SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Qld v Kanaveilomani* [2013] QSC 86
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Applicant) **v** **TIMOCI KURUYAWA KANAVEILOMANI** (Respondent)
FILE NO/S:	BS No. 6425/10
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2012
JUDGE:	Ann Lyons J
ORDER:	**1. I will hear from Counsel as to the final form of the order**
CATCHWORDS:	DANGEROUS PRISONERS (SEXUAL OFFENDERS) ACT 2003 – INTERPRETATION – where Respondent was sentenced to imprisonment for serious sexual offences in 1999 – where originating application brought by the Attorney-General pursuant to s 5 *Dangerous Prisoners (Sexual Offenders) Act* 2003 that the Respondent be subject to either a continuing detention order under s 13(5)(a) or a supervision order under s 13(5)(b) – where Respondent was subsequently sentenced to imprisonment for offences not amounting to serious sexual offences – whether the originating application met the requirements of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 – where the Respondent would currently be a serious danger to the community if released from custody without a Division 3 order as per s 13(1) *Dangerous Prisoners (Sexual Offenders) Act* 2003 – where the originating application was valid under s 5(2)(c) *Dangerous Prisoners (Sexual Offenders) Act* 2003 – but where a Division 3 order would have no utility due to the Respondent being incarcerated and where there was no cogent evidence that the Respondent would be a serious danger to the community once released from prison in ten years – where the Applicant had not discharged the onus in s

13(7) that one or other of the orders in s 13(5) should be made

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), ss 3, 5, 9A, 13, 14, 15
Juvenile Justice Act 1992 (Qld)

Attorney-General (Qld) v Lawrence [2009] QCA 136
Attorney General for the State of Queensland v Sutherland [2006] QSC 268

COUNSEL: P Davis SC with J Rolls for the Applicant
J Allen for the Respondent
SOLICITORS: G R Cooper, Crown Solicitor for the Applicant
Legal Aid Queensland

ANN LYONS J:

The criminal history

[1] Timoci Kanaveilomani is currently 30 years of age. On 13 August 1999, at the age of 17, he pleaded guilty in the Children's Court to a number of offences which were committed over a two month period in 1998, when he was 16. Those offences included offences of entering a dwelling at night with intent, two counts of assault occasioning bodily harm and two counts of rape which occurred on 18 October 1998 and 1 November 1998.

[2] There is no doubt from the sentencing remarks of Robertson DCJ on 13 August 1999 that the rape offences involved considerable physical force and were accompanied by death threats. His Honour indicated that "it is hard to remember descriptions of offences of rape that are so violent, so callous and so ferocious." He also noted that the offences were sinister and involved "planning, preparation, and striking at a time when you obviously believed your victims were most vulnerable." The rapes had involved the Respondent entering a woman's home, assaulting her and then raping her.

[3] Pursuant to the *Juvenile Justice Act* 1992 (Qld), the Respondent was sentenced to separate terms of imprisonment for each of the offences, to be served concurrently. He was sentenced to a period of 12 years imprisonment for the rape offences and lesser periods of imprisonment for the other offences.

[4] Whilst the Respondent was in custody, he came before the courts on four further occasions in relation to property and violence offences. On 11 July 2003, he pleaded guilty in the District Court to one count of assault occasioning bodily harm and was sentenced to a further 12 months imprisonment. The sentence was ordered to be served cumulatively on the sentence imposed on 13 August 1999 for the 1998 offences.

[5] The Respondent's full time release date for those sentences was 19 November 2010.

Release on Parole

[6] The Respondent was granted parole on 14 November 2008 with a requirement that he comply with a number of conditions which included that he not use alcohol or drugs and that he attend a Sex Offender Maintenance Program.

[7] On 25 January 2009, two months after he was granted parole, he committed further offences. Whilst the initial charges included the offence of grievous bodily harm with intent to commit rape, he was ultimately sentenced on one count of entering a dwelling with intent to commit an indictable offence, one count of grievous bodily harm and one count of stealing.

Further offending whilst on Parole

[8] The circumstances of that offending involved the Respondent creeping into a home through an unlocked door at 3.30 am. To reach the complainant's bedroom, he needed to walk past a number of people asleep in the house including young children. The Respondent then viciously attacked the complainant and she suffered severe head trauma as well as bleeding on the brain. The Respondent was observed to be bending over the complainant whilst she was lying face down on the bed before fleeing when the complainant's sister-in-law opened the complainant's bedroom door after being roused by the complainant's screams. The Respondent's mobile phone was found at the complainant's home. He was subsequently arrested and was charged on 28 January 2009. His parole was suspended indefinitely and he was immediately returned to custody given that his full time release date for his 1998 offences was not until 19 November 2010.

[9] On 22 June 2010, which was within the last six months of the period of imprisonment imposed in 1999, the Attorney-General for the State of Queensland filed an application pursuant to s 5 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("DPSOA") that the Respondent be detained in custody for an indefinite term for care, treatment or control or, that when released from custody, he be subject to conditions. The Respondent was subsequently assessed by a number of psychiatrists in 2010 in accordance with the provisions of the DPSOA. Reports were prepared by Dr Joan Lawrence, Dr Michael Beech and Professor Barry Nurcombe.

[10] On 10 January 2012, the Respondent was sentenced in relation to the offences committed on 25 January 2009. He received 13 years imprisonment in respect of the grievous bodily harm charge, 10 years in respect of the entering a dwelling charge and three years for stealing. All terms of imprisonment are concurrent. Four hundred and seventeen days of presentence custody were declared and his full time release date is 20 November 2023, that is, in 11 years' time.

This Application

[11] Since November 2010, the Respondent has been serving a lengthy period of imprisonment for these violent offences committed in January 2009. Arguably, they are not serious sexual offences within the definitions in the DPSOA. Accordingly, an application under the DPSOA may not be able to be made six months before the full time release date in November 2023.

[12] The Applicant therefore wishes to proceed with the current application, filed in June 2010, despite the fact that the Respondent will not be living in the community in the

foreseeable future. The Applicant argues that, as the Respondent was a prisoner for the purposes of the DPSOA at the time the application was made, a Division 3 Order can be made at this point in time. The Applicant also argues that not only was the application validly brought pursuant to the requirements of the DPSOA, but that as the requirements of s 13 DPSOA have been satisfied, a continuing detention order pursuant to s 13(5)(a) should now be made even though it will not have any practical effect until the end of his present sentence.

[13] The overarching question, therefore, is whether the current application in fact fulfils all of the requirements of the DPSOA. The real issues are whether the Respondent is a serious risk to the community in the absence of a Division 3 order and whether a Division 3 Order should be made now. These issues have to be determined by acceptable cogent evidence to a high degree of probability.

Psychological and psychiatric reports

[14] The three psychiatrists who initially assessed the Respondent have also prepared updated reports and all gave evidence at the hearing of the application. In particular, the Court considered reports from Dr Joan Lawrence, dated 2 February 2010, 26 June 2012, 17 September 2012 and 1 November 2012, Dr Michael Beech, dated 26 September 2010, 15 September 2012 and 15 October 2012 and Professor Barry Nurcombe, dated 7 August 2010 and 25 August 2012. There are also a number of psychologists' reports, including the reports of Mr Scott Natho, dated 9 January 2012 and Dr James Freeman, dated 10 August 2009.

The evidence of Dr Lawrence

[15] Dr Lawrence initially conducted extensive interviews with the Respondent as well as undertaking a number of formal risk assessments. Dr Lawrence's opinion is conveniently summarised in her Second Addendum Report of 17 September 2012. She considered that the Respondent is a very high risk of reoffending sexually, if released currently or in the near future and that there is evidence of a Psychopathic Personality Disorder, as described by Hare. She also noted that he was released on parole only 2 months earlier after a lengthy sentence for previous violent sexual crimes. She also considered that he had displayed a lack of compliance with supervisory conditions, virtually from the outset of his parole and totally disregarded many of those conditions.

[16] Dr Lawrence also noted the deliberateness of his behaviour in the current offences in that he entered a house passing through rooms with sleeping people in the middle of the night and the coolness of his behaviour, even when potentially detected and disturbed, entering the victim's bedroom where she was sleeping alone and his attack upon her. Dr Lawrence was concerned by the coolness of his response, even when disturbed by an adult in the act and during his departure, the violence of the attack on the woman with its concentration upon her face and neck.

[17] Dr Lawrence considered that the violence was used as a prelude to a sexual attack and that the behaviour indicated a high degree of callousness, recklessness and ruthlessness. She also noted that a comparison of the modus operandi of this crime, with that of his two previous rape events, as described by his victims, revealed considerable similarity including the common elements of planning, waiting for a woman to be alone, making threats and taking a coercive approach by putting his

hands over the victim's mouth, compressing the victim's neck to control in a strangulation-type mode and threatening and actually using violence.

[18] Dr Lawrence also referred to the extent and severity of the consequences of the Respondent's violence and his lack of remorse or empathy concerning his behaviour not only towards his victims, but also towards his female mentor, whose kindness and care he betrayed and abused so rapidly. Dr Lawrence noted the Respondent's long term conning and manipulation of his mentor, both leading up to parole and subsequently. She also referred to evidence of deliberate acts suggestive of a plan to escape imprisonment by self-injury and transport to hospital from Borallon after his return to custody.

[19] Dr Lawrence also indicated that the Respondent had failed to benefit from previous courses, including two Drug and Alcohol Programs, an Anger Management Course, a Cognitive Skills Program and the Getting Started and the Medium Intensity Sexual Offender Treatment Programs. Reference was also made to the Respondent's continuing use of alcohol and marijuana in direct contravention of his supervisory conditions and their potential for dis-inhibition and contribution to further sexual and other offending.

[20] Dr Lawrence also noted his relatively young age which meant that his age and maturity were not protective factors which could be taken into account in future considerations, even though a lengthy sentence had been imposed. Dr Lawrence also stated that the Respondent lacks reliability and credibility as a historian. She also considered that he displays significant traits of manipulativeness and pathological lying which are unlikely to change.

[21] In response to the question of whether she considered that the Respondent's present risk would alter over the next decade, Dr Lawrence replied:

> "I think it's clinical wisdom, it's certainly promulgated, that age may have some modifying effects on the personality and that is clearly a person - I think most of the evidence suggests that the number of crimes, et cetera, that people commit are much more frequent in early life rather than in middle or late life, so that's the sort of evidence that there is. But I believe that and I think there is considerable evidence in the literature as well as clinical experience that suggests that whilst some of the behaviour might moderate, the underlying personality characteristics of the individual don't change. So it just sort of goes underground or is, perhaps, less evident in terms of criminal activity. But the other thing I think that should be borne in mind with this man is that I think I estimated that he would be only about 43 or something about that age if he were to serve the current sentence and be released, 43 is not very old in these days and certainly couldn't affect his, his sexual drive." [1]

[22] Dr Lawrence stated that she could not identify and factors which would cause the current risk to reduce over the next decade.

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[1] T1-10, lines 18-35.

[23] Dr Lawrence, however, made it clear in cross examination that none of the actuarial tools which were used to predict risk were designed to be used to "assess a person's risk ten years hence after a period of imprisonment."[2] Dr Lawrence also conceded that the tools had been formulated based on North American prison populations and were based on studies of prisoners who had been released rather than a group who would be incarcerated for another decade. She stated:

> "I don't think there's been anything that will without, without risk, predict the future immediately. These are, these tools are designed to highlight risk factors which, to assist people in identifying the things that may be able -well, need to be managed, perhaps, addressed, or which need to be, perhaps, supervised closely. They are directed towards both short term risk as well as, I believe, the longer term risk, but they're not going to be able to predict "This man is going to definitely commit a crime within a short space of time", nothing can do that."[3]

[24] Dr Lawrence indicated, however, that her assessment of risk was not simply based on the actuarial tools. She said:

> "One would make the assessment using all tools, not just the actuarial ones, but applying your clinical knowledge and skills as well for the information that you've got at that particular time, that will hopefully allow you to make some, admittedly somewhat broad, that is low, moderate, severe or high risk, if you like, comments about the likely behaviour of this person, or the risks of him re-offending, but that will also occur in the, cover the short, medium and, perhaps, the longer term period as well." [4]

[25] Dr Lawrence also conceded that events could occur in the next ten years that could change the risk such as a head injury.

> "If he damages part of his brain, things will change quite dramatically. There may well be other factors affecting his health which could intervene. I don't know what the future holds. I don't have a crystal ball.
>
> He may well benefit from a high intensity Sexual Offenders Program?-- I doubt it, but combined with maturity, he may appear to benefit. I would have reservations about accepting the stated or - his - particularly his statements about the perceived benefits that he might state or appear to receive from a sexual offenders program. I believe he's a highly intelligent person. My experience is that such people, knowing what is involved and what the stakes are, cannot always be relied on to be honest."[5]

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2 T1-14, line 46.
3 T1-14, lines 47-56.
4 T1-15, lines 44-52
5 T1-18, line 50 to T1-19, line 5.

[26] Dr Lawrence also conceded the possibility that a lengthy prison sentence could have a deterrent effect.

> "All right. Would you, in those circumstances, concede that the salutary deterrent effect of that sentence is a significant factor as to the likelihood of him re-offending in a sexual way?-- I can't say just how he's going to react, but I would not rely on the salutary effect of deterrence to expect and rely on change in his personality. Just what that change will be, I can't say. I don't have a crystal ball.
>
> Would you agree that in 13 years' time, his risk is likely to be less than it is now if he was released into the community now?-- I would expect that it would be marginally less, but I think it should be reassessed closer to the time, and that all of these past factors must be taken into account
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> ....
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> I would much prefer to do an assessment closer to the time of his release."[6]

[27] Dr Lawrence was also asked to explain the fact that the Respondent obtained good exit reports from the Sexual Offenders' Treatment Program.

> "Are you able to offer an explanation for that, having regard to his personality construct, as you see it?-- Well, I think - as I said, I think he's highly intelligent and I believe that if, at the time that he did those, he was hoping to get parole and an earlier release, he would behave himself in that program. So, he would comply. And I think he was able to - would be able to learn the things - the things to say and to report which would give him a good report doing that program, and even though the facilitators of those programs in their exit report try to be as honest as possible, they cannot always detect reliably or sufficiently to report even underlying concerns that they may have about the reliability or the amount of change that some of these people have achieved through participation in the program. So, I find that most of the people that I've assessed have good reports. Some have some reservations expressed about them, but I think that they tend to get good reports because they have tried to benefit from the program. The other factor, though, that pertains for Mr Kanaveilomani, I believe, is that he has the ability, both by his intelligence and his personality, to know the right things to say and do when questioned about this sort of area, and I don't think that's necessarily reliable – or his statements are reliable."[7]

[28] Dr Lawrence conceded that the actuarial instruments and assessments might be the subject of improvement in the next decade and that there could be an improvement in sex offender courses, particularly those for psychopaths. However, she considered that there were certain aspects of the Respondent's personality that would not change and that he would continue to receive a high score because "they

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6 T1-19, lines 40-57 and T1-20, lines 22-23.

7 T1-22, line 39 to T1-23, line 3.

are essentially the part of the emotional core or the personality of this individual and I don't think they are likely to change".[8]

[29] Dr Lawrence concluded that she regards the Respondent as a very high risk of reoffending sexually and that the risk is likely to continue. She considered that it is far more probable than not, that the risk will remain high at the time of his future eligibility for release. She considers that the most likely scenario is that the Respondent will rape a female stranger in her own home possibly with the use of a weapon, accompanied with threats.

The evidence of Dr Beech

[30] Dr Beech's reports indicate that he initially gave the Respondent a score of 27.8 out of 38 on the Hare Psychopathy Checklist. Dr Beech stated that he regards such a score as a 'high' score despite it being below the cut off for psychopathy as such a score "indicates a high risk for sexual reoffending in rapists."[9] Dr Beech scored him on the Static 99 risk assessment tool at 6 which means he has a 33% risk of reoffending within 5 years. Dr Beech in his oral evidence to the Court indicated that he considered that a more accurate way to describe that result would be to indicate "that the risk of re-offending of that group is considered high and in the realm of twice or more of the base rate of the risk of sex offences generally."[10] Dr Beech initially gave the Respondent a Sexual Offender Risk Appraisal Guide ("SORAG") score of 25 which put him in category 8 which gave a 75% risk of violent reoffending within seven years.

[31] Dr Beech's reports indicate that the Respondent has an antisocial personality and that he displays significant psychopathic traits. Dr Beech was not, however, satisfied that there was a sufficient basis for a diagnosis of sexual sadism at the present time. He stated;

> "I didn't rule that in and I didn't rule that out. I don't think there is enough material available to me to confirm that diagnosis. It requires, I think, some indication that there are thoughts sexes - sorry, thoughts, images, fantasies and urges towards violence, intimidation and humiliation, and I can't clearly see that. I have a suspicion that it's there and the suspicion arises out of the offences in Toowoomba. It seemed to me that not only were they predatory but some of the acts involved an attempt to terrorise the woman before she was assaulted."[11]

[32] Dr Beech considered that there were a range of possible treatment options as follows:

> "I would go back to a high intensity sexual offender program, a high intensity violent offender program. I would look at more the prosocial things that he needs to gain over the next couple of years, which is education, employment, you know, employment skills. I would look at drug and alcohol rehabilitation programs and then

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8 T1-27, lines 50-52.
9 Report of Dr Beech, dated 26 September 2010, page 29.
10 T1-48, lines 8-10.
11 T1-48, lines 25-34.

> during the course of his incarceration involve him in maintenance programs for that. But given his high psychopathy rating and given his very high, not high but very short time in which he re-offended, I would be sitting down with him and doing some intensive cognitive therapy. I know Professor James talked about - sorry, Professor Nurcombe talked about psychonamic therapy, I would be looking at cognitive therapy. I'm more convinced by the researcher Steven Wong in Canada that if you meet with psychopaths and you need to treat them, the best tactic is to talk with them about what is in their best interests when they are released into the community, and I think you have to sit down with Mr Kanaveilomani and talk about what is in his best interests next time he gets released, and that would be not to sexually offend otherwise he's going to be back in prison for a long time again. That if he wants to have sex with women, you know, he is a fit man, he's reasonably good looking, there would be better ways to arrange sexual liaisons than these drunken or predatory sexual sprees."[12]

[33] Dr Beech, however, ultimately considered it would be difficult to make predictions over the next 13 years taking the Respondent's age at release into account. Dr Beech also referred to the research which indicated "that people did change"[13] but considered that the Respondent would be a risk of further sexual offending on release. In particular, Dr Beech noted that the prison reports before the Respondent's release were pretty good and that his prison reports soon after he returned to prison and his current prison reports were all good. It would seem, therefore, that although the Respondent does well in prison, as soon as he is released, he faces a range of destabilising factors and does not react well to supervision.

[34] Dr Beech considered that the Medium Intensity Sexual Offender Treatment Program he did prior to his release in 2008 was probably inadequate for him. Dr Beech also noted that the Respondent had done a violence program, a cognitive skills program, as well as an anger management and a drug and alcohol program. Dr Beech stated that what came out in the Sexual Offender Program were his attitude of sexual entitlement and his tendency to minimise the range of his offences. He stated that those issues would need to be the focus during any high intensity program. He also considered that an important factor would be the Respondent's relapse prevention plan, and the things that he would need to do when released so that he would not re-offend.

[35] Dr Beech stated that what cannot be predicted currently is the way in which the Respondent may change over the next 10 years which would act to decrease the assessed risk. Dr Beech's evidence in this regard was as follows:

> "how would Mr Kanaveilomani present in November 2023 when he's to be released?-- Well, I think that is the difficulty. The difficulty is in 13 years' time, 10 years' time you talk with him, you say - you could realistically say, "Listen, he's done all the programs. His prison behaviour has been very good. He's now a mature prisoner,

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12 T1-49, lines 25-49.
13 T1-50, line 14.

> compliant with all the rules, and during that time he has completed his construction course and he's done a number of other vocational programs". The difficulty is you would be saying, "Okay, but this looks a lot like it was back in 2009, doing very well, do up some plans, he has a number of skills and strategies, but if we release him how do we know he won't do the same thing again?", which is as soon as he gets out, resists restrictions, resists parole, doesn't take up the drug and alcohol programs or the vocational programs that he is supposed to do and instead pushes to go ahead and drink with his mates and friends and very quickly returns to his earlier lifestyle, and I don't know how you would judge that all things being equal at the moment.
>
> All you have but is someone who is at high risk of sexual re-offending?-- Yes."[14]

[36] Dr Beech stated that in his view, there was currently no way of assessing whether any treatment would be successful short of releasing the Respondent. He considered that "The difficulty is not knowing how he might have changed or what other factors may have changed in ten years' time."[15] In terms of what factors would need to change he stated:

> "I think, and I mean I guess I can generate a romantic notion, if you like, which would be along the lines that he meets up with other Fijian elders, he is then returned to a religious basis for his beliefs, he moves from construction, then takes up, given a job as a carer for one of the elderly prisoners and over time people are astounded by the empathy that he has been able to develop, take responsibility for his actions, things like that, that at the end of it you say, 'Well, he has done very well. He's surprised us. There's a number of things that he's put in place which look very good. Over the years he's pursued his training and courses and now he's actually established that he can work and he's actually got some good prospects for employment. All those things that I can see make me think, gee, he has done better and his risk of re-offending has reduced', but the biggest difficulty is I don't know how they would stand up once he faces the destabilising factors that he would on release." [16]

[37] Ultimately, Dr Beech considered that an assessment of risk on release would need to be done closer to release date. He stated, however, that "what's known is that on an actuarial basis, in 10 years' time, he would still be within the group viewed as being at high risk of re-offending."[17] In terms of his current risk, Dr Beech stated that he considered that the Respondent was currently a high risk of reoffending sexually if released from custody and that the offence was likely to be a violent rape.

The evidence of Professor Nurcombe

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14 T1-51, lines 9-30.
15 T1-51, lines 42-44.
16 T1-51, line 45 to T1-52, line 5.
17 T1-53, lines 11-13.

[38] Professor Nurcombe indicated that he had initially assessed the Respondent whilst he was an inmate of the Youth Detention Centre whilst he was incarcerated for the first offences. Dr Nurcombe indicated that he then did a full assessment in relation to the DPSOA in August 2010 which he ultimately revised in his subsequent report in 2012. He indicated that he initially assessed the Respondent's score under the Hare Psychopathy Checklist as between 17 and 19 out of a possible score of 40. Dr Nurcombe stated that he revised that score in 2012 to a score of 31 out of 40 which meant that the Respondent qualified for a diagnosis of psychopathy. Dr Nurcombe was asked to explain the revision in the scores.

> "What motivated you to make the changes between 17 to 19 on the one hand and 31 on the other?-- Fuller knowledge of the nature of the offence which I didn't have, did not have complete information about that on the first, in the first assessment.
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> How is that relevant?-- Well, it had to do largely with the nature of the offence, it's the planning involved in it, and the degree to which I thought that Mr Kanaveilomani's glibness had essentially conned me into making certain evaluations initially which I changed afterwards.
>
> How do you mean "conned" you?-- Well, I think that Mr Kanaveilomani is able to role play certain attitudes, that he is, has learnt how to say what he needs to say to gain a certain end. He's an impressive looking man and he comes through with great sincerity in what he says.
>
> So how did that affect your assessment?-- Well, I think I was conned."[18]

[39] Dr Nurcombe diagnosed the Respondent as suffering a paraphilia, sexual sadism, possible voyeurism, antisocial personality disorder and psychopathic personality disorder. Dr Nurcombe differed from Dr Lawrence in that he considered that there were both paraphilia and sexual sadism on the basis that there have been three episodes of rape, including two episodes of sadistic rape and a third episode which he took to be an abortive rape. Dr Nurcombe stated that he considered that the Respondent had behaved in an extremely violent manner towards three women. He indicated that sexual sadists gain sexual gratification from the infliction of pain and domination and it is the dominating and degrading of the woman which is significant. He considered that there was evidence of those elements in this case.

[40] Dr Nurcombe also explained the manifestations and implications of an antisocial personality disorder and a psychopathic personality disorder manifest in the following terms;

> "Well, antisocial personality disorder grows out of conduct disorder which is a diagnosis associated with childhood and adolescence, chronic rule breaking, stealing and disruptive behaviour in children and adolescents then goes over into or progresses into chronic antisocial behaviour in adulthood with rule breaking and other forms of antisocial behaviour.

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[18] T1-31, lines 13-32.

> And the psychopathic aspect?-- About 60 per cent of the prisoners in a prison are diagnosed as having antisocial personality disorder, that's been consistent throughout the world, and about 20 per cent of people with antisocial personality disorder have the more highly developed psychopathic personality disorder which is characterised by those different facets of behaviour which are fully described in the Hare Psychopathy Checklist.
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> So of that 60 per cent 20 per cent of that 60 per cent have, are psychopaths?-- Yes.
>
> And so what does that mean for that subset of persons with antisocial personality disorder that have psychopathic personality disorder?-- It means that they are less likely to be available for treatment and often they may appear to improve but their improvement is not authentic."[19]

[41] Dr Nurcombe also indicated that he had also considered that there was an Axis 1 diagnosis of possible voyeurism as he believed that there was a voyeuristic aspect in the offending behaviour, as there is evidence of the Respondent hanging around outside houses to find a victim, a suitable victim, perhaps to see the victim undressing or to see them through the window. He also considered this behaviour to be an aspect of the sexual sadism.

[42] In terms of possible treatment, Dr Nurcombe stated that it would be essential that the Respondent complete a high intensity sex offender treatment program and that those who treat him need to be sceptical about claimed improvements. He stated that they need to be more focused on concrete matters, rather than issues like empathy and remorse, which he did not think the Respondent was capable of at the present time. He also considered that he would like the Respondent to be in an "individual, dynamically oriented psychodynamic psychotherapy to explore the relationship between this man's attitude towards his violent father, his unfaithful and abandoning mother, and the other terrible events that happened to him when he was cut loose by his family, allowed to wander on the streets of Suva."[20]

[43] Dr Nurcombe concluded that even if all of these resources were applied to the Respondent he would be "sceptical it would be effective, but I would always be positive about the possibility".[21] He indicated "I don't think it's likely to change but I can't say it would not change."[22] In this regard, he referred to a study done in 1999 by Seto and Barberry which "found that people with a psychopathic personality who had been exposed to a Sexual Offenders' Treatment Program and appeared to have done well were, in fact, four times as likely as other offenders in that treatment to reoffend."[23] He considered that the risk was that the Respondent, on release, would re-offend by way of breaking in and being sexually sadistic towards a woman.

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19 T1-32, lines 21-45.
20 T1-34, lines 11-16.
21 T1-34, lines 38-39.
22 T1-34, line 58 to T1-35, line 1.
23 T1-35, lines 5-9.

[44] Dr Nurcombe gave his ultimate opinion on the likelihood of improvement in the next decade, particularly in terms of the Respondent's possible maturity as follows:

> "Well, if maturity means age - if you mean by maturity, moral maturity and so forth, I doubt whether that's going to happen. It might. I wouldn't preclude it, but I think it is unlikely. On the other hand, with age, as sexual impulses dampen down, rape becomes less likely, certainly after the age of 45.
>
> So, Mr Kanaveilomani might only be about 42 or 43 when he is released in 2023?-- So, he will be on the cusp of when sex impulses are less intense.
>
> Dr Lawrence seemed to suggest that the real features that would be effective to reduce his risk would be decline in health?-- Certainly that occurred, yes.
>
> Or a head injury?-- Yes.
>
> Other than that, Dr Lawrence seemed to be reasonably pessimistic about Mr Kanaveilomani's prospect of risk reduction with the mere passage of time. Do you agree with that - do you agree with that evidence?-- Well, she mentioned two different possibilities of things that could happen. It is possible that this man might respond to the combination of treatments I've suggested - it's possible. I wouldn't preclude that."[24]

[45] Dr Nurcombe indicated that whilst the Respondent had completed the Medium Intensity Sex Offenders Program in gaol in 2008, he had not completed the High Intensity Sex Offender Treatment Program in custody, which is what he considered should have been provided.

[46] Dr Nurcombe considered that the Respondent may in fact be deterred from offending by the fact that he has once again been sentenced to a substantial period of imprisonment for his current offences. Dr Nurcombe stated that the Respondent may desist given "The pay off of the pleasure of hurting women versus the displeasure of being in prison for 13 years."[25] He considered that there may be some change if there was some effective personal deterrence particularly if combined with a reduced sexual desire. He also indicated that "It is possible that his manipulativeness and pathological lying and his glibness could be reduced over time, particularly if he responds to therapy. It's possible."[26]

[47] Whilst Dr Nurcombe noted the Respondent's excellent progress in vocational programs in prison, including a medium intensity sex offender program, he also noted that on parole, the Respondent objected to supervision and drank alcohol.

[48] Dr Nurcombe was also asked a number of questions about the reliability of the actuarial instruments that were currently in use in the following terms:

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24 T1-36, lines 1-25.
25 T1-38, lines 50-52.
26 T1-39, lines 25-28.

> "Can you see any difficulties with using the actuarial instruments to assess the risk that the respondent might present if released from custody some 13 years hence?-- Yes, I see several.
>
> And what are those?-- Well, first of all these actuarial instruments were developed upon North American and to some extent British population, Canadian, basically, Canadian and to some extent British populations, whether they refer to the Australian population as a whole we don't know, whether they refer in particular to indigenous people we don't know. Now some work is about to be done in Canada with regard to the Inuit and American and Canadian Indian populations, but even if that work is known whether it applies to Australian Aboriginal or Melanesian populations is an open question. So that's a problem.
>
> That's a problem which is there generally with respect to the use of the instruments in relation to different populations than those which were the subject of the studies?-- Yes.
>
> But can I also ask you about any particular difficulties in using such instruments to assess a risk, a future risk which will be deferred some 13 years from the time of the use of the instrument?-- Yes. There are two points that I can make about that, and that is most of the instruments only predict up to ten years, but the Static 99 2003 does predict up to 15 years, but it's important to note that the prediction has to do with groups of prisoners not with an individual prisoner. Whether those figures apply to a specific individual is not clear because that specific individual may have other factors which are highly relevant to a prediction that are not included in the instruments." [27]

[49] Dr Nurcombe also considered that "it would be most unfair to make an assessment of risk factors that ignored what might occur over the next 13 years".[28] Dr Nurcombe, however, stated that given the Respondent's psychopathic personality, the risk of sexual violence soon after release is very high. In terms of the Respondent's current risk, Dr Nurcombe stated that he considered that he "remains a very high risk of enacting violent sexual fantasies if released". [29]

The Statutory Scheme

[50] There is no doubt that, in order to provide for the adequate protection of the community, the DPSOA legislation establishes a scheme for the continued detention in custody or supervised release of prisoners who have previously committed serious sexual offences and are deemed to be at risk of committing serious sexual offences if released, or if released without appropriate supervision. Significantly, the legislation also aims to facilitate the rehabilitation of those prisoners by providing control, care or treatment. Those objects as set out in s 3 of the DPSOA are:

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27 T1-42, lines 22-54.

28 T1-43, lines 10-13.

29 Report of Professor Nurcombe, dated 25 August 2012, at page 10.

(a) "to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and

(b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

[51] The Attorney General then has the responsibility for making an application pursuant to s 5 of the DPSOA as follows:

> **"5 Attorney-General may apply for orders**
>
> (1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.
>
> (2) The application must—
>
> (a) state the orders sought; and
>
> (b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and
>
> (c) be made during the last 6 months of the prisoner's period of imprisonment.
>
> (3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (*preliminary hearing*) to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order.
>
> (4) The return date for the preliminary hearing must be within 28 business days after the filing.
>
> (5) A copy of the application and any affidavit to be relied on by the Attorney-General must be given to the prisoner within 2 business days after the filing.
>
> (6) In this section—
>
> ***prisoner*** means 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."

[52] The orders which may be granted under the DPSOA as "Division 3 orders" are usually 'continuing detention orders' pursuant to s 13(5)(a) or 'supervision orders' pursuant to s 13(5)(b). Section 13 of the DPSOA is in the following terms:

> "**13 Division 3 orders**
>
> (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—

(a) if the prisoner is released from custody; or

(b) if the prisoner is released from custody without a supervision order being made.

(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

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

(4) In deciding whether a prisoner is a serious danger to the community 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.

(5) If the court is satisfied as required under subsection (1), the court may order—

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (*continuing detention order*); or

(b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (*supervision order*).

(6) In deciding whether to make an order under subsection (5)(a) or (b)—

(a) the paramount consideration is to be the need to ensure adequate protection of the community; and

(b) the court must consider whether—

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.

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

Issues:

[53] The real issue in this application is whether the DPSOA applies in the particular circumstances of this case and whether a Division 3 Order should be made. The legislation is clearly directed at a "particular class of prisoner''. That is, a prisoner who "is serving a period of imprisonment for a serious sexual offence". The Respondent is not currently serving a period of imprisonment for a serious sexual offence and he is not in the last six months of that period of imprisonment. He is, however, serving a long period of imprisonment and will not realistically be considered for release for another decade.

[54] There is no doubt, however, that the Respondent was a prisoner for the purposes of the legislation at the time the application was filed. The question is whether that is sufficient not only to trigger an application pursuant to the DPSOA legislation but also to make the Respondent subject to a Division 3 order whilst he is also serving a current term of imprisonment.

The Applicant's arguments

[55] Counsel for the Applicant notes that the term 'prisoner' is defined in s 5(6) of the DPSOA as 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" and that pursuant to s 13(2), such a prisoner is a serious danger to the community as mentioned in s 13(1) if "there is an unacceptable risk that the prisoner will commit a serious sexual offence" if released from custody or released without a supervision order. Counsel argues that in this case the application has been validly brought pursuant to s 5 of the DPSOA and that the question of unacceptable risk therefore has to be determined "now" and not at the time of the Respondent's release from the current term of imprisonment in a decade.

[56] Counsel argues that if there is an intervening term of imprisonment, the reference to 'release from custody' in s 13(2)(a) and (b) DPSOA cannot be "temporally restricted to a release from custody from that particular term of imprisonment, and the section didn't apply unless he was going to be released from custody as opposed to serving another sentence". Counsel therefore submits that the question is whether there is an unacceptable risk that the Respondent will commit a serious sexual offence if he was released from custody now and that the overwhelming evidence is that he is such an unacceptable risk and that a continuing detention order should be made.

[57] Counsel argues that the continuing detention order would take effect once the Respondent has served his current term of imprisonment as s 14(1)(a) of the DPSOA provides that "a continuing detention order has effect in accordance with its

terms – on the order being made or at the end of the prisoners period of imprisonment, whichever is the latter." In this case, it would be at the end of the period of imprisonment. A supervision order has effect pursuant to s 15 of the DPSOA "on the order being made or on the prisoner's release day, whichever is the later". A 'release day' is defined in the Schedule to mean "the day on which the prisoner is due to be unconditionally released from lawful custody under the *Corrective Services Act* 2006".

[58] Counsel for the Applicant then argues that once a continuing detention order is made it must be reviewed at regular intervals in accordance with s 27 of the DPSOA. Section 30 then provides that at those reviews the Court may only affirm the decision that the prisoner is a serious danger to the community in the absence of a Division 3 order if satisfied by acceptable, cogent evidence to a high degree of probability of all the relevant matters as required by s 13(4). Section 30(3) of the DPSOA provides that if the Court affirms the decision it may order that the prisoner continue to be subject to a continuing detention order or be released from custody subject to a supervision order. Accordingly, Counsel submits if the periodic reviews of the continuing detention order do not result in the rescission of the order, then it will remain in place. It may well be that when his fulltime release date is reached, the Respondent will remain in custody pursuant to the continuing detention order if it has not been rescinded.

[59] In terms of the discretion in s 13(3) Counsel for the Applicant submits that the respondent is clearly very dangerous and is currently an unacceptable risk of committing further serious sexual offences if he were to be released from custody now. Counsel argues that all of the psychiatrists accept that conclusion on the evidence as it currently stands and have also indicated that future treatment will be "difficult". Counsel for the Applicant accepts that all the psychiatrists acknowledge that there is a prospect that "there might be advancements which might render this very dangerous man an acceptable risk." Counsel argues that should such advances be made and they in fact reduce the risk then that prospect will be examined in the periodic reviews over the coming decade. Accordingly it is argued that all of the requirements of the DPSOA have been satisfied and a continuing detention order should now be made.

Should a Division 3 Order be made?

[60] I am satisfied that a valid application has been made pursuant to s 5(2)(c) of the DPSOA as the Attorney General has made the application in the last six months of the prisoner's period of imprisonment.

[61] I am satisfied that the Respondent was a "prisoner" as defined by s 5(6) of the DPSOA at the time the application was made as he was at that time a prisoner detained in custody serving a period of imprisonment for a serious sexual offence.

[62] The next question for the Court therefore is whether the requirements of s 13(1) DPSOA have been satisfied? That is whether the Court is satisfied that the Respondent prisoner is a serious danger to the community in the absence of a Division 3 Order. Section 13(2) of the DPSOA provides that a prisoner is a serious danger to the community if there is an unacceptable risk that he will commit a serious sexual offence if released from custody or if released without a supervision order.

[63] It would seem therefore that the real question in this application is whether I can be satisfied to a high degree of probability that the Respondent is currently a serious danger to the community if released from custody without an order being made under Division 3 of the DPSOA. It is clear that the Attorney General has the onus of proving that matter. As McMurdo J stated in *Attorney General for the State of Queensland v Sutherland*[30]:

> "[27] The court can be satisfied as required under s 13(1) only upon the basis of acceptable, cogent evidence and if satisfied "to a high degree of probability that the evidence is of sufficient weight to justify the decision." Those requirements are expressed within s 13(3) by reference to the decision which must be made under s 13(1). They are not made expressly referable to the discretionary decision under s 13(5). The paramount consideration under s 13(5) is the need to ensure adequate protection of the community. Subsection 13(7) provides that the Attorney-General has the onus of proving the matter mentioned in s 13(1). There is no express requirement that the Attorney-General prove any matter for the making of a continuing detention order, beyond the proof required by s 13(1). So s 13 does not expressly require, precedent to a continuing detention order, that the Attorney-General prove that a supervision order would still result in the prisoner being a serious danger to the community, in the sense of an unacceptable risk that he would commit a serious sexual offence. However in my view, such a requirement is implicit within s 13."

[64] The unanimous view of all of the reporting psychiatrists is that the Respondent is currently a serious danger to the community. I am satisfied that such a finding can currently be made by acceptable, cogent evidence having had regard to all of the factors the Court must have regard to pursuant to s 13(4) of the DPSOA. Clearly the evidence of all of the psychiatrists as set out in these reasons does not allow for any other conclusion. I consider that there is ample evidence to support such a finding to a high degree of probability at this point in time.

[65] The next question which needs to be considered is the type of order the Court should make pursuant to s 13(5) of the DPSOA. The section requires the Court in deciding whether to make an order under subsection (5)(a) or (b) to take into account the fact that the paramount consideration is to be the need to ensure adequate protection of the community and the court must consider whether adequate protection of the community can be reasonably and practicably managed by a supervision order.

[66] This question was examined by Chesterman JA in *Attorney-General (Qld) v Lawrence*[31] as follows;

> [28] Section 13(7) explicitly places on the Attorney-General the onus of proving that a prisoner is a serious danger to the community, ie that there is an unacceptable risk that he will commit a serious sexual offence if released from custody or released without a supervision order. As the trial judge pointed out if the Attorney discharges that onus the Court is then empowered pursuant to s 13(5) to make a continuing detention order or a supervision order or, perhaps, no order. The latter possibility comes from the use of the permissive

30 [2006] QSC 268.
31 [2009] QCA 136.

"may order" in terms of (a) or (b). In *Fardon* Gleeson CJ thought that the Act conferred:

> "a substantial discretion as to whether an order should be made, and if so, the type of order." (592)

McHugh J thought that:

> "... if the Court finds that the Attorney-General has satisfied that standard, the Court has a discretion as to whether it should make an order under the Act and, if so, what kind of order (s 13(5))." (597)

[29] The trial judge thought that it was "an open question whether the s 13(5) discretion extends to making no order". The opinions just quoted reinforce my own, formed from the terms of s 13(5), that the court may make no order despite being satisfied that the prisoner in question poses a serious danger to the community; though it is to be expected that it will be rare indeed for a court to make no order where the finding is made. The point does not arise in the present appeal and need not be considered further.

[30] What is in issue is whether the Attorney-General, having discharged the onus referred to in s 13(7), must persuade the court that one or other of the orders specified in s 13(5) should be made. In my opinion he must. Such a conclusion accords with the orthodox legal convention that the party who makes an application must satisfy the court that the order sought should be made. The authors of *Cross on Evidence* Australian edition put it shortly:

> "For a fundamental requirement of any judicial system is that the person who desires the court to take action must prove the case to its satisfaction." [7060]

The authorities cited, *Dickinson v Minister of Pensions* [1953] 1 QB 228 at 232 and *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125 are civil cases but the principle is obviously of wider application."

[67] I consider that s 13(5) of the DPSOA vests a clear discretion in the Court in terms of what order should be made or indeed if any order should be made all. The onus is on the Applicant to establish the basis for the order sought. The question for determination therefore is whether the Applicant has satisfied that onus to the requisite standard and established that a continuing detention order is currently required.

[68] As Counsel for the Respondent has argued, the real issue is whether any order under s 113(5) of the DPSOA should in fact be made. Whilst I accept that the Respondent is currently "a serious danger to the community in the absence of a division 3 order" he is not about to be released because he is serving a further period of imprisonment and is incarcerated. When one examines the requirements of s 13(5) there is no doubt that the focus of the subsection is on determining how the risk that the prisoner currently poses can be managed to ensure the adequate protection of the community. The underlying assumption is clearly that if a Division 3 Order is not

made there will be a risk that the prisoner will commit another serious sexual offence. In the present case the Respondent does not present such a risk as he is incarcerated. A Division 3 Order will make no difference in managing the current risk that the Respondent poses to the community. A Division 3 Order will in fact have no current utility. If a Division 3 Order is not made the risk to the community will be no greater. There is no need for a continuing detention order or a supervision order under the DPSOA as the Respondent is serving a period of imprisonment imposed by the District Court. Any current risk to the community is in reality being managed by corrective services officers in his current custodial setting.

[69] Despite the fact that the Division 3 Order will have no current utility, the Applicant argues that the order should still be made given the risk is so high and there is no real likelihood that circumstances will change in the next decade. Should the order be made despite the fact it will have no real impact until the Respondent is released? Is the state of affairs so certain that the Court would be satisfied about the risk that the Respondent will pose in 2023?

[70] Having considered the evidence of the psychiatrists in relation to the Respondent's risk over the coming decade I am satisfied that the following issues are raised as a result of that evidence:

(i) The Respondent may benefit from the High Intensity Sex Offenders Treatment Program over the next decade.

(ii) The Respondent may benefit from individual, dynamically oriented, psychodynamic psychotherapy.

(iii) The Respondent may benefit form cognitive therapy over the next decade.

(iv) The Respondent may experience a decline in sexual desire around the age of 45.

(v) The current lengthy prison term may act as a personal deterrent.

(vi) There may be advances in the development of courses for sex offenders particularly sex offenders those with psychopathic traits.

(vii) There may be an improvement in the use and predictability of the actuarial assessments to assess risk in the next decade.

(viii) The current risk of sexual re-offending may reduce should the Respondent suffer a decline in health or a brain injury.

(ix) There may be advances in the medications used to treat sex offenders in the next decade.

(x) Whilst all the psychiatrists are sceptical about the possibility of the Respondent's risk changing over the course of the next 10 years none of the psychiatrists were prepared to rule out the "possibility" of the risk changing.

(xi) None of the actuarial tools which were used to predict risk were designed to be used to assess a person's risk ten years hence after a period of imprisonment.

[71] Accordingly, given the presence of those factors, I cannot be satisfied by cogent evidence to a high degree of probability that the evidence is of sufficient weight to justify a decision that the Respondent will be a serious danger to the community in 2023. That may well be the position in 2023 but there are currently too many variables to be satisfied of that question to a high degree of probability.

[72] Significantly, even if I was satisfied that the Respondent would be a serious danger to the community in 2023 in the absence of a Division 3 Order, given the uncertainty in relation to those factors it would be impossible to determine whether the final order should be a continuing detention order pursuant to subsection (5)(a) of s 13 of the DPSOA or a supervision order pursuant to subsection 5(b). Indeed, the factors I have identified in paragraph [70] may well determine the questions posed in s13(6)(b) of the DPSOA as to whether the adequate protection of the community "can be reasonably and practicably managed by a supervision order" and whether the requirements under s 16 "can be reasonably and practicably managed by corrective services officers".

[73] In my view, whilst the Applicant has satisfied the requirements of s 13(1) of the DPSOA, the Applicant has not satisfied me that an order should be made pursuant to s 13(5) of the DPSOA given both the lack of certainty about the nature and management of the risk and the lack of utility in the order. I consider that this is indeed the type of case foreshadowed by Chesterman JA in *AG (Qld) v Lawrence* where his Honour indicated that "it is to be expected that it will be rare indeed for a court to make no order where the finding is made".[32] In the present case, despite a finding that the Respondent is a serious danger to the community, I am not satisfied that the Applicant has discharged the onus referred to in s 13(7) of the DPSOA that one or other of the orders specified in s 13(5) should be made.

[74] Given my finding that the Respondent is currently a serious danger to the community should he be released from supervision without a Division 3 Order it would seem abundantly clear that an evaluation of the issue of the risk he poses to the community at that point in time should be revisited prior to his fulltime release date in 2023. It would seem to me that the current legislation does not allow for such a possibility. In terms of whether the application should be adjourned pursuant to s 9A of the DPSOA to a date in 2023 Counsel for the applicant has indicated that as the Applicant is a model litigant, an order which would see the current application lie in abeyance for more than a decade, is not sought.

[75] Whilst I consider that no order should currently be made pursuant to s 13(5) of the DPSOA, I will hear submissions from Counsel as to the final form of orders.

ORDERS:

1. I will hear from Counsel as to the final form of the orders.

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32 [2009] QCA 136 at [29].