SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v S* [2019] QSC 327
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **S** (respondent)
FILE NO/S:	BS 2012 of 2015
DIVISION:	Trial Divisions
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2019
JUDGE:	Wilson J
ORDER:	**The order of the court is that:** **1. Pursuant to s 30(1) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the decision made on 9 June 2015, that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 of the Act, is affirmed.** **2. Pursuant to s 30(3)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the respondent continue to be subject to the continuing detention order made on 9 June 2015.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – SERIOUS OR VIOLENT OFFENDER – where the respondent's continuing detention order is reviewed under section 30 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – whether the community would be adequately protected if the respondent is released subject to a supervision order – where the respondent refused to participate in psychiatric assessments –

where there is evidence the respondent is a serious danger to the community in the absence of an order under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld)

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 13(2), s 13(4), s 13(5)(a), s 16, s 27, s 30, s 30(3), s 30(4)

Attorney-General for the State of Queensland v DBJ [2017] QCS 302, cited
Attorney-General for the State of Queensland v Fisher [2018] QSC 74, cited
Attorney-General for the State of Queensland v S [2015] QSC 157, cited
Attorney-General for the State of Queensland v S [2017] QSC 32, cited
Attorney-General for the State of Queensland v S [2018] QSC 89, cited

COUNSEL: M Maloney for the applicant
J Fenton for the respondent

SOLICITORS: Crown Law for the applicant
Ashkan Tai Lawyers for the respondent

[1] HER HONOUR: The applicant, the Attorney-General for the State of Queensland, has made an application pursuant to section 27 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), which I will refer to as the Act, that the continuing detention of the respondent be reviewed. Now, there have been a number of orders made by the court.

[2] On the 9th of June 2015, P.D. McMurdo J was satisfied that the respondent was a serious danger to the community in the absence of a division 3 order under the Act. An order was made pursuant to section 13(5)(a) of the Act, that the respondent be detained indefinitely for control, care and treatment. That order can be seen in the judgment of P.D. McMurdo J – *Attorney-General for the State of Queensland v S* [2015] QSC 157. I will call that the original order in my reasons.

[3] Then we have a review, which was the first review, conducted by Brown J on the 13th of March 2017. In the first review, Brown J determined that the decision that the respondent was a serious danger to the community in the absence of an order pursuant to division 3 of the Act should be affirmed. It was further ordered that the respondent continue to be subject to a continuing detention order. This judgment is *Attorney-General for the State of Queensland v S* [2017] QSC 32, and in my reasons I may refer to that as the first review.

[4] Then the continuing detention order was the subject of a review by Lyons SJA on 1 May 2018. The decision that the respondent was a serious danger to the

community in the absence of an order pursuant to division 3 of the Act was affirmed. It was further ordered that the respondent continue to be subject to a continuing detention order. That judgment is *Attorney-General for the State of Queensland v S* [2018] QSC 89, and in my reasons I may refer to that as the third review.

[5] We are here today by an application filed the 5th of March 2019. The applicant, the Attorney-General for the State of Queensland, has filed an application for review of the continuing detention of the respondent, pursuant to section 27 of the Act.

[6] The respondent was born in 1973. He is presently 45 years of age. The respondent has a criminal history and P.D. McMurdo J summarised the applicant's criminal history at paragraphs two to six of the original judgment:

> [2] In May 2001 the respondent was sentenced to several terms of imprisonment amounting to a period of 16 years which expires on 10 June 2015. He was sentenced to 10 years imprisonment for maintaining a sexual relationship with a child with circumstances of aggravation over a six month period in 1988-1999. He was sentenced to concurrent terms of five and three years on a number of offences of assault occasioning bodily harm and the indecent treatment of a child who was under 12 years. He was sentenced to a cumulative term of six years for grievous bodily harm. Nearly two years of pre-sentence custody had been served. He was declared to be a serious violent offender.
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> [3] These offences were committed against the respondent's then partner and her young son. The offences were summarised by McPherson JA, in dismissing the respondent's appeal against conviction and application for leave to appeal against sentence, as follows:[1]
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> > "The victim of the physical assaults was at the time his de facto wife. Most of them took place after she had, at his insistence, performed indecent acts which the applicant filmed for the purpose of setting up a pornographic business. Some of those acts consisted of performing acts of multiple sex with other adults. The assaults, some of which involved the use or threat of use of a dangerous instrument such as a garden fork, were carried out by the applicant because he was dissatisfied with the standard of the complainant's performance during those indecent acts.

[1] *R v S* [2002] QCA 38

> One of the persons with whom she was forced to commit some of the sexual acts was her own nine year old son, who was also the victim of the sexual offences committed against the child to which I have referred. To crown this career of appalling behaviour, the applicant finally subjected the woman complainant to a prolonged and savage beating inflicting grievous bodily harm on her, including brain damage, fractures to facial bones and a severe injury to her left ear requiring plastic surgery.
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> In the course of his submissions in this Court the applicant, it may be noted, admitted that he had committed that assault causing grievous bodily harm.
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> …
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> He showed no remorse whatever for what he has done. The learned sentencing Judge described his behaviour as depraved and despicable.
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> Those are strong words, but they are in my opinion fully justified. In the 20 years in which I have been on this Court, I have not seen a case in which the conduct of the accused was worse than this."

[4] The respondent has always maintained that he did not commit sexual offences against the child. He sought to explain his violent assaults upon his partner as attempts to protect the son from sexual misconduct by her.

[5] […] Prior to the matters already mentioned, he had a criminal history for offences of violence, dishonesty and breaking and entering a dwelling house, for which he received various terms, including one of three years imprisonment for which he was required to serve 12 months. The offence of breaking and entering a dwelling house with intent was committed in October 1992. The sentencing judge then remarked:

> "I regard this as a very serious offence. Here we have a decent woman asleep in her own home where she should be safe. You come in the early hours of the morning and subject her to a terrifying ordeal. You say you went there for money, but from what she tells the police even if that were so your mind changed towards sexual matters. You told her to remove her knickers. She managed to escape you and she was punched as she eluded you."

> [6] There are several recorded breaches during the respondent's time in prison. Most involved disobeying the lawful direction of a corrective services officer. At least one involved an assault on another prisoner. Another, in 2013, involved an assault on a visitor.[2]

[7] On the 25th of February 2015, the applicant made an application for the respondent to be dealt with pursuant to division 3 of the Act. This application was heard on the 1st of June 2015.

[8] In making an order pursuant to section 13(5)(a) of the Act, P.D. McMurdo J said:

> "[35] I am satisfied that the respondent is a serious danger to the community in the absence of a division 3 order. It is clear, in my view, that there is an unacceptable risk that he would commit a serious sexual offence if released from custody without any such order. The respondent's offending behaviour, his antisocial personality, the possibility that there is in his case an element of sadism or paedophilia, his denial of his sexual offending and the fact that he has not engaged in necessary treatment programs together combine to present that unacceptable risk.
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> […]
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> [40] […] But my task is to consider whether the community could be adequately protected only by a continuing detention order. That involves a consideration of the nature and extent of risk, as well as the potential consequences of that risk eventuating, in order to assess whether the risk is acceptable in the sense of providing adequate protection to the community. That risk has a content not only from what can be found as a fact about the prisoner, but also from what constitute real possibilities.
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> [41] It was argued for the respondent that the effect of the evidence of the psychiatrists was that there was no unacceptable risk from the supervision order on the conditions which, during their evidence, he asked them to consider. But that was not the effect of their evidence. They were not critical of the conditions. Their concern, in each case, was that the respondent would not comply with the order and that a serious offence might be committed before his non-compliance was detected and he was returned to custody. In my view, that is a substantial risk. It is a risk which exists especially from

[2] *Attorney-General for the State of Queensland v S* [2015] QSC 157 at [2] – [6].

> the likelihood, as the psychiatrists explained it, that the respondent would not engage with those supervising him and from the difficulties in supervising this prisoner without his having undergone what they regard as necessary treatment programs.
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> [42] In my conclusion, the Attorney-General has established that there could be adequate protection of the community only by a continuing detention order. It will be ordered that pursuant to s 13(5)(a) of the Act, the respondent be detained in custody for an indefinite term for control, care or treatment."[3]

[9] Then came the first review by Brown J. Brown J reviewed the continuing detention order and her Honour made a number of observations which can be seen from paragraph 62 to 89 of her judgment.[4] Her Honour noted that:

> "[62] The lack of engagement by the respondent in key rehabilitation programs identified by Dr Grant and Dr Beech is a matter which both Dr Grant and Dr Beech regarded as critical in being able to identify the deciding factors for the respondent's offending behaviour and how they can be treated and addressed for the purpose of reducing the risk of re-offending should the respondent be released on a supervision order. Even though the respondent engaged in the Getting Started Sexual Offenders Program, both psychiatrists considered that has proved to be of little benefit in this regard because of the respondent's categorical denial that he engaged in sexual offending.
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> […]
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> [65] Both Dr Grant and Dr Beech however recommend that the respondent to engage in a High Intensity Violence Program and a High Intensity Sexual Offender's Program whilst in custody prior to release, as they had done in their assessments before the Court in 2015. Given the continual denial of the respondent that he had engaged in any sexual offending which prevents him presently being suitable for the High Intensity Sexual Offender's program, both Dr Grant and Dr Beech consider that participation in a High Intensity Violence Program may break the impasse and result in the respondent developing some insight into his sexual offending such that he may be able to participate in a High Intensity Sexual Offender's Program.

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3 *Attorney-General for the State of Queensland v S* [2015] QSC 157 at [35], [40] – [42] (footnotes omitted).

4 *Attorney-General for the State of Queensland v S* [2017] QSC 32 at [62] – [89].

[…]

[73] The difficulty for the respondent is that until he meaningfully engages in these programs such that his offending behaviour can be discussed and his motivation and the triggers for that behaviour ventilated, the respondent cannot progress forward and appropriate treatment, and management to avoid his risk of sexual reoffending cannot be implemented.

[74] While it may be true as submitted by the respondent that he did not consider that he had to participate in such programs in order to obtain parole and had participated in a drug and substance program, it is plain that from his own correspondence that he was aware that the result of the decision last year of this Court that he needed to participate in the Getting Started: Preparatory Program, High Intensity Sexual Offending Program and Cognitive Self Change High Intensity Violence Program. The respondent's own correspondence in ex 2 dated 8 October 2015 indicated he needed to become part of the Getting Started Program, the Pathways Program and the Violence Program.

[75] The weight of the evidence supports the fact it is largely the respondent's own conduct and positional stance that has resulted in him not participating effectively or at all in any of the programs that were recommended as necessary to address his sexual offending behaviour and the risk factors giving rise to sexual reoffending."[5]

[10] Justice Brown went on in her judgment to the consideration of the issues. Justice Brown stated at paragraph 76:

"[76] The first question is whether the respondent is a serious danger to the community in the absence of a division 3 order under the Act. I am satisfied to a level of high degree of probability that there is acceptable cogent evidence that has been presented to me, particularly with respect to the psychiatric evidence and the evidence of Ms O'Brien, Mr Phelan and Ms Cowie as to the respondent's history and conduct in undertaking or being offered various rehabilitation programs, of sufficient weight to affirm the decision that the respondent continues to be a serious danger to the community in the absence of a division 3 order under the Act, having regard to the required matters I am to consider."[6]

5 *Attorney-General for the State of Queensland v S* [2017] QSC 32 at [62], [65], [73] – [75] (footnotes omitted).

6 *Attorney-General for the State of Queensland v S* [2017] QSC 32 at [76].

[11] Brown J then went on and stated:

> "[84] In the present case, I am also satisfied on the evidence before me that the position remains as was described by this Court in the reasons of Philip McMurdo J at para [40], cited above that while there is uncertainty as to whether there is in his case sexual sadism or even paedophilia, there is a real possibility that the respondent may have a paraphilia which is sexual sadism which raises a high risk of sexual reoffending, particularly having regard to his antisocial personality and psychopathic traits. The absence of a clear determination in this regard due to the respondent's unwillingness to engage in such a program does not suggest that the respondent is not a serious danger to the community. It supports a finding of unacceptable risk."[7]

[12] Brown J went on to say that she was:

> "… satisfied that the court should affirm the decision that the respondent is a serious danger to the community in the absence of a division 3 Order. The respondent's offending behaviour in the past in relation to sexual offences, his anti-social personality, the fact that he has psychopathic traits and that there is a real possibility that there is an element of sexual sadism in his offending and possibly paedophilia, satisfies me that there is unacceptable risk that the respondent would commit a serious sexual offence if released without a division 3 order. That risk is further heightened by the fact that he is not engaged in necessary treatment programs previously recommended, save for the Getting Started Program. While he did participate in that program, his denial of sexual offending has meant the respondent has not responded positively as it has provided no insight into the nature of his behaviour or motivations and the relevant triggers for his sexual offending such that it could be treated. Presently his attitude indicates that a High Intensity Sexual Offending Program which both psychiatrists considered he would need to engage in is not open given his denial."[8]

[13] Having affirmed the decision of this court on the 9th of June 2015, the question that Justice Brown then had to consider, and did, is whether the court may make a supervision or the continuing detention order. Brown J stated that at [86]:

> "[86] […] In this regard the paramount consideration is whether adequate protection of the community can be ensured by a supervision order. The applicant contends it cannot and carries the onus in that regard. Conversely, as

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7 *Attorney-General for the State of Queensland v S* [2017] QSC 32 at [84] (footnotes omitted).
8 *Attorney-General for the State of Queensland v S* [2017] QSC 32 at [85].

was stated by the Court in *Attorney-General v S* [2015] QSC 157 at [40], the task of the court is to consider the nature and extent of the risk as well as the potential consequences of that risk eventuating in order to assess whether the risk is acceptable in the sense of providing adequate protection to the community. That risk has content not only from what can be found as a fact about the respondent but also what constitutes real possibilities. Both Dr Beech and Dr Grant were of the view that there was an unacceptable risk that the respondent would breach any supervision order. Given his psychopathic tendencies, Dr Beech indicated a supervisor could not place trust in what the respondent said he was going to do. Dr Beech considered that in order to avoid the risk of the respondent breaching the supervision order he could not in fact be let out of the accommodation. That is neither reasonable nor practicable. Dr Grant also expressed the view that given the respondent's denial that he had offended in a sexual way, it was unlikely that he would accept the terms of an order which sought to restrain him and his actions on the basis that he was such an offender. This was supported by the evidence of Dr Beech.

[87] Dr Grant indicated that the fact that a supervision order puts forward some 30 requirements and puts a straight-jacket on the respondent in various ways would be expected to have some effect on reducing the risk posed by the respondent's release. However, he indicated that in the absence of a real understanding of the risk pathways of the respondent and exactly what is going on and given the potential for breaching supervision orders, the risk of reoffending posed by the respondent would still be significant. While the risk would not be as high, it would still be quite significant. His view is that there would still be a moderate to high risk of some violent sexually offending behaviour. Dr Grant was of the view that the respondent needs to undertake the High Intensity Sexual Offender Program prior to release and also the Violence Program. He said completion of programs addressing violence, substance abuse and sexual offending would all assist in increasing confidence that the risk can be contained. Those matters presently cannot be addressed by any supervision order. In that regard, Dr Grant's evidence does not support a finding that a supervision order would be efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences as submitted by the respondent's previous legal team.

> [88] While the psychiatric evidence acknowledged that electronic monitoring under a Supervision Order could assist in containing the risk, it doesn't provide information such as who he is seeing and the kind of relationships he is developing. Given the respondent's antisocial behaviour and psychopathic traits no trust could be placed in the respondent to reliably inform any supervisor of these matters. Both Dr Beech and Dr Grant considered this increased the risk of reoffending significantly. According to Dr Grant the risk arises if they are not reporting what they are doing and that is particularly important in terms of addressing the behaviour.
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> [89] It is evident therefore that there is a significant risk that the respondent would not comply with any supervision order and that he may commit a serious offence before his non-compliance is detected. Moreover presently no supervision order can be formulated to properly address the risks posed by the respondent to ensure adequate protection of the community, given the failure of the respondent to engage in programs that would enable that to occur. In the circumstances-"[9]

[14] Brown J considered that:

> "...the imposition of a supervision order cannot reasonably and practically manage the adequate protection of the community, because it presently cannot contain the risk posed by the respondent to provide such adequate protection."[10]

[15] Accordingly, the respondent was ordered to continue to be subject to a continuing detention order.

[16] Then we get to the second review. Lyons SJAJ reviewed the continuing detention order and an order was made on the 1st of May 2018. Her Honour observed at paragraphs 40 to 46 that:

> "[40] Having considered the extensive evidence before me and taking into account the required matters in s 30 of the Act, I am satisfied to a high degree of probability that there is acceptable, cogent evidence that the respondent is a serious danger to the community in the absence of a division 3 Order. I therefore affirm the decision made on 9 June 2015 and affirmed on 13 March 2017.

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9 *Attorney-General for the State of Queensland v S* [2017] QSC 32 at [86] – [89] (footnotes omitted).

10 *Attorney-General for the State of Queensland v S* [2017] QSC 32 at [89].

> [41] The issue which remains to be determined is whether pursuant to s 30(3) the respondent should (a) continue to be subject to the continuing detention order; or (b) be released from custody subject to a supervision order. In making such a determination s 30(4) provides that the paramount consideration is the need to ensure adequate protection of the community and the Court must consider whether the adequate protection of the community can be reasonably and practicably managed by a supervision order and whether the requirements of s 16 can be reasonably and practicably managed by corrective services officers."[11]

[17] Lyons SJA stated that:

> "[42] Having considered the reports which have been prepared for this hearing, as well as the other material relied upon by the applicant, I am satisfied that the evidence indicates that the respondent's risk of serious sexual re-offending is still in the moderate to high range and that the likely offence would involve an adult female or child and that such an offence would result in psychological or physical damage. In the present case the applicant submits that the respondent is an untreated sex offender who has limited or no insight into his condition and the steps he needs to take to address his risk and therefore a continuing detention order is required."[12]

[18] Lyons SJA noted that the applicant must establish that the adequate protection of the community cannot be ensured by a supervision order. Lyons SJA noted that in the present case she could not be satisfied that a supervision order would be efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences. Lyons SJA stated that:

> "In making such an order the Court is required to reach a positive conclusion that the supervision order proposed would provide adequate protection. As counsel for the applicant stated in his closing submission, because of the respondent's non engagement in the HISOP, the risk cannot be quantified."[13]

[19] Lyons SJA stated that she accepted that the evidence remains unaltered since 2015 and clearly establishes that the applicant has satisfied her that the adequate protection of the community cannot be ensured by a supervision order and the respondent should continue to be subject to a continuing detention order.

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11 *Attorney-General for the State of Queensland v S* [2018] QSC 89 at [40] – [41].
12 *Attorney-General for the State of Queensland v S* [2018] QSC 89 at [42].
13 *Attorney-General for the State of Queensland v S* [2018] QSC 89 at [44].

[20] Accordingly, the respondent was ordered to continue to be subject to a continuing detention order. There was an obligation cast upon the applicant to apply for the further review of the continuing detention of the respondent and that application has now been filed, evidence has been filed and this matter is being determined today.

[21] The objects of the Act are to provide for continued detention or supervision of a particular class of prisoner and to provide continuing control, care or treatment of a particular class of prisoner to facilitate rehabilitation.

[22] The Act establishes a scheme for the continued detention in custody or supervised release of prisoners who are deemed to be at risk of committing serious sexual offences if released at all, or if released without appropriate supervision. The Act makes provision for the Supreme Court to hear applications for orders under the Act and section 5 of the Act places the responsibility for making the necessary applications on the Attorney-General.

[23] Once an order has been made under division 3 of the Act then the Attorney must make an application for a review to be carried out and the application for review is governed by section 30 of the Act. Section 30 also brings into play section 13. Section 13(2) of the Act provides that a prisoner is a serious danger to the community if there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or if released from custody without a supervision order being made. This definition is applicable and applies to the determination that is required to be made under section 30 of the Act.

[24] It is noted that the expression "unacceptable risk" is not defined by the Act. It is incapable of precise definition, but it is an expression which requires the striking of a balance which takes into account considerations, including the likelihood of the person offending, the type of offence the person will commit and the consequences to any victim of the commission of that offence.

[25] Regard must be also had to the restrictions imposed by an order under Part 3 on the respondent. On considering whether the risk is unacceptable, the court may take into account treatment therapy or other rehabilitative measures that the offender might engage in. It's noted that whilst such matters may be taken into account, the primary focus of the Act is not on rehabilitation, but on ensuring protection of the community from those at risk of committing a serious sexual offence.

[26] In *Attorney-General for the State of Queensland v Fisher* [2018] QSC 74, Bowskill J observed:

> "A supervision order cannot be made under the Act (simply) to facilitate the further rehabilitation of a convicted sex offender. A supervision order can only be made if the Court is satisfied, to a high degree of probability, that the offender is a serious danger to the community in the absence of such an order because there is an

> unacceptable risk he will commit a serious sexual offence if released without such supervision."[14]

[27] The relevant risk is the risk of commission of a serious sexual offence. That is, an offence of a sexual nature involving violence or against children. Risk means the possibility, chance or likelihood of a commission of such an offence and is not just a risk of offending being generally violent. An unacceptable risk is a risk which does not ensure adequate protection of the community.

[28] And I note what Bowskill J observed in *Attorney-General for the State of Queensland v DBJ* [2017] QCS 302 at paragraphs 12 to 15.

[29] For the court to make a division 3 order it must be satisfied that the offender is a serious danger to the community in the absence of such an order. Section 13(2) defines a "serious danger to the community". There must be an unacceptable risk that the prisoner will commit a serious sexual offence if released at all, or if released without a supervision order.

[30] The schedule to the Act defines what a serious sexual offence is. It "means an offence of a sexual nature, whether committed in Queensland or outside Queensland – involving violence; or against children." The offence must be of a sexual nature, with the added requirement that it either involves violence or is an offence against children.

[31] In determining whether a decision ought to be affirmed, the matters mentioned in section 13(4) must be considered. Section 30(3) of the Act permits the court to affirm the decision if it is satisfied

> (a) by acceptable, cogent evidence; and
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> (b) by a high degree of probability;
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> that the evidence is of sufficient weight to affirm the decision that the prisoner is a serious danger to the community in the absence of a Division 3 order.

[32] If the court, on the review hearing, affirms a decision that the prisoner is a serious danger to the community, in the absence of a division 3 order, then the discretion granted by sections 30(3) of the Act is enlivened.

[33] Once the decision has been affirmed, then the court is able, by section 30(3) of the Act, to order the respondent to be subject to continuing detention or be released from custody subject to a supervision order. In determining whether to make such an order, the paramount consideration is to ensure adequate protection of the community. If the court declines to order continuing detention, then the court must rescind the continuing detention order.

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[14] *Attorney-General for the State of Queensland v Fisher* [2018] QSC 74 at [88].

[34] Now, Dr Lars Madsen, a forensic psychologist, was engaged by Queensland Corrective Services to assess and treat the respondent by having him engage in an individual motivational therapy and counselling, designed to encourage him to undertake a group-based sexual offender treatment program. Dr Madsen formed a preliminary plan to attend on the respondent and conduct three sessions in March/April 2018. It was then intended that a progress report would be prepared.

[35] On 9th March 2018, Dr Madsen attended the Wolston Correctional Centre, but the respondent refused to participate in any motivational therapy. On the 23rd of March 2018 Dr Madsen attended the Wolston Correctional Centre for the purpose of conducting motivational therapy with the respondent. The respondent again refused to participate. Due to the respondent's attitude, Dr Madsen cancelled all future appointments.

[36] On the 3rd of April 2018 Dr Madsen provided Queensland Corrective Services with a termination summary, informing the department of his decision to cancel all further scheduled appointments, and following the second annual review the respondent has refused to be involved in ongoing efforts for motivational interviewing to ready him for individual therapy. It is noted that further conduct is occurring with the respondent to endeavour to have him participate in appropriate treatment.

[37] I have before me an affidavit of Ashley Spencer Phelan. He is the manager of Specialised Clinical Services, that is noted as SCS, within specialist operations for Queensland Corrective Services. On the 7th of May 2019 Mr Phelan was requested by Crown Law to provide an affidavit in relation to the engagement between Specialised Clinical Services and the respondent in 2018/2019, including but not limited to the role of Specialised Clinical Services, details of interaction between Specialised Clinical Services and the respondent, and the proposed plan that Specialised Clinical Services has leading up to formal intervention or treatment programs for the respondent, should he subsequently choose to participate prior to being released from custody.

[38] On the 20th of June 2018 the High Risk Offender Management Unit referred the respondent to Specialised Clinical Services with a specific aim of motivating the respondent in engaging in some form of offence specific intervention. That is, an individual intervention group and/or engagement with court appointed psychiatrists.

[39] The respondent was initially seen by Mr Phelan on the 3rd of July 2018 for approximately two hours at Wolston Correctional Centre. However, Mr Phelan states, at paragraph 16 of his affidavit, that it became apparent the primary barriers to the respondent's participation on future offence specific interventions, regardless of modality, are the respondent's sense of general injustice. That is, his innocence of committing a sexual offence, his unjust punishment under the Act, a legal system being designed to set him up to fail within a system which targets him personally, especially by women, and his acceptance of his fate. That is, 'no one can help me, no one listens to me and why bother'.

[40] Mr Phelan stated:

> "From a clinical perspective, the respondent's personality, cognitive/neurological functioning, learnt behaviours and environment has and is perpetuating his current stance of innocence, subsequent grievance narrative and lack of progress through the judicial system."

[41] Mr Phelan states that during the two-hour session, dated the 3rd of July 2018, he consistently asked the respondent if he would consider continuing to work with Specialised Clinical Services, without response. The respondent would continue to deflect his attempts to have him commit to further sessions with SCS, which is Specialised Clinical Services. Mr Phelan states that he refused to review any psychiatric reports or collateral information the respondent presented with at interview until he responded to the question at hand.

[42] The respondent agreed to see Mr Phelan in approximately one month's time and that brings us to the 1st of August 2018. This second session, on the 1st of August 2018, was conducted at Wolston Correctional Centre and lasted approximately 90 minutes. Mr Phelan states:

> "The respondent is presenting as less guarded and engaged appropriately throughout the session."

[43] Mr Phelan states that:

> "During the session [...] the respondent's personality construct [...] cognitive/neurological functioning was further highlighted with the respondent consistently reporting he did not see the benefit of working with SCS or capacity to re-integrate back into the community under the axe conditions, effectively.
>
> During the session […] the respondent soon articulated his innocence noting his current sentence/life situation was a function of a generalised conspiracy involving multiple layers of corruption targeting the respondent because of his ethnicity and his knowledge of government corruption. Throughout discussion, the respondent would note his superior reasoning skills and an ability of being able to see/view/interpret things differently to others."

[44] Mr Phelan states that the respondent would talk to him at such a rate which could only be described as relentless and exhausting for him. The respondent appeared to be unable to identify his purposeful and overt facial cues of disengagement; the respondent's barrage of information was unchanging and unyielding in its presentation.

[45] Mr Phelan states for the remainder of the session the respondent was interrupted by Mr Phelan when he either talked for too long or when his point had been made but he continued to argue his points regardless.

[46] In Mr Phelan's opinion he engaged well in this exercise and did not demonstrate any frustration or anger over being interrupted, often apologising and allowing Mr Phelan to speak. However, any topic being discussed would inevitably lead back to the respondent's defensiveness about his current sentence, DPSOA and treatment by staff.

[47] Then we have the third session, which is dated the 29th of August 2018, which again was conducted at Wolston Correctional Centre. This session lasted approximately 45 minutes and it was to allow for more focused interaction and reduce fatigue for Mr Phelan. During this session a number of topics outside of past, present and future grievances were discussed, but these were either limited or directed back to grievances, conspiracy theories and ongoing demonstration of a superiority personality construct and perseveration of errors.

[48] The only method that Mr Phelan identified which would stop the respondent from talking at him or repeating the same argument was to physically bang on the table, stand up, and ask him to stop. This technique would result in five to seven minutes of conversation other than that described previously, before the respondent would resume his innocence and conspiracy narratives.

[49] Mr Phelan states at the conclusion of the three sessions, which totalled approximately six hours of interaction, it was decided SCS would only re-engage with the respondent at his request.

[50] On the 15th of January 2019 the respondent informed Wolston Correctional Centre that he wished to re-engage with Mr Phelan and it is envisaged that SCS will re-commence engagement with the respondent on completion of the current psychiatric assessments and subsequent hearing today on the 13th of May 2019.

[51] Mr Phelan states:

> "Presently, there is no evidence to indicate the respondent will engage in offence specific interventions or benefit thereafter.
>
> At this time, I am not in a position to recommend a given offence specific pathway or timeframe pertaining to such intervention, due to the significant barriers experienced in engaging the respondent in very basic motivational based intervention work."

[52] Mr Phelan states that:

> "The respondent will require a significant amount of individual work, initially by a male practitioner, that focuses on generalised skills relating to engaging more willingly with clinicians and staff in areas pertaining to very basic social/communication and life skills."

[53] Mr Phelan states:

> "So as not to increase the risk the respondent may present to others, I am of the view and mindful of not upskilling the respondent's communications and social skills too quickly and in the absence of him demonstrating measurable attitudinal and behavioural changes."

[54] Mr Phelan also states:

> "To better inform the best modalities in which to elicit cognitive/attitudinal and behavioural change relating to future engagement in offence specific interventions, it is envisaged that SCS will conduct a number of cognitive assessments with the aim of investigating the respondent's cognitive/neurological function pertaining to apparent perseveration of errors correlated with orbitofrontal functioning, general prefrontal functioning and the respondent's broader fixated/rigid presentation that may not be just driven by a personality per se."

[55] I have some further psychiatric reports. There's a report by Dr Josephine Sundin, consultant psychiatrist, dated the 2nd of March 2019. On the 19th of December 2018 the Crown solicitor engaged Dr Sundin to interview the respondent. On the 22nd of February 2019 Dr Sundin attended the Wolston Correctional Centre for the purposes of conducting the psychiatric assessment, but the respondent refused to participate. So Dr Sundin prepared her report in the absence of cooperation from the respondent, but upon reviewing the material.

[56] Dr Sundin noted the material suggested the respondent suffers from anti-social personality disorder and meets the criteria for psychopathy. Further, the respondent is an individual whose violence has been linked to sexual offending. Accordingly, the paraphilia of sexual sadism cannot be excluded.

[57] Dr Sundin, having previously recommended the need for the respondent to complete a High Intensity Sexual Offender Program prior to consideration of release into the community under a supervision order, is of the view that in light of his intransigence and his high level of psychopathy, it seems unlikely that he would be suitable for such a program.

[58] Dr Sundin was of the further view that until the respondent participates in treatment individually with a forensic psychologist, has demonstrated some acquisition of insight into risk management strategies and some capacity for adherence of the requirements of a supervision order, he is not suitable for release into the community.

[59] I also have a report of Dr Robert Moyle, a consultant psychiatrist, dated the 1st of May 2019. On the 21st of February 2019 Dr Moyle was engaged to undertake a psychiatric risk assessment of the respondent. The respondent refused to participate in that process, and so Dr Moyle's report was prepared on the basis of the material which was supplied to him.

[60] Dr Moyle sets out his opinions in his report as follows, which I will read into the record. At paragraph 143:

> "The key issues that seem to me to stand out are the effect of nearly 2 decades in jail in a man who was not succeeding probably from as young as 11 in integrating into society, despite being raised in Inala in a suburban Brisbane environment and attending school in such an environment. By 11 he is running away, by 13 getting into alcohol dependence, and by 15 into trouble with the law and accommodated away from home. Violence has been pervasive.
>
> Therefore it is not surprising that I am concerned at the degree of institutionalisation and probable under socialisation affecting this middle-aged adult Aboriginal male with a martial arts background, and his invitation to be accommodated in prison, the only stable environment he has known in his life, He seems freely willing to remain there for the next 30 years. He wants a room to himself and threatens murder if he does not get what he demands. He gets what he demands. Such behaviour is not conducive to survival in the wider community, nor are assaults on fellow human beings. He does not report nor does he appear to have been convicted of sexual assaults or innuendo or approaches to women in custody but he does report and display some general dominant behaviour."

[61] Whether this dominant behaviour is specific to women or to others in the prison, be they officers or prisoners, is information that was not available to Dr Moyle:

> "While behaviourally largely controlled, as there does not appear to be frequent or excessive out of control behaviours, he controls any urges himself to a degree by isolating himself, devaluing the fellow inmates, and appears to be under-socialised, even in a prison. Nonetheless, there are reports that he goes to people who are friendly towards him when he wants to facilitate conflict with the officers and escalate his aggressive behaviours. He seems to settle in more secure units of the jail and makes it to Residential but returns to Secure. He reports 14 years in Secure as being quite stable. He reports in jail he has drugs, sex and food and accommodation and does not need to live anywhere else. He says he is willing to wait there until Corrections admit that they have made errors or that society admits their errors in convicting him. He will need considerable support to move from this entrenched position, more than transitions programs."

[62] At paragraph 144 Dr Moyle states:

> "Next are the sexual elements to his violent and abusive offending which have not been treated. His early interviews revealed a reasonably high sex drive and questions about sexual

> sadism, possible paedophilic sadism or paedophilia, in that a child was involved, allegedly at his insistence, with the child's mother. He is alleged to have been an active participant in encouraging and showing the child how to behave. It is of some puzzlement to me why this man, who wants to be seen as brave, powerful and dominant, after 20 years in custody, if he truly wants to get out of custody does not show bravery in acknowledging the offences, which are reported to have been witnessed, including witnesses to his aggressive and abusive attitudes towards his 10 to 12 years older partner and the child, except for the low status that people who acknowledge offending against children have in the prison system or perhaps the consequences to him culturally of such behaviours. If indeed he has to survive in the prison system it might be difficult for him to acknowledge elements of the sexual offences against a 9 year-old boy, the son of his partner. His rationale for injuring her, be it by one punch or by the grievous bodily harm, was that he did so to prevent her abusing the child but in fact all he has to do to do that is remove the child from her care and present to the police. Perhaps his distrust of police and authority may have meant that that was not an option he considered at the time, but the offences against the child for which he was convicted occurred over a six month period and were not singular, leading to the maintaining charge. He also devalues the other crimes he has been involved in, unconvincingly complaining of racism and racial bias as working against him and having him convicted of crimes he never committed or, at his most honest, some of the crimes he committed."

[63] And paragraph 145 Dr Moyle states:

> "If he was a brave man wanting out and intelligent (all psychiatrists have found no cognitive impairment), then it is puzzling to me as to why he does not simply acknowledge some sexual offending, including the making of pornographic videos for sale, and get on with the Sex Offender Program, the Cognitive Self-Change Program, the Pathways Substance Abuse Program, and move towards developing a Relapse Prevention Plan. It may be a very brave act to do so. I cannot help but feel there is evidence that institutionalisation and deeply entrenched attitudes prevent such a brave move on his part. Perhaps he lacks confidence that he can succeed and indeed it might be that group programs are not appropriate. It may be that he might feel more comfortable in an Indigenous group program but there is considerable risk he will not be a helpful influence and may be a disruptive influence in such a group program if he doesn't fully commit to the program. Program staff are well experienced in assessing and managing such people including excluding the disruptive elements from such programs if not so committed."

[64] At paragraph 146 Dr Moyle states:

> "Next are the risk assessments. While I might be able to quite simply do a PCI Screening Version on the information available to me, I think it is far more reliable to rely on the fact that all three independent psychiatrists have rated him as scoring above 30 on a Psychopathy Check List. I doubt a PCI Screening Version would find any different."

[65] And at paragraph 147:

> "Similarly, a Static-99R, given that I have stated that the first sexual offence was the assault against a woman in the home he had broken into in an attempted burglary that had sexual motivation and was therefore the first sexual offence, would mean that his static risk is high or well above the average sex offender in jail. Taking both clinical and instrumental risk into account his sexual violence risk is well above the average sexual offender in jail. Those at risk are women acquaintances and children if he wishes for them to engage in sexual acts. Violence is likely threatened or acted on if his wishes are not met. He has not addressed those risks."

[66] At paragraph 148:

> "Some instruments can be used without a direct assessment of the individual. I am not able to talk much about the protective factors as I have insufficient information about the stability of his childhood relationships with his parents and other internal factors in a Structured Assessment of Protective Factors for violence risk (SAPROF) and, while I might be able to comment on the current external factors holding him, I doubt I can comment positively on any motivational items. Therefore, I am only left with the negatives and his positives in learning in jail education and vocational programs. Without interviewing him, I would not be able to add other positive elements. This would look bad for him as it already does so I doubt there is going to be any value in me attempting to do so."

[67] And paragraph 149:

> "I agree with my colleagues who state that the combination of substance abuse, psychopathy and sexual deviance, especially sexual sadism, is the most dangerous combination for reoffending according to the largest database collected, an international database collected by the Solicitor-General of Canada, Hansen and his colleagues, amounting to tens of thousands of offenders. It is unusual in Behavioural Sciences to get numbers in the thousands, let alone tens of thousands. I acknowledge that the internationally used instruments are not reliably tested in Aboriginal subjects in Australia but the factors considered have

> been used in many populations around the world and seem relevant considerations in planning for the safe return of sex offenders to their chosen communities."

[68] And at paragraph 150-151, Dr Moyle notes that:

> "This is the third review of a Continuing Detention Order, with little sign of change. The Continuing Detention Order has to be reviewed each year. He has refused to see assessors. There seems no attempt on his part to act in ways that are seen to reduce that risk.
>
> He has also refused to change attitudes and his behaviours do not seem to be moderating in custody more than they were last year, with him still getting into trouble for both stealing and interpersonal aggression offences. On release, women are vulnerable to assaultive behaviours and assaultive sexual behaviours, as are children, and his claims that his twice as large partner could not have been assaulted by him because of the size differential did not take into account his pride at being a martial arts expert, that I doubt she was. It has never been accepted by the Court."

[69] At paragraph 152 states Dr Moyle states:

> "He minimises, justifies any violence, changes the story regularly about all elements of his behaviours and development, including his violent behaviours, and it is hard to feel that this can be anything but deception aimed at creating an impression he wishes to portray. He is reported by Dr Beech to be glib, superficial, evasive, and in similar terms by Dr Grant. He does not seem to have any secure attachments. He has no contact with family or friends or even people he sees as potential ex or current partners of any duration in custody. He has attachment difficulties. He does not report strong attachments to family. He has powerful dominance needs, both in custody and it seems, given the six-month history of the pornographic movie manufacture and the descriptions of the behaviours for this, out of custody as well over the last 25 years. He is only 45 now. He still has an active sex drive. While in general in custody he can contain many behaviours a lot of the time, he occasionally impulsively gets into conflict. I cannot weigh this too much as he is always in a secure or residential area that he states is constantly an environment for violence."

[70] At paragraph 153, Dr Moyle states:

> "Generally, he is behaviourally reasonably controlled in jail but, if his wishes are not met, he becomes agitated, aggressive, accusing staff of racism and denying his rights and threatening. No doubt, if he is released into the community, the community

> will always meet his wishes. In custody, he has not been abusing drugs and alcohol so, behaviourally, he seems to have somewhat less dyscontrol of substance urges and impulsivity. But he is irresponsible, never showing any interest in supporting his children, stealing from the Education Centre when he is allowed access to the Education Centre, and not meeting the requirements of Court Orders, both before and after these offences."

[71] At paragraph 154, Dr Moyle states:

> "Therefore, on a current Detention Order there is little to justify a Supervision Order, it does seem that those that have interviewed him feel that his attitudes shown in interview mirror their assessments that he could not be trusted to comply with the conditions of a Supervision Order and is likely to revert to drug and alcohol use but, even without this, he is unlikely to comply with a Supervision Order and answer truthfully questions by authority. I cannot assure the court that he would be a safe person in the community without drug and alcohol abuse given his tendency also to threaten people charged with monitoring him in custody if his wishes are not adhered to."

[72] At paragraph 155, Dr Moyle states:

> "Underlying all this, I do not see any evidence that this man is motivated to learn about his personality weaknesses, his vulnerabilities to aggression and sexual aggression in the interests of being a safe member of society even if subject to supervision and monitoring."

[73] At paragraph 156:

> "Questions remain. Is individual motivational interviewing a strategy to assist him to explore the process of change and will he be brave enough to address the acknowledged violence potential? If committed, attending a Cognitive Self-Change Program might be a step towards gaining motivation to explore sexual elements. I can see the sense in these approaches."

[74] And at paragraph 157:

> "It seems therefore to me that the court will need evidence of change for the better and low risk to others for a supervision order to be considered. He remains at well above average risk of sexual reoffending."

[75] Dr Moyle states:

> "...that in people I have treated, both subject to this Act or not subject to this Act, who have serious personality vulnerabilities over the years, are unlikely to respond quickly to interventions but the one thing that does seem consistent in those that do not

> seem to go on to reoffend is that they continue to attend appointments throughout and, whether they have breached or not, return to the care of the same person. Over a number of years gradually some can adapt to life safely in the community without indulging sexually violent urges, in that it is in their best interest not to do so, as to do so will result in a return to a less appealing lifestyle, a more injurious lifestyle, and a closely supervised and monitored lifestyle in custody."

[76] And then at paragraph 158:

> "The only meta-analysis that carefully analysed (despite the criticisms of meta-analytic studies) various modes of psychological therapies occurred many decades ago and from which have developed many approaches that are variations of cognitive behavioural therapy, because that was one of the two strategies found to show some benefit, as well as long-term analytically orientated psychotherapy. I find no mental illness requiring medical treatment. If he had a paraphilia then we could talk with him about decreasing such paraphilic sexual drives biologically as well as psychologically but this would require a long-term treatment commitment with therapists experienced in this area. Absent that, the only other therapeutic strategy found to be of benefit was one involving long-term psycho-dynamically orientated psychotherapy, what is generally referred to as long-term psychotherapy. Most psychotherapists understand the principles of dynamic psychotherapy and, irrespective of the methodologies they claim to use, the formation and maintenance of a therapeutic relationship is the key therapeutic force that helps change."

[77] Dr Moyle states that:

> "In my experience of people with psychotherapy, and my understanding that there's only been one reportedly effective custodial intervention program in this regard–"

[78] He refers to one in Scotland:

> "...that closed decades ago when its time was up. The British prison service has adopted to use many of the strategies of the program. They adopted a long-term therapeutic approach in a consistent environment."

[79] Dr Moyle states:

> "I am also mindful that criticisms of the early studies of inmate therapy programs led to pessimism about the outcome from inmate programs. In retrospect a fallacy was that these programs were the therapeutic instrument rather than one step in a process. The outcome data when people returned to the same environment

> from which they came prior to prison was that they tended to reoffend in the same rate as if they had not gone to jail in the first place. Attending to this environment is important and the main factors covered in Queensland's supervision orders."

[80] At paragraph 159, Dr Moyle states:

> "The DPSOA process in Queensland has been to be set up to last a decade or more if necessary, where environmental rehabilitation, therapy, monitoring and supervision in their released environment is supervised and monitored to ensure conditions of the court are implemented."

[81] I refer to paragraph 160 of Dr Moyle's report, where he states:

> "Therefore, my recommendation would be that we think in terms of hope that change might be possible in the long term, and that we give up on short-term miracle fixes for a man with such entrenched psychopathic vulnerabilities. He does not relate to people as others who feel a sense of attachment relate, he does not have rapport, he does not experience empathy. Therefore, to try and induce such states of mind in a person who rigidly has none is probably not going to be as effective a goal as having such people change their behaviours over time, recognising their weaknesses and, in promoting their self-interest in achieving a desired good lives outcome, try by the time he is 55 to achieve a good free life, enjoying being an elder Aboriginal man. He has reported some interest in trying to help, treat and aid younger offenders. There will need to be mutual long-term commitments. We cannot promise a positive outcome, but I suspect what is done here is the most likely strategy with hope for change."

[82] Dr Moyle's conclusions are set out at paragraphs 161 to 168. And at paragraph 161 he states that:

> "[The respondent], now 45, has repeatedly been found to pose a very much higher than average risk of sexual violence against women and possibly children if not subject to a DPSOA Order. This continues. Victims of sexual violence depend on his wishes at the time and have included women he knows, one in her own home that he was breaking into, and a 9 year-old child to his long term partner."

[83] At paragraph 162:

> "[The respondent] has been repeatedly found to be unreliable in his adherence to authority and restrictions, meaning that, inside or outside of jail, he will tend to follow his own interests ahead of those of the authority figures and is therefore unlikely to adhere to conditions of a Supervision Order in his current state of mind."

[84] At paragraph 163:

> "[The respondent] has entrenched personality weaknesses and, of those characteristics commonly referred to as psychopathic, he scores in the range of psychopathy professionally. He has entrenched attitudes, values, and psychological factors relevant in psychopathy, including a lack of empathy, lack of attachments, lack of remorse, ability to try to con, manipulate, lie, as well as entrenched behavioural difficulties in and away from supervision and monitoring involving a need to dominate aggressively with threats and aggression, and antisocial behaviours conflicting against the rights of others. Such personality weaknesses, once recognised by him, although they may persist, may lead to him learning strategies to not act on these weaknesses. He may not recognise other people's emotions and reactions in the same way. He will see others needs as subservient to his wishes, that he is dominant and superior and that his wishes must be adhered to. He can learn that this is one of his weaknesses and that such attitudes are not generally accepted as valid and, even though he does not appreciate other people's rights, he can learn what they are and how to modify his behaviour to respect them. He can learn how other people think morally, even if he does not. Most of all, however, as he ages, he may find it is in his best interests not to continue to behave in such irresponsible and violent ways as he has in the past, offending against the law, to hold back on his impulsive wishes and learn how to stop, think and then act in his and other people's best interests, with the help of good behavioural scientists (i.e. mental health professionals skilled in working with sexual and violent offenders)."

[85] And at paragraph 164:

> "He may have sensory deficits needing assessment if not already done."

[86] To paragraph 165:

> "He needs to attend to those weaknesses in the community by committing to drug and alcohol analysis and treatment and maintain the gains."

[87] Paragraph 166:

> "There needs to be a better understanding of his sexual attractions, intimacy feelings and behaviour and his relationship skills with remediation for any deficits from his early learning educations and home and social and intimacy skill development."

[88] At paragraph 167 Dr Moyle states:

> "In my opinion programs such as the Cognitive Self-Change Program, if engaged in by him with an attitude that allows him to see that he is doing so to improve his understanding of himself and how he might live more comfortably, may assist him to consider options for change. However, he will be disruptive, in my opinion, in a High Intensity Sex Offender Program if he simply adopts the view that he is there because he has to be there and tries to be disruptive to play up to his fellow attendees, to fail to acknowledge any element of his sexual offending, and to lie, deceive and dominate, as he does now. I do not think he is ready to attend a High Intensity Sex Offender Program.

[89] At 168 Dr Moyle states:

> "It may take several years for him to establish a relationship with a therapist but, from my reading, he was starting to develop such a relationship with Ashley Phelan and one hopes this is continuing."

[90] As I stated before, the respondent is willing to re-engage with Mr Phelan.

[91] The Crown submits that there is acceptable cogent evidence which would satisfy the court to a high degree of probability required, that the respondent remains a serious danger to the community in the absence of an order made under division 3 of the Act.

[92] The Crown submits that the psychiatric evidence identifies the risk the respondent's release presents as being in the moderate to high range and any offence, if committed, would constitute a sexual assault of an adult female or child. The risk of psychological damage and/or physical injury to any victims is obvious, the Crown submits.

[93] The Crown submits clearly and unequivocally that the respondent presents a serious danger to the community, in the absence of a division 3 order under the Act. The Crown submits accordingly the decision made on 9 June 2015 ought to be affirmed.

[94] The Crown submits at the outset of any consideration of what order ought to be made, there ought to be a preference for a supervision order over a continuing detention order.

[95] The Crown acknowledges that it is for the applicant to establish that adequate protection of the community cannot be ensured by the adoption of a supervision order.

[96] The Crown acknowledges that ultimately it must be open to conclude that a supervision order would be efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences. That is what the test has to be for the Court.

[97] I note what Brown J stated in *Attorney-General for the State of Queensland v S* [2017] QSC 32 at paragraph 40, where her Honour stated:

> "Given the respondent's maintenance of innocence and his denial of what happened in terms of sexual offending Dr Grant noted that it is not possible to explore motivations, what went on and what happened so as to be able to diagnose a paraphilia with any certainty. He considered that there was a real possibility, quite a strong possibility that the respondent may be sexually sadistic. As there was less evidence that the actual violence involved the child, there was less possibility that it was a paedophilic sadism."

[98] So too in this case the Crown submits the position remains as it was when the matter came before the Court in the second annual review in 2018.

[99] That is, the Crown submits, the respondent presents as an untreated sexual offender. He has limited or no insight into his condition and the steps he needs to take to address his risk. The Crown submits he is aware of the importance of the meaningful participation in programs offered by corrective services and this was clearly an issue in the 2015, 2017 and 2018 hearings.

[100] The Crown submits that the respondent denies the circumstances which give rise to his incarceration. He has not demonstrated any emotional and intellectual commitment to participation in any programs which would serve to minimise the risk and the Crown submits his refusal to participate in any involvement by Dr Madsen is evidence of the intransigence that he displays. However, the Crown acknowledges on a slightly positive note that the respondent is willing to re-engage with Mr Phelan.

[101] The Crown submits that on the evidence of the psychiatrists, the respondent needs to meaningfully participate in a High Intensity Sexual Offender Treatment Program, or an individual treatment prior to his release into the community and if he did meaningful participate in such programs or treatment, it would provide his supervisors with more information about the offending pathways which the respondent is likely to traverse prior to the commission of any offence. It would enable supervision to be an effective tool and provide adequate social protection to the community.

[102] The Crown submits that absent such participation, it is impossible for the court to be satisfied that adequate protection to the community could be reasonably and practically ensured by a supervision order. Ultimately the Crown submits that taking into account all of the evidence, the preference for a supervision order has been displaced. It cannot be found in the circumstances presented by the respondent's presentation that adequate protection of the community is ensured by his release on supervision and accordingly, the Crown submits, an order pursuant to section 30(3)(a) of the Act ought to be made.

[103] The respondent instructs that he contests that he is a serious danger to the community, within the meaning of section 30(1) of the *Dangerous Prisoner (Sexual Offenders) Act* 2003, but wishes to be released on a supervision order

if the court finds to the contrary. The respondent still, on instruction, professes his innocence to the charges.

[104] In the respondent's written submissions he states that he has filed no material. However, an affidavit was filed today under the hand of Manuccher Ashkan Tai, the instructing solicitor for the respondent. This attached a number of certificates of completion that demonstrates the respondent has undertaken various courses whilst in custody. They are the Graduate Certificate For Adult Resilience, Strong, Not Tough, on the 22nd of March 2018; the certificate of completion in relation to the Peace Education Program on the 15th of December 2017; another Peace Education Program on the 25th of August 2017; another Peace Education Program on the 25th of May 2017; a certificate of attendance in the One Punch Can Kill workshop on the 24th of February 2017; and that he has successfully completed all core modules in the Transitions Program on the 13th of October 2011.

[105] The respondent continues to maintain his innocence in relation to the charges of which he was convicted at the trial. The respondent acknowledges that the outline of submissions filed on behalf of the applicant is a fair and proper summation of the facts and the law.

[106] At paragraph 25 of the respondent's submissions, it acknowledges that very little appears to have changed in the last 12 months. There have been some engagement with a psychologist, Ashley Phelan, but very little. The psychiatrists agree there needs to be some establishment of a therapeutic relationship with Mr Phelan before the respondent participates in treatment for sex offending and ultimately the respondent's counsel submits that the Court should dispose of the application as it sees fit.

[107] So should the respondent be subject to a division 3 order? The respondent refused to be interviewed by the psychiatrist. I've referred to the evidence of Dr Moyle already and I accepted the evidence. I note in particular that at paragraph 147 where Dr Moyle states that his static risk is high or well above the average sex offender in jail, and taking both clinical and instrumental risks into account, his sexual violence offence risk is well above the average sexual offender in jail and those at risk are women acquaintances and children if he wishes for them to engage in sexual acts. At paragraph 161, Dr Moyle states:

> "[The respondent], now 45, has repeatedly been found to pose a very much higher than average risk of sexual violence again women and possibly children if not subject to DPSOA order. This continues. Victims of sexual violence depend on his wishes at the time and have included women he knows …"

[108] I referred to the evidence of Dr Sundin generally and I accept the evidence as contained in her expert reports. I note at page 6 of her report that the material suggests that the diagnosis is clearly one of anti-social personality, and that he meets the criteria for psychopathy. He is an individual whose violence has been linked to sexual offending to a point that the paraphilia of sexual sadism cannot be excluded. There is nothing in the material to alter her opinions that

she first proffered to the court in 2014, which can be found in the judgment of P. McMurdo J and *Attorney-General Queensland v S* [2015] QSC 157 and with reference to paragraphs 11 to 18 of that judgment.

[109] In Dr Sundin's opinion the respondent poses an unacceptable risk for sexual offending if he were to be released into the community and Dr Sundin states:

> "At this stage I do not consider that an intensive supervision order would be adequate to ensure the safety of the community."

[110] Dr Sundin has previously recommended that the respondent needs to complete a High Intensity Sexual Offending Program prior to any consideration of release into the community, under the auspices of a supervision order. In the light of his intransigence and his high level of psychopathy, it seems highly unlikely that he would be suitable for such a program.

[111] Dr Sundin states that until the respondent participates in treatment individually with a forensic psychologist, has demonstrated some acquisition of insight into risk management strategies and some capacity for adherence to the requirements of a supervision order, he is not suitable for a release into the community.

[112] Dr Sundin respectfully recommends to the court that he should be detained in prison for further treatment.

[113] Having considered all of the evidence before me, in particular the expert evidence, and taking into account the required matters in section 30 of the Act, I'm satisfied to a high degree of probability that there is acceptable cogent evidence that the respondent is a serious danger to the community in the absence of a division 3 order.

[114] I therefore affirm the decision made on 9 June 2015 that had again been affirmed on 13 March 2017 and affirmed again on 1 May 2018.

[115] The issue then arises – and which remains to be determined – is whether pursuant to section 30(3), the respondent should (a) continue to be subject to the continuing detention order, or (b) be released from custody, subject to a supervision order.

[116] In making such a determination, section 30(4) provides that the paramount consideration is the need to ensure adequate protection of the community and the court must consider whether the adequate protection of the community can be reasonably and practically managed by a supervision order and whether the requirements under section 16 can be reasonably and practically managed by corrective service officers.

[117] It is for the applicant to establish that adequate protection of the community cannot be ensured by a supervision order. I note that an order for supervised release should be preferred to a continuing detention order. This is because the intrusions of the Act upon the liberty of the subject are exceptional and the

liberty of the subject should be constrained to no greater extent than warranted by the Act. It is not contemplated under the Act that supervision orders must be watertight, otherwise, of course, they would never be made.

[118] In this case, however, I cannot be satisfied that a supervision order would be efficacious in continuing the respondent's behaviour by preventing the opportunity for the commission of sexual offenders. In making such a supervision order the court is required to reach a positive conclusion that the supervision order proposed would provide adequate protection. I am not so satisfied.

[119] The expert evidence does not reach such a conclusion and I take into account Dr Moyle's report, in particular, paragraphs 154 to 157, paragraph 160 and paragraphs 160 to 168. I note Dr Sundin's report at page 6, from line 158 to page 7 at line 171.

[120] It is noted that in 2017, Brown J affirmed the continued detention order, as no supervision order could be formulated to properly address the risk posed by the respondent to ensure adequate protection of the community. One of the primary reasons for coming to that conclusion was the failure of the respondent to engage in programs that would enable his release on a supervision order to occur. I note that nothing much has changed in two years.

[121] The applicant, in all of the circumstances, has satisfied me that the adequate protection of the community cannot be ensured by a supervision order and the respondent should continue to be subject to a continuing detention order.

[122] So I am satisfied to the requisite standard that the respondent is a serious danger to the community in the absence of an order pursuant to division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), and order that the decision made on 9 June 2015 that the respondent is a serious danger to the community, in the absence of a division 3 order, be affirmed, and the respondent continue to be subject to the continuing detention order made on 9 June 2015. I sign the order.