of sexual offending. Of them, he said in his report that they were designed from studies in Canada and the United Kingdom, and that it is not known whether they are reliable for Australian indigenous people. He noted that the evaluations using those instruments "could be either too high or too low". Dr Lawrence also expressed concern about the reliability of assessments using such instruments for an indigenous male like the respondent.

[19] In his report, Professor Nurcombe identified how adequate "warning of the risk of sexual abuse" by the respondent might be obtained. When asked in his oral evidence about the meaning of the expression "sexual abuse" in this passage, he stated, "I think that the risk of sexual abuse in regard to violence towards an adult woman who refuses him sex or who has been unfaithful to him would be high." Professor Nurcombe also stated that he regarded as high the risk that the respondent would engage in forced sexual intercourse, if the respondent were affected by alcohol.

[20] Professor Nurcombe was asked about the reasoning which lead to a conclusion that there was a high risk that the respondent would use violence in order to have forced sex with a woman. His response included an acknowledgement that there was no evidence that the respondent had used violence in the course of raping an adult woman. He also stated that there was no evidence of anything else which would lead to a conclusion that there is a high risk that the respondent would use violence to enable him to carry out a sexual act with an adult. In re-examination, he explained his earlier comment as the product of "a kind of halo effect" resulting from the principal offence; but that an attempt to link the respondent's conduct in relation to the principal offence to a preparedness to act in a similar way to an adult woman was conjectural.

[21] It should also be noted that Professor Nurcombe said of the applicant that he does not have a sexual abnormality along the lines of a preference for rape, or a preference for children rather than adult women. He also stated that the respondent was "not violent sexually, because that's a perversion". He also said that the respondent was "not a man who goes prowling looking for sex and raping women". He also said the applicant was "not a violent predator".

[22] It might also be noted that with respect to offending similar to the principal offence, Professor Nurcombe stated "I think the likelihood that that would occur again is not high – moderate at most and most likely low".

[23] In her report Dr Sundin said:

> "… this man represents a high risk for general offending behaviour, including potentially violent behaviour fuelled by either abuse of alcohol and/or cannabis. I also consider that he is at high risk for violent behaviour towards intimate partners and I am concerned as to the potential for sexual violence or sexually coercive behaviour towards intimate partners, despite Mr Watt's denials. I do not consider that he represents a high risk of re-offending in a sexual

> fashion against a child and overall would assess his risk of recidivism in this area as being moderate to low. Were such an offence to occur again, it is likely to occur in the setting of alcohol or cannabis abuse and triggered by an adverse comment or interpersonal stressor."

[24] Dr Sundin's report records, in respect of a partner of the respondent who had been physically assaulted by him, "…her statements suggest threats of physical violence in order to try and coerce intercourse from her."

[25] When asked in her oral evidence to deal with the risk of sexual violence towards partners separately from other violence towards partners, Dr Sundin said:

> "… I take the point … that this man has never been actually charged with rape, but we have evidence from his longstanding partner and one of his girlfriends that he created an environment of violence generally within relationships, creating an atmosphere of general coercion."

[26] Shortly thereafter, Dr Sundin said:

> "My concern from this material was that this man's general level of violence is such that he creates an atmosphere of coercion and that that spoke to my concerns about sexually coercive violence as being part of intimate partner relationships … there is material that speaks of his use of violence and general coercion and his attitude towards women as needing to be kept in line. I would argue that that creates an atmosphere in which coercion is achieved – de facto … but I do acknowledge that there's no conviction for rape itself."

[27] Dr Sundin's views were said to be inferences which came from her "work in the domestic violence area".

[28] Dr Sundin was also asked about the relationship between the principal offence, and the risk of sexual offending against an adult woman. As part of her answer she said, "I don't know that you can go back the other way – that is if he is violent to a child, he's going to be violent to an adult woman, but I think thereis just a general issue of violence with this man."

[29] Dr Lawrence provided two reports, the first dated 27 June 2011, and the second, a supplementary report, dated 21 July 2011.

[30] In her first report, speaking with reference to the principal offence, Dr Lawrence considered the risk of recidivism to be moderate or moderate to low; though increased if the respondent were in a state of intoxication and isolation. She also considered his risk of re-offending in a potentially violent manner, if fuelled by alcohol, abuse or dependence, to be high. She also stated that the score resulting from the use of risk assessment or actuarial terms placed him as having a high risk of sexual violence.

[31] In her supplementary report, Dr Lawrence confirmed her view that the respondent was a high risk of re-offending in a potentially violent way, especially if affected by alcohol or drugs; and a moderate to low risk for sexually offending against child, increasing with the use of alcohol or drugs.

[32] In her oral evidence Dr Lawrence said she did not see the respondent "as a predator on the streets". However, she thought him to be "capable of violent sexual acts to an adult woman". Dr Lawrence thought that there was a greater risk that the respondent would offend in a sexually violent way against an intimate partner, than that he would commit an offence against a child. She considered that there was "evidence to suggest a degree of entitlement in [the respondent's] approach to women". Her conclusion about the risk of sexual violence was based on her "understanding of his likely use of violence against his partner and other people, because he has been charged with assaults, although they weren't necessarily sexual assaults".

[33] When asked whether there was a high risk, if released, the respondent would commit a sexual offence such as forced intercourse or something of that kind, Dr Lawrence said, "I think he's capable of it…Perhaps – whether it is a high risk. There is a risk. I believe there is an increased risk over and above the ordinary person in the street, shall we say." She also associated the risk of offending with the respondent's being in a community where he is alienated, and did not readily enter into an intimate relationship. She associated the risk of his offending in those circumstances with his lack of socialisation and amorality, and the effect of alcohol and marijuana.

[34] Dr Lawrence also gave evidence that she considered that the risk that the respondent would again commit a sexual offence against a child, of the nature of the principal offence, was low, though the risk would increase "if he were drinking".

Consideration

[35] For the applicant, it was contended that there was a greater risk that the respondent would commit a serious sexual offence involving an adult woman (that is to say, an offence of a sexual nature, involving violence, committed against an adult woman) than that he would offend against a child. It was also submitted that the risk that the respondent would commit another sexual offence against a child was sufficient to warrant his detention. For the respondent it was submitted that the applicant had not demonstrated that, if the respondent were released from custody, there was an unacceptable risk that he would commit a serious sexual offence. Alternatively, it was submitted that he should be released, subject to an appropriately conditioned supervision order.

[36] It is necessary to determine whether there is an unacceptable risk that the respondent will commit a serious sexual offence if released from custody (whether or not he is subject to a supervision order). By virtue of s 13(3) of the DPSOA, such a determination may only be made if the court is satisfied by acceptable, cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to justify the decision.

[37] In my view, s 13(3) of the DPSOA establishes a rather high hurdle to be overcome before an application for an order under s 13 will be successful. There was no suggestion that there should be any departure from the natural or grammatical meaning of this provision, which is ordinarily the legal meaning[3]. Indeed, the legislature has nominated a special standard to be achieved to establish the risk mentioned in s 13(1). The question therefore is whether the applicant has

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3 *Project Blue Sky v ABA* (1998) 194 CLR 355 at [78].

established that risk, by acceptable, cogent evidence, and to a high degree of probability.

[38] In *Makita (Australia) Pty Ltd v Sprowles*[4] (*Makita*), Heydon JA (as his Honour then was) cited with approval the following passage from *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh*[5] (a case where the opinion expressed by an expert was not contradicted):

> "Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court … Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury."

[39] Although the DPSOA specifically recognises the value of psychiatric evidence for the determination of applications for an order under s 13[6], it seems to me that that evidence should be assessed in the ordinary way. Section 13(4) also specifies a range of other matters to be considered.

[40] Dr Sundin's concern about the risk of sexually coercive violence from the respondent was closely related to her view that the respondent created an atmosphere of general coercion in his relationships with women. While he has been violent towards women, the evidence does not demonstrate sexual coercion. The one occasion on which there appears to have been an association between the respondent's desire for sex, and violent conduct from him towards his partner, was an occasion where the partner refused the respondent. This occurred on 17 November 1999. The refusal itself is not consistent with the existence of "an atmosphere of general coercion"; nor in its resulting in the respondent's carrying out sexual activity against the will of his partner.

[41] The respondent's violent conduct to his partner after the refusal seems, on the available material, to be the result of the respondent's anger, rather than as part of an attempt to force his partner to engage in sexual activity. There was a complaint of violence, but not of rape or attempted rape. The available material records that the respondent punched the woman in the face, and kicked her in the back. It also records that she was subsequently in fear that he would spear her; but there is no suggestion of a fear of a sexual attack[7].

[42] When approached by police on 19 November 1999, the woman gave a full account of what happened, including her injuries, although the respondent had "threatened to spear her if she went to the police to report the incident"[8]. A domestic violence order was taken out against the respondent shortly after this offence, on 23

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4 (2001) 52 NSWLR 705 at [59].
5 [1953] SC 34, 39-40.
6 See for example s 8, and s 13(4)(a).
7 See Affidavit of Byrne, ex MRB 1 p 19.
8 See Affidavit of Byrne, ex MRB 1 p 19.

November 1999 by the respondent's partner[9]. The woman stated, on 21 December 1999, that the respondent had been her boyfriend "until about 2 months ago"[10], suggesting the relationship ceased about the time of November 1999 offence.

[43] These facts do not suggest, despite his violence, that an atmosphere of general coercion was created by the respondent. The parties were invited to identify the evidence relating to the respondent's assaults against women. None of the other complaints about the respondent's violence towards a partner suggested an attempt by him to engage in forced sexual activity. They did not support the statement in Dr Sundin's report that a partner of the respondent suggested that he used threats or violence in order to coerce sexual intercourse from her.

[44] Although the respondent's violence to women is completely unacceptable, so far as the facts are known, they do not support a conclusion of sexual coercion, or sexually coercive violence, by the respondent. In those circumstances, I do not accept that Dr Sundin's evidence establishes that the respondent is a serious danger to the community, in relation to the commission of a serious sexual offence against an adult.

[45] Having heard Professor Nurcombe's evidence, I was left with the strong impression that his view that there was a high risk that the respondent would offend in the future related to violent offending, but not to sexual offending. It might also be noted that he could not identify reasoning that would support a conclusion that there was a high risk that the respondent would commit a sexual offence involving violence against an adult. It would follow that, to the extent that he expressed a view that the respondent would commit a sexual offence against an adult which involved violence, his evidence should not be accepted.[11] In any event, in re-examination, Professor Nurcombe appeared to resile from that view. When one considers the totality of his evidence, including his views as to whether the respondent was violent sexually, it seems to me that it does not satisfy the standard prescribed by s 13(3) for forming the view that the respondent is a serious danger to the community, in the sense identified in s 13, if released from prison.

[46] The applicant acknowledged that, in her reports, Dr Lawrence's view that there was a high risk that the applicant would commit an offence, related to an offence of violence, but not a sexual offence. Dr Lawrence has had extensive experience in providing reports under the DPSOA. By s 11 of that Act, those reports are to include an assessment of the level of risk that a prisoner would commit a serious sexual offence, if released, and the reasons for that assessment. Dr Lawrence's report was a "risk assessment report" for the purposes of a potential application under the DPSOA. In those circumstances, it is a little surprising that, if Dr Lawrence had formed the view that there was a high risk that the respondent would commit a sexual offence involving violence against an adult woman, she did not say so in either her initial report or her supplementary report. This somewhat detracts from the weight which otherwise might be given to her oral evidence on that topic.

[47] Dr Lawrence's evidence to the effect that there was a higher risk that the respondent would commit a sexual offence against a woman, than would the ordinary person in

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9 See Affidavit of Byrne, ex MRB 1 p 9.

10 See Affidavit of Byrne, ex MRB 1 p 28.

11 See *Makita* at [79], [85], [86]. See also *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37], [42].

the street, was based on a chain of reasoning set out earlier. It might be observed that such a statement does not assist in determining whether the risk that he would commit such an offence is unacceptable.

[48] For the applicant it was submitted that Dr Lawrence's opinion was part of the predictive aspect of psychiatry,[12] being the application of her diagnosis to identified facts. The submission did not specify the diagnosis referred to. Two of the facts mentioned in Dr Lawrence's chain of reasoning should be noted. One is that the respondent, if, on release, he goes to a community which is not so accommodating and familiar as Mornington Island, will be alienated. The other is that the respondent would desire sex from a woman who would refuse him. Of the latter, it was submitted for the applicant that this was a self-evident possibility. Of the former, it was submitted that the evidence showed it was unlikely that the respondent would return to Mornington Island. It may be accepted that it is unlikely that the respondent would return to Mornington Island. However, it seemed to me that the evidence did not provide a firm basis for concluding that the respondent would then go to another community where he would experience alienation. Although it is possible that the respondent would desire sex from a woman and be refused, the likelihood of that occurring is also uncertain.

[49] In my view, Dr Lawrence's evidence does not establish, in the manner specified in s 13(3), that, if released from custody, there is an unacceptable risk that the respondent would commit a serious sexual offence involving a woman.

[50] None of the doctors supported the view that one could rely on the principal offence as demonstrating the likelihood of a serious sexual offence involving an adult woman.

[51] To use the language of s 13(4)(c) of the DPSOA, the evidence indicates that the respondent does not have a propensity to commit serous sexual offences against women. Likewise, in the language of s 13(4)(d), his pattern of offending behaviour does not include such offences. When the evidence of the psychiatrists, including that the respondent is not a sexual predator, is considered with these matters, it is hard to reach a firm view about the risk that the respondent would commit a serious sexual offence involving an adult woman.

[52] As a result, I do not consider the evidence on the question whether there is an unacceptable risk that the respondent will commit a serious sexual offence involving an adult woman to be cogent. I am not satisfied to a high degree of probability that the evidence is of sufficient weight to justify the conclusion that the respondent is an unacceptable risk of committing a serious sexual offence against an adult woman, if released from custody.

[53] It will be apparent that, in considering the evidence, I have focused on the risk that the respondent would commit a serious sexual offence against a domestic partner. So far as the legislation is concerned with the position of a domestic partner, it is to that risk, rather than the risk of violence against the partner, that the legislation is directed. The legislation is not designed to achieve the continued detention of a person who is prone to violence, unless the violence is associated with the commission of a sexual offence.

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12 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [63] per Gummow J.

[54] The principal offence is plainly a very serious offence. It demonstrates the extent of the amoral conduct of which the respondent is capable, when affected by anger and alcohol.

[55] Nevertheless, it appears to be a unique event in the respondent's life. It was associated with his mother's death. It seems to be the only case where the respondent's anger was taken out on someone other than the person who induced it.

[56] The respondent is not considered to be a paedophile, nor affected by any other form of paraphilia. There is no suggestion that the respondent has a propensity to commit sexual offences involving children. His pattern of offending behaviour does not include such offences.

[57] The psychiatrists did not consider that the respondent was at a high risk of committing a similar offence, if released from custody.

[58] The expressions "moderate" and "low" when used in the present case with respect to the risk of the respondent's committing a sexual offence involving a child were expressions of clinical judgment, but were not otherwise explained. When I consider the evidence of the psychiatrists as to the level of this risk, against the background of the other matters to which I have just referred, I find that I am not satisfied to a high degree of probability that the evidence is of sufficient weight to justify the conclusion that there is an unacceptable risk that the respondent would commit a serious sexual offence involving a child, if released from custody. As an additional factor in support of that position, I note that the respondent will have completed 11 years in custody for this offence, before his release. There has been nothing to suggest that, in the present case, the time in prison will not act as a personal deterrent of some influence in the respondent's future conduct.

Conclusion

[59] The application is dismissed.