

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v DXP* [2019] QSC 77

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
DXP
(respondent)

FILE NO: 11077 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 28 March 2019

DELIVERED AT: Brisbane

HEARING DATE: 25 March 2019

JUDGE: Applegarth J

ORDER: **The respondent be released subject to a supervision order for a period of 10 years.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT SEXUAL OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY — where the applicant seeks an order pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – where the respondent concedes that on the evidence the Court would be satisfied to the requisite high degree that he is a serious danger to the community in the absence of a Part 2, Division 3 order – where the parties agree that the evidence supports the conclusion that a supervision order will provide adequate protection of the community – whether the supervision order should be for more than five years

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)

Attorney-General for the State of Queensland v Fardon [2011] QCA 111, cited

Attorney-General v Francis [2007] 1 Qd R 396; [2006] QCA 324,

cited

Attorney-General for the State of Queensland v KAH [2019] QSC 36, cited

Attorney-General for the State of Queensland v Lawrence [2010] 1 Qd R 505; [2009] QCA 136, cited

Attorney-General for the State of Queensland v S. [2015] QSC 157, cited

Attorney-General for the State of Queensland v Sutherland [2006] QSC 268, cited

Turnbull v Attorney-General for the State of Queensland [2015] QCA 54, cited

Yeo v Attorney-General for the State of Queensland [2012] 1 Qd R 276; [2011] QCA 170, cited

COUNSEL: J Tate for the applicant
K Bryson for the respondent

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

- [1] The applicant seeks an order under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). The applicant acknowledges that, on the evidence before the Court, it is open to conclude that adequate protection of the community can be ensured by a supervision order in the terms proposed.
- [2] The respondent concedes that on the evidence, including the expert evidence, the Court would be satisfied to the requisite high degree that he is a serious danger to the community in the absence of a Part 2, Division 3 order. The respondent submits that the proposed supervision order will be effective in reducing the risk that he will commit a serious sexual offence if released.
- [3] Whilst the making of a supervision order is not opposed, its duration is contentious. The applicant submits that it should be greater than five years. The respondent submits that it should be for five years.
- [4] Setting a period of supervision involves a present assessment of the respondent's state and a prediction of when he will be an acceptable risk in the community without a supervision order.¹
- [5] The principal issue for determination is when, on the evidence, the respondent is likely to be an acceptable risk in the community without a supervision order. An associated issue is the willingness of the respondent to engage in ongoing treatment in the community.

Overview of the facts

¹ *Attorney-General for the State of Queensland v KAH* [2019] QSC 36 at [68]. It would be an error if the Court considered that the respondent would only cease to be an unacceptable risk in the community after ten years on supervision, but set the duration of the order at five years on the basis that the order could later be extended under s 19B of the Act: *ibid* at [70].

- [6] The respondent was born in late 1965, and is now 53 years old. His criminal offending began in 1980, when he was a child aged 14. He has an extensive criminal history which includes assaults, theft, burglary, escape from lawful custody, drug offences and breaches of bail undertakings.
- [7] The index offences involve serious sexual offending committed on 2 October 2002. The respondent abducted and sexually abused two young female students from overseas, who were temporarily living on the Gold Coast. The respondent was convicted of eight counts of rape, one count of assault with intent to commit rape and two counts of deprivation of liberty.
- [8] The respondent was sentenced to 14 years' imprisonment on each count of rape and lesser concurrent terms of imprisonment on the other offences for which he was found guilty. An appeal against conviction and an application for leave to appeal against sentence were dismissed by the Queensland Court of Appeal.
- [9] The serious sexual offences committed on 2 October 2002 for which the respondent was convicted were preceded by offences committed between July 2001 and July 2002 against a woman with whom the respondent was then in an intimate relationship. The respondent was aged 36 – 37 at the time of those offences. The relationship was characterised by drug use, transient behaviour and violence. The victim said the respondent was controlling and she was in fear of him.
- [10] On 30 May 2006, the respondent pleaded guilty in the District Court at Southport to two counts of assault occasioning bodily harm, and one count of assault occasioning bodily harm whilst armed. The respondent's guilty plea was in satisfaction of a 12 count indictment which additionally charged him with three counts of deprivation of liberty, five counts of rape, and a third count of assault occasioning bodily harm. These offences pre-dated the index offences. The sentencing judge described the respondent's offending as "gratuitous and deeply unpleasant, nasty violence to a woman who, like you, was a drug addict who was struggling with her life at the time".
- [11] The respondent's full-time release date is 8 April 2019.
- [12] Dr Timmins, a consultant psychiatrist, was instructed to assess the respondent's risk of sexual recidivism in relation to a possible application under the Act. She attempted to interview the respondent on two occasions (22 January 2018 and 5 March 2018) at the Townsville Correctional Centre. On each occasion, the respondent declined the interviews. As a result, Dr Timmins' report is based upon the respondent's documentary files, including an assessment of records relating to the respondent's criminal history, transcripts of relevant proceedings, files held by the Office of the Director of Public Prosecutions and files held by Queensland Corrective Services.
- [13] Dr Timmins' comprehensive report details the respondent's psychological and psychiatric history, sentencing comments, prison conduct, family history, education and vocation history, social history, sexual history, the offences, the respondent's participation in treatment programs and his plans upon release. These factors informed Dr Timmins' assessment of the respondent's risk of sexual recidivism.
- [14] In Dr Timmins' opinion the respondent's psychiatric diagnosis includes provisional diagnoses including **Cluster B personality traits** (in particular narcissistic and antisocial). Additionally,

Psychopathy may be present. There is clear evidence of **Polysubstance Abuse** (in sustained remission in a controlled environment).²

- [15] The respondent's risk has also been assessed under the Act by Dr Arthur and by Dr Harden, who also have provided comprehensive reports. Dr Arthur³ diagnoses the respondent as suffering from **Antisocial Personality Disorder; Cluster B Personality Features** (within the narcissistic and borderline spectrum); and many features of **Psychopathy**.⁴ According to Dr Harden, the respondent suffers from **Anti-Social Personality Disorder** (Paranoid and psychopathic personality features) and **Polysubstance Abuse** (in remission).

Psychiatric assessments of risk – summary

- [16] The psychiatric assessments undertaken indicate the respondent's unmodified risk of sexual re-offending is at the "**well above average (high)**" range or at least "**moderate to moderately high**" range, compared to the recidivism rate of sex offenders generally. I quote from their reports:

Dr Timmins

"Given his history and the probable score in the Static-99R I am of the opinion that [the respondent] may have a relatively high risk of sexual reoffending if released into the community without a supervision order in place.

It is recommended he be further assessed for placement under either a continuing detention or a community order as per the *Dangerous Prisoner (Sex Offender) Act 2003*.

A period of supervision in the community under a community DPSOA order is likely to be beneficial to decrease the risk he poses to the community. I am unclear as to exactly how much the risk would be modified at this stage.

He requires further assessment in order to clarify a number of aspects of his history in addition to his current circumstances, mental state examination, future plans and his own views on his behaviour; all factors that currently remain unclear."⁵

Dr Arthur

"The actuarial assessment of [the respondent] utilising the Static 99R places him in the above average risk group. The presence of Psychopathic Personality has implications for recidivism in general and has associations in the literature with increased risk of violent and sexual recidivism. Utilising the RSVP, he presents

² Affidavit of Evelyn Timmins sworn 19 September 2018, Exhibit ET-2, 40 ("Dr Timmins' Report").

³ Dr Arthur's Report dated 14 March 2019, 43 ("Dr Arthur's Report").

⁴ The respondent meets the PCL-R cut-off for a diagnosis of Psychopathic Personality Disorder: Dr Arthur's Report, 44.

⁵ Dr Timmins' Report, 43.

with a number of factors known to be associated with increased risk of sexual recidivism.

Although he identifies that future substance use is a risk in general reoffending, he now minimises his sex drive/sexual interest and no longer acknowledges his predilection for physically aggressive, dominating sexual activity. He appears to have retained little else from the MSOP and has no interest in repeating it due to his aversion of child sex offenders. Whilst this is not unreasonable given his own history of childhood sexual abuse, this is also typical of his well-established pattern of avoidant coping.

[The respondent's] major risk factor for sexual recidivism appears to be a return to substance abuse which may lead to disinhibition or heighten his sex drive. Reconnecting with criminal peers and re-engaging in drug dealing may reinforce antisocial and negative attitudes towards women as well as putting him into regular contact with emotionally and physically vulnerable females, thus increasing his victim access. His persistent distorted attitudes towards women, relationships and sex are also risk factors, along with psychopathic personality features.

Should [the respondent] reoffend, it is likely to involve unwanted sexual contact or rape. The victims are most likely to be casual sexual partners, prostitutes or women in vulnerable positions (geographical or social isolation). He is more likely to sexually assault women who have slighted him in some way such that he feels justified in seeking revenge against them.

The motivation for further sexual offences would be predominantly sexual gratification but there may be an element of punishment or retribution.

Any future sexual offending is likely to cause significant psychological harm to the victims. Given [the respondent's] history of serious and gratuitous violence towards women, there is a significant risk that he may cause serious physical harm to future victims.

Based on the above factors, I would estimate that [the respondent's] unmodified risk of sexual recidivism on release would be between moderate and moderately high."⁶

Dr Harden

"His ongoing unmodified risk of sexual re-offence in the community in my opinion is most likely in the **Well Above Average (High)** range.

His greatest risk factors are his general pro criminal attitudes, substance misuse, problems with intimate relationships, lack of concern for others and management of previous sexual behaviour. He has had problems with cooperating with

⁶ Dr Arthur's Report, 46.

supervision in the community in the past although he has shown a more cooperative approach in custody in more recent years.

If he were to be placed on a supervision order in the community in my opinion this risk will reduce to **Average (Moderate)**.⁷

- [17] All three reporting psychiatrists comment on the risk reduction that flows from the imposition of a supervision order under Division 3 of the Act. Dr Timmins notes that a supervision order is likely to decrease the respondent's risk. In his report, Dr Arthur states the reduction in risk would be to the "low" range and, in Dr Harden's view, the reduction is to the "average (moderate)" range.⁸

A Division 3 order should be made

- [18] Having regard to each of the matters stated in s 13(4) and, in particular the risk assessments to which I have referred, I am satisfied to the high degree required that the respondent presents an unacceptable risk of committing a serious sexual offence if released from custody without a supervision order being made. The evidence is cogent and satisfies me to a high degree of probability.

The statutory scheme

- [19] The objects of the Act and its scheme are well-established and it is not necessary to quote the terms of s 13 and other provisions.
- [20] The first enquiry is whether or not the respondent is a serious danger to the community in the absence of a Division 3 Order. The statutory test is whether there is an unacceptable risk that the prisoner will commit a serious sexual offence if released without a Division 3 order.⁹ That matter must be proven by sufficient cogent evidence, and the Court is required to consider each of the matters stated in s 13(4). If satisfied to the high degree of probability required that, if released without a Division 3 order there is an unacceptable risk that the respondent will commit a "serious sexual offence", then the second inquiry is as to the form of order to be made. In considering these matters, the paramount consideration is to ensure adequate protection of the community.
- [21] It is for the applicant, in seeking a continuing detention order, to establish that adequate protection of the community cannot be ensured by the adoption of a supervision order.¹⁰ P D McMurdo J (as his Honour then was) said in *Attorney-General for State of Queensland v S*:

"[38] Other judgments of the Court of Appeal have expressed the present question somewhat differently. In *Attorney-General (Qld) v Lawrence*, Chesterman

⁷ Dr Harden's Report dated 17 March 2019, 19 ("Dr Harden's Report").

⁸ Dr Timmins' Report, 43; Dr Arthur's Report, 46; Dr Harden's Report, 19. But see Dr Arthur's oral evidence which revised an actuarial assessment of the applicant's unmodified risk.

⁹ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("The Act") s 13 (2).

¹⁰ *Attorney-General for the State of Queensland v Lawrence* [2009] QCA 136.

JA (with whom Margaret Wilson J agreed) said this as to the relevant onus of proof:

‘[I]n cases where the Attorney-General contends that the community will not be adequately protected by a prisoner’s release on supervision the burden of proving the contention is on the Attorney. The exceptional restriction of the prisoner’s liberty, after he has served the whole of whatever imprisonment was imposed for the crimes he committed, and for the protection of the public only, should not be imposed unless the inadequacy of a supervision order is demonstrated. The liberties of the subject and the wider public interest are best protected by insisting that the Attorney-General, as applicant, discharges the burden of proving that only a continuing detention order will provide adequate protection to the community.’¹¹

- [22] Similarly, in *Yeo v Attorney-General (Qld)*, Margaret McMurdo P (with whom White JA agreed) said:

“[73] Under s 13(6), the paramount consideration in determining whether to order a continuing detention order or a supervision order is the need to ensure adequate protection of the community. This requires the judge to make a value judgment based on the evidence. It is impossible to eliminate all risk of criminal offending, including offending against children, from a community. A judge must determine what is adequate protection of the community in all the circumstances (*Attorney-General v Sutherland* [2006] QSC 268, [28]-[30]; *Attorney-General v DGK* [2011] QSC 73, [28]). The respondent has not persuaded me that the adequate protection of the community in this case cannot be assured by the release of the appellant into the community under a carefully structured supervision order, conscientiously supervised by corrective services officers. It follows that I must release the appellant on an appropriate supervision order.”¹²

- [23] 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.”¹³ It has been said:

“The means of providing the protection, and avoiding that risk, is a supervision order. When a court is assessing whether a supervision order can reasonably and practically manage the adequate protection of the community, it is necessarily assessing the protection the order can provide against that risk. Before making

¹¹ *Attorney-General for the State of Queensland v S.* [2015] QSC 157 at [38].

¹² *Yeo v Attorney-General for the State of Queensland* [2012] 1 Qd R 276; [2011] QCA 170 at [73].

¹³ See *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111 at [29].

the order a court has to reach a positive conclusion that the supervision order will provide adequate protection.”¹⁴

- [24] A relevant consideration is whether the respondent is likely to comply with the requirements of a supervision order. If the respondent is unlikely to comply with the requirements of a supervision order, and the result of such of such non-compliance would present an unacceptable risk of the commission of a serious sexual offence, then a supervision order is most unlikely to be made. Ultimately, the Court must be satisfied that adequate protection of the community can be reasonably and practicably ensured by a supervision order. However, this does not entail proof that a supervision order is unlikely to be contravened, even in some trivial way. Many supervision orders contain numerous and exacting requirements which are designed to reduce risk and encourage positive behaviour by the respondent. Non-compliance with a particular provision may not, in itself, signal that the respondent has become an unacceptable risk of committing a serious sexual offence. Instead, it may alert the authorities supervising the respondent to a problem which needs to be addressed. Therefore, whilst I do not have to be satisfied to a high degree that every requirement in the supervision order is likely to be complied with over the duration of the order, I have to consider whether the respondent is likely to comply with it. Any supervision order carries some risk that it will not be complied with. The relevant issue is whether the terms of the supervision order provide adequate protection of the community in all the circumstances.
- [25] Relevant to the making of an order pursuant to s 13(5) for continuing detention or supervised release is whether the requirements of a supervision order can be reasonably and practicably managed by corrective services officers.¹⁵ Unless evidence is before the Court to indicate otherwise, the Act assumes that the requirements of supervision orders can be reasonably and practicably managed by corrective services officers.¹⁶
- [26] There is an implicit requirement in s 13 that a continuing detention order should only be made where the applicant proves that the community cannot be adequately protected by a supervision order.¹⁷ A supervision order need not be risk free; that would be an impossible bar.¹⁸ The starting position for a s 13(5) order is a supervision order; for that starting position to be displaced, the applicant must prove a continuing detention order is an appropriate order:¹⁹

“The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the act upon the liberty of the subject are exceptional,

¹⁴ See *Turnbull v Attorney-General for the State of Queensland* [2015] QCA 54 at [36].

¹⁵ The Act s 13(6).

¹⁶ *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [37].

¹⁷ *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 at [27].

¹⁸ *Attorney-General v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [39].

¹⁹ *Attorney-General for the State of Qld v Lawrence* [2010] 1 Qd R 505 at 512 at [31].

and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.”²⁰

- [27] If a supervision order is made, the Court must state the period for which a supervision is to have effect. The minimum period for which a supervision order can be imposed is five years.²¹
- [28] In considering whether to make an order under Division 3, and in deciding the form of order, the paramount consideration is to ensure adequate protection of the community. The Court’s consideration is informed by the extensive factors contained in s 13(4).
- [29] If the Court is satisfied that adequate protection of the community can be afforded by a supervision order, then it is necessary to consider its terms and its duration. In considering the period of the order, the Court makes a current assessment of future risks and asks: when will the respondent reach a point at which he is an acceptable risk without a supervision order?²² The assessment of when a risk will be acceptable or unacceptable is for the Court, not the psychiatrists. However, the opinions of psychiatrists concerning risk and matters within their professional expertise assist the Court in determining the issue for its decision.

²⁰ *Attorney-General v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [39].

²¹ The Act s 13A.

²² *Attorney-General for the State of Queensland v KAH* [2019] QSC 36 at [56].

The facts in greater detail

- [30] The following part of these reasons in relation to the facts (which are not in dispute) are drawn heavily from the written submissions of the applicant.

Previous offences

- [31] On 30 May 2006, the respondent pleaded guilty in the District Court at Southport to two counts of assault occasioning bodily harm, and one count of assault occasioning bodily harm whilst armed. His guilty plea was in satisfaction of a 12 count indictment which additionally charged him with three counts of deprivation of liberty, five counts of rape, and a third count of assault occasioning bodily harm. These offences pre-dated the index offences. These offences were alleged to have occurred over a 12 month period between July 2001 and July 2002.
- [32] The respondent was aged 36 – 37 at the time of commission of the offences. The victim was a young woman with whom the respondent had been involved in an intimate relationship. The relationship was characterised by drug use, transient behaviour and violence. The victim said the respondent was controlling and she was in fear of him.
- [33] Count 1 occurred while the victim was residing at a crisis accommodation centre with her son at Southport. The respondent would visit the victim, eat her food and sleep at the unit. On one occasion the victim told the respondent to leave. He responded by punching the victim in the face, striking her with considerable force to the nose. Her nose immediately started bleeding, and the victim decamped to the bedroom. The respondent followed her, threatening the victim with her life. He then punched her in the head two or three times, causing her head to strike a concrete wall behind her. He then screamed at her and returned to the lounge and went to sleep. The victim was scared to move for some time, and when she eventually went to clean herself up, she found her nose was full of dried blood.
- [34] Count 2 occurred on 18 November 2001. The victim was talking on a public telephone in Woodridge when the respondent approached her on a pushbike. When she would not do as he said, he punched her to the head and face five or six times and then kicked her. The respondent then accompanied the victim to where she was staying. When the victim's father attended the property later that day, he observed the victim's injuries and distress. A confrontation between the victim's father and the respondent ensued, which resulted in threats being made by the respondent against the victim's family. The victim took out a domestic violence order against him the following day.
- [35] Count 3 occurred shortly after the domestic violence order was taken out. The victim had returned to the Gold Coast. She met up with the respondent and was taken to an empty house in Labrador. At the time, he was very angry about the domestic violence order. While in the house, he beat her over the body with a bed post, he cut her on her back with a knife. He then tied her to the floor with a rope around her wrists. He then ripped up pages of a phone book, put them all over her and burnt them. He then held a cigarette lighter under her chin and burnt her skin. He threatened to burn other parts of her body. While she was tied up, he threatened to get others to come and have sex with her. He repeatedly threatened her that she would not survive.
- [36] The victim was located by police on 27 November 2001 at the residence of a relative of the respondent's. Police had been called to the property in order to conduct a welfare check on the victim. The respondent was also at the property. Upon seeing the police, the respondent

pushed the victim towards the officer, turned off the bedroom light, ran across the floor and jumped from the two-story bedroom window into the backyard and escaped. Police took the victim to the police station, where she was collected by her father.

- [37] The sentencing judge described the respondent's offending as involving "gratuitous and deeply unpleasant, nasty violence to a woman who, like you, was a drug addict who was struggling with her life at the time". On each count, the respondent was sentenced to two years' imprisonment. All terms of imprisonment were ordered to be served concurrently, and concurrently with the 14 year term imposed on 23 February 2005.

Index offences

History of proceedings

- [38] On 23 February 2005, the respondent was convicted by a jury in the District Court at Southport of eight counts of rape, one count of assault with intent to commit rape and two counts of deprivation of liberty. In addition to those offences, the respondent pleaded guilty to one count each of stealing and the obstruction of a police officer in the execution of his duty. These offences were unrelated to the offences of rape, assault with intent to commit rape and deprivation of liberty.
- [39] The respondent was aged 36 years at the time of the commission of the offences and 39 years old when sentenced. All offences occurred on the night of 2 October 2002. The two young female victims were tourists from overseas, who were temporarily living on the Gold Coast while studying English. They had only been in Australia for approximately four weeks before the offences were committed.
- [40] The respondent was initially tried on a 23 count indictment, which contained two counts of deprivation of liberty, one count of sexual assault, two counts of assault with intent to rape, 13 counts of rape, two counts of torture, two counts of procuring a sexual act by coercion and one count of robbery.
- [41] Ultimately, the jury convicted the respondent of eight counts of rape, one count of assault with intent to commit rape and two counts of deprivation of liberty. The jury acquitted the respondent in relation to the count of procuring a sexual act by coercion, and failed to return a verdict on the remaining counts (one count of sexual assault, one count of assault with intent to rape, five counts of rape, two counts of torture and one count of robbery).
- [42] Specifically, with respect to one victim, the respondent was found guilty of one count of deprivation of liberty and four counts of rape. One of those rapes involved forced oral sex and the others were penile penetration of the victim's vagina.
- [43] With respect to the other victim, the respondent was found guilty of one count of deprivation of liberty, one count of assault with intent to commit rape and four counts of rape. Like the first victim, one of the rapes involved forced oral sex and the remaining counts involved penile penetration of the vagina.

Facts

- [44] In the early hours of 2 October 2002, the two victims left a nightclub in Surfers Paradise to return to Runaway Bay, where one of them was living. They discovered it was too late to catch a bus to Runaway Bay. On hailing a taxi, they were informed that they had insufficient money for the fare to Runaway Bay. They then decided to hitchhike.
- [45] The respondent offered the women a lift home, claiming he was headed in their direction. The respondent was driving a vehicle he had borrowed earlier that night from an acquaintance. After initially driving in that direction, the respondent at some point decided to stop following directions. He ignored the victims when they told him he was going the wrong way. The respondent was driving very fast.
- [46] At one point, both victims opened the doors of the vehicle whilst it was moving in an endeavour to escape. That attempt was unsuccessful, when the respondent grabbed hold of one victim, who was sitting in the front passenger, and held onto her. The other victim, who was sitting in the back seat, not wanting to leave her friend, then desisted from her attempt to escape. Attempts by her to subdue the respondent while striking him with a screwdriver were similarly unsuccessful.
- [47] Over a period of approximately five or six hours, the respondent took them to various, isolated locations on the Gold Coast, where they were subjected to persistent sexual assaults. Compliance was forced by repeated violence in the form of hits, pulling each victim forcibly by the hair and repeated threats to kill not only them but also their friends if they tried to escape.
- [48] During the ordeal, the victims were forced to travel naked, in the boot of the vehicle. Whilst the victims were locked in the boot, they made a triple 0 call. Understandably, because of their limited English, and the fact that they did not know where they were, police were unable to determine where the call was coming from, or whether it was a hoax.
- [49] The victims remained in the boot until the respondent stopped for petrol at a service station near Palm Beach. Seizing an opportunity to escape, when the respondent accidentally opened the boot of his car by mistake, the victims ran from the car and sought assistance from people in the vicinity. According to some witnesses, the respondent attempted to prevent the victims from getting help.
- [50] In the hours that followed the victims' escape, the respondent disposed of a number of items of property which the victims had left behind, wiped down his car and changed his appearance by shaving his head.
- [51] A medical examination of each victim revealed both suffered minor injuries to the head, body and limbs as well as abrasions to their genitals, consistent with non-sexual intercourse having occurred. One victim ended up with a tampon tightly impacted in the upper part of her vagina.
- [52] The respondent's DNA was located in vulval swabs taken from the victims.

The trial

- [53] The respondent's defence to all charges required the victims to be cross examined both at the committal proceedings and the trial. The respondent falsely suggested to the victims during cross examination that they had offered him sex in return for money and that they had stolen his wallet. These assertions were rejected by both victims.
- [54] Significantly, during sentencing, the judge stated that he was satisfied that, because of the violence inflicted on the victims, the fact that they had previously been locked in the boot of the car, their isolation and the threats made to them, they were at the time they were being raped, genuinely fearful for their lives. He made that finding, conscious of the fact that the jury were unable to agree on the counts of torture.
- [55] His Honour also noted the respondent had shown no remorse for his offending, despite the "overwhelming" evidence against him.

Sentencing

- [56] During sentencing, the respondent told the judge that he "didn't need your leniency...you can shove it up your arse ... give me indefinite, you dog ... Oh, go and get fucked, I never raped those kids, those girls, you can go and fuck yourself ... I never fucking raped them ... they were on the street selling themselves ... they were fucking, dirty, rotten, little sluts".
- [57] The respondent continued to interrupt the judge during the sentencing, professing his innocence, saying, "... feel remorse; how do you feel remorse for people? I'm the victim, not them ... you're biased, very biased ... towards me in your wrapping up". The respondent's behaviour during sentencing ultimately required him to be removed from the Court. Sentencing continued in his absence.
- [58] The respondent was sentenced to 14 years' imprisonment on each count of rape. Periods of imprisonment of four and two years were imposed for the counts of assault with intent to commit rape and deprivation of liberty, respectively. He was sentenced to three months imprisonment for the stealing charge, and was convicted and not otherwise further punished for the charge of obstruction of a police officer. All terms of imprisonment were ordered to be served concurrently.
- [59] The rapes and the assault with intent to commit rape were automatically declared to be serious violent offences pursuant to the *Penalties and Sentences Act 1992*, requiring the respondent to serve 80 per cent of the sentences imposed for those offences. All terms of imprisonment were ordered to be served concurrently. A period of 229 days pre-sentence custody was declared as time already served.

Appeal

- [60] On 28 July 2005, the respondent's application for leave to appeal against sentence in relation to the eight counts of rape, one count of assault with intent to commit rape and two counts of deprivation of liberty was dismissed. On 12 August 2005, the respondent's appeal against conviction was also dismissed.

Events in custody

[61] During this current period in custody, the respondent has completed the following programs aimed at assisting him to address his offending behaviour:

- Getting Started: Preparatory Program (GS:PP), completed at the Townsville Correctional Centre on 25 September 2013;²³
- Sexual Offender Program Allocation Assessment (SOPA), completed at the Townsville Correctional Centre on 23 July 2013;²⁴
- Stable 2007 Assessment, completed at the Townsville Correctional Centre on 14 November 2013;²⁵ and
- Mainstream Sexual Offending Program (MSOP) completed at the Townsville Correctional Centre on 15 December 2014,²⁶ with the program facilitators making these recommendations:

“Finally, [the respondent] is recommended to participate in the Staying on Track: Sexual Offending Maintenance Program (SOMP) in order to consolidate the gains he made through the MSOP and assist him to manage additional risk factors he may experience upon his release. He is encouraged to seek ongoing psychological intervention for his anxiety and general coping with everyday events. He is assessed as needing a significant level of support to reintegrate into the community due to significant periods of incarceration. A period of supervision in the community would also be beneficial and case workers and Queensland Corrective Services staff should encourage him to apply for Parole/ Supervision.”²⁷

[62] On 22 March 2017, the respondent refused an offer of place on the SOMP.²⁸

[63] On 23 June 2016, the respondent refused an offer of a place in the Low Intensity Substance Abuse Intervention program.²⁹

Psychiatric Reports and Risk Assessments

Dr Eve Timmins, Consultant Psychiatrist (4 April 2018)

²³ Affidavit of Katherine McKinnon affirmed 3 October 2018, Exhibit KM-3, 24-6.

²⁴ Affidavit of Katherine McKinnon affirmed 3 October 2018, Exhibit KM-1, 1-10.

²⁵ Affidavit of Katherine McKinnon affirmed 3 October 2018, Exhibit KM-2, 11-23.

²⁶ Affidavit of Katherine McKinnon affirmed 3 October 2018, Exhibit KM-4, 27-38.

²⁷ Affidavit of Katherine McKinnon affirmed 3 October 2018, Exhibit KM-4, 38.

²⁸ Affidavit of Shannon Newell sworn 24 September 2018, 2 [7]-[8].

²⁹ Affidavit of Karola Hoffman sworn 20 September 2018, 2 [7]-[8].

[64] Dr Timmins' report was prepared on instructions from Crown Law to assess the respondent's risk of sexual recidivism in relation to a possible application under the Act. Dr Timmins attempted to examine and interview the respondent on two occasions (22 January 2018 and 5 March 2018) at the Townsville Correctional Centre. On each occasion, the respondent declined the interviews.

[65] Dr Timmins provides this clinical formulation:

"[The respondent] is a 52 year old single male. He is the father to two adult daughters with whom it appears he has limited contact with.

He is currently incarcerated for a range of sexual offences relating to an incident where he abducted two Czechoslovakian women and raped them in October 2002. He has been incarcerated for 14 years and is due for release in April 2019.

While I have not been able to interview [the respondent] I note the following:

- An extensive history of criminal behaviour from an early age
- Difficult upbringing, lack of schooling and sexual abuse while housed in Boys Town
- Long history of incarcerations from 19 years for many offences across various offending domains
- Dysfunctional relationships and lack of employment history
- History of substance abuse from a young age including history of supplying and using substances whilst in custody
- History of a number of psychiatric diagnoses including dissocial personality, amphetamine induced psychosis and anxiety with the prescription of psychotropic medications in the past
- History of poor response to community orders, a number of escapes from custody and lack of motivation to complete custodial courses addressing his offending behaviour
- His history in custody is punctuated by assaults, sexual behaviour towards other prisoners, periods of time in the Detention Unit, manipulative behaviour, threats of self-harm and actual self-harm and generally being disruptive and poorly compliant with directions.
- His lifestyle in the community revolves around substance use, transience and instability, avoiding responsibility, criminal behaviours and dysfunctional relationships."³⁰

Diagnosis

³⁰ Dr Timmins' Report, 41.

[66] Dr Timmins provides this preliminary diagnosis in relation to the respondent:³¹

- Cluster B personality traits (in particular narcissistic and antisocial);
- Psychopathy may be present; and
- Polysubstance Abuse (in sustained remission in a controlled environment).

Actuarial Assessment

[67] Dr Timmins assessed the respondent on a number of risk assessment tools, with the following results:³²

- Psychopathy Checklist (PCL-R): Dr Timmins was unable to score the affective elements of the PCL-R due to the respondent declining to be interviewed. With this caveat, Dr Timmins suspects elements of Psychopathy are present, as follows:
 - *Need for Stimulation*
 - *Manipulation*
 - *Lack of remorse/guilt*
 - *Parasitic lifestyle*
 - *Poor behavioural controls*
 - *Impulsivity*
 - *Irresponsibility*
 - *Failure to Accept Responsibility*
 - *Juvenile Delinquency*
 - *Revocation of Conditional Release*
 - *Criminal Versatility*
- HCR-20: the respondent's history of violent offending suggests that he most probably scores highly across the Historical, Clinical and Risk Management items. In particular:

³¹ Dr Timmins' Report, 40.

³² Dr Timmins' Report, 41-3.

- *Previous Violence*
 - *Relationship Instability*
 - *Employment problems*
 - *Substance Use Problems*
 - *Early Maladjustment*
 - *Prior Supervision Failure*
- Static 99R: the respondent scored 5, placing him in the '**moderate to high**' risk category;
 - Risk of Sexual Violence Protocol (RSVP): based on the documentary evidence the respondent probably scores positively on these items:
 - *Physical Coercion in Sexual Violence*
 - *Psychological Coercion in Sexual Violence*
 - *Extreme Minimisation or Denial of Sexual Violence*
 - *Attitudes that Support or Condone Sexual Violence*
 - *Problems resulting from Child Abuse*
 - *Problems with Employment*
 - *Non-sexual Criminality*
 - *Problems with Supervision*
 - *Problems with Substance Abuse*
 - *Problems with Intimate Relationships*

[68] Dr Timmins explains throughout her report that her opinions were provisional in nature, due to the respondent's refusal to be interviewed.

Risk

[69] As to the question of risk, Dr Timmins reports:

"Given his history and the probable score in the Static-99R I am of the opinion that [the respondent] may have a relatively high risk of sexual reoffending if released into the community without a supervision order in place.

It is recommended he be further assessed for placement under either a continuing detention or a community order as per the Dangerous Prisoner (Sex Offender) Act 2003.

A period of supervision in the community under a community DPSOA order is likely to be beneficial to decrease the risk he poses to the community. I am unclear as to exactly how much the risk would be modified at this stage.

He requires further assessment in order to clarify a number of aspects of his history in addition to his current circumstances, mental state examination, future plans and his own views on his behaviour; all factors that currently remain unclear.”³³

Dr Ken Arthur, Consultant Psychiatrist (14 March 2019)

[70] At the Preliminary Hearing on 9 November 2018, Dr Arthur was appointed by the Court under s 8 to undertake a risk assessment in relation to the respondent. Dr Arthur assessed the respondent on 20 February 2019 at the Townsville Correctional Centre and reported on 14 March 2019.³⁴

Diagnosis

[71] Dr Arthur diagnoses the respondent as suffering from:³⁵

- Antisocial Personality Disorder;
- Cluster B Personality Features (within the narcissistic and borderline spectrum); and
- Many features of Psychopathy.³⁶

Actuarial Assessment

[72] Dr Arthur assessed the respondent on a number of risk assessment tools, with the following results:³⁷

- Static 99-R: the respondent scored 5,³⁸ placing him at the ‘above average risk’ group;
- Psychopathy Checklist (PCL-R): scored 30/40, which meets the diagnostic criteria for **Psychopathy**;
- Risk for Sexual violence Protocol (RSVP): on this instrument Dr Arthur notes:

³³ Dr Timmins’ Report, 43.

³⁴ Dr Arthur’s Report, 1.

³⁵ Dr Arthur’s Report, 43.

³⁶ The Respondent meets the PCL-R cut-off for a diagnosis of Psychopathic Personality Disorder: Dr Arthur’s Report, 44.

³⁷ Dr Arthur’s Report, 44-5.

³⁸ In his oral evidence, Dr Arthur reviewed this to take account of previous charges and stated that the score should be 6, and that the respondent should be placed in the “well above average risk range”: Transcript 25 March 2019, 1-21.

“Utilising this instrument, I have identified the following factors relevant to the future risk of sexual recidivism –

- Physical coercion
- Psychological coercion
- Attitudes supporting sexual violence
- Problems with self-awareness
- Problems with stress/coping
- Problems resulting from child abuse
- Psychopathic personality disorder
- Problems with substance abuse
- Problems with intimate relationships
- Problems with employment
- Non-sexual criminality
- Problems with planning
- Problems with treatment
- Problems with supervision

I have identified further possible risk factors of relevance –

- Extreme minimisation or denial
- Problems with non-intimate relationships”

Risk

[73] On the question of risk, Dr Arthur states:

“The actuarial assessment of [the respondent] utilising the Static 99R places him in the above average risk group. The presence of Psychopathic Personality has implications for recidivism in general and has associations in the literature with increased risk of violent and sexual recidivism. Utilising the RSVP, he presents with a number of factors known to be associated with increased risk of sexual recidivism.

On assessment, [the respondent] presents as less aggressive, impulsive and oppositional compared to his documented behaviour in the early years of his current incarceration. He has shown some ability to regulate his affect and moderate his underlying antisocial and hostile attitudes. It appears that he is accepting some responsibility for the index offences in that he now acknowledges the victims were frightened of him and that he clearly had the intent to rape them. However, he is unrepentant about pleading not guilty to the charges and appealing his conviction, seeing this as his right to attempt to ‘game’ the system to his advantage.

Although he identifies that future substance use is a risk in general reoffending, he now minimises his sex drive/sexual interest and no longer acknowledges his predilection for physically aggressive, dominating sexual activity. He appears to have retained little else from the MSOP and has no interest in repeating it due to his aversion of child sex offenders. Whilst this is not unreasonable given his own history of childhood sexual abuse, this is also typical of his well-established pattern of avoidant coping.

[The respondent's] major risk factor for sexual recidivism appears to be a return to substance abuse which may lead to disinhibition or heighten his sex drive. Reconnecting with criminal peers and re-engaging in drug dealing may reinforce antisocial and negative attitudes towards women as well as putting him into regular contact with emotionally and physically vulnerable females, thus increasing his victim access. His persistent distorted attitudes towards women, relationships and sex are also risk factors, along with psychopathic personality features.

Should [the respondent] reoffend, it is likely to involve unwanted sexual contact or rape. The victims are most likely to be casual sexual partners, prostitutes or women in vulnerable positions (geographical or social isolation). He is more likely to sexually assault women who have slighted him in some way such that he feels justified in seeking revenge against them.

The motivation for further sexual offences would be predominantly sexual gratification but there may be an element of punishment or retribution.

Any future sexual offending is likely to cause significant psychological harm to the victims. Given [the respondent's] history of serious and gratuitous violence towards women, there is a significant risk that he may cause serious physical harm to future victims.

Based on his past history of offending it is difficult to predict imminence. Warning signs that might indicate an increased risk of sexual recidivism include a return to substance use, re-establishing associations with antisocial peers, returning to dealing in drugs, increased sexual preoccupation (as evidenced by a high frequency of sexual encounters or increasing use of prostitutes) and involvement in violent or abusive relationships.

Whilst [the respondent] cites his family connections as protective factors, it should be noted that he claimed to have remained in contact with his family prior to the index offences (indeed, he has previously reported that he had spent a number of weeks with his daughter). This suggests that family contact may not necessarily be protective; it is also concerning that his brother continues to use drugs hence increases their availability. He himself acknowledges that he is susceptible to peer pressure in regard to returning to drug use.

He also cites employment as a potential protective factor, although he has a very poor work history in the community and a somewhat indifferent work ethic in jail.

Based on the above factors, I would estimate that [the respondent's] unmodified risk of sexual recidivism on release would be between moderate and moderately high."³⁹

Dr Scott Harden, Consultant Psychiatrist (17 March 2019)

[74] Dr Harden also was appointed by the Court under s 8 to undertake a risk assessment in relation to the respondent. Dr Harden assessed the respondent on 24 January 2019 at the Townsville Correctional Centre and reported on 17 March 2019.⁴⁰

Diagnosis

[75] Dr Harden diagnoses the respondent as suffering from:⁴¹

- Anti-Social Personality Disorder (Paranoid and psychopathic personality features); and
- Polysubstance Abuse (in remission).

Actuarial Assessment

[76] Dr Harden assessed the respondent on a number of risk assessment tools, with the following results:⁴²

- Static 99-R: the Respondent scored 6, placing him in 'well above average' risk category;
- Psychopathy Checklist (PCL-R): scored 26/40, representing an elevated score but falling below the clinical cut-off;
- Stable 2007: scored 15/24, placed him in the High (greater than 12) needs group in terms of sexual offender's dynamic risk offender's dynamic risk;
- Sexual Violence Risk (SVR-20): On this instrument Dr Harden notes "I assessed [the respondent] as being positive for 10 items out of 20 and possibly positive for 3 items. In my opinion this placed him generally in a HIGH (well above average) risk category on this measure of Sexual Violence Risk."

Risk

[77] On the question of risk, Dr Harden reports:

"[The respondent] is a 53 year old indigenous man who was convicted of an extremely serious and violent sexual offence in 2002 against two young women who he abducted and raped.

³⁹ Dr Arthur's Report, 45-6.

⁴⁰ Dr Harden's Report, 2.

⁴¹ Dr Harden's Report, 18-19.

⁴² Dr Harden's Report, 17.

He did not have a formal previous history of sexual offences but at least one of his previous violent offences on the reported circumstances looked to have some sexual element.

He denies his guilt with regard to a range of facts associated with various of these offences.

He has a very long and diverse criminal history dating back to childhood including property offences, drug offences, motor vehicle offences, fraud offences and offences of interpersonal violence. He has supported himself fire criminal behaviour and has "lived on the street" during much of his time in the community when not in custody.

He has avoided close interpersonal relationships with others in general both sexual and nonsexual and has had a somewhat paranoid attitude to others regarding people as untrustworthy although he states that he has been able to form some close relationships particularly in more recent times.

His early life was characterised by multiple losses including the deaths of siblings and half siblings and a distant relationship with his mother as well as the absence of his biological father. When placed in out-of-home care he allegedly experienced sexual abuse.

He has undertaken treatment programs for sexual offending successfully but has significant ongoing treatment needs. In more recent times he has refused further sexual offending and substance abuse programs in custody. There is no evidence of deviant sexual attraction.

He has limited strengths and experience of living in the community in a prosocial way. He has few supports in the community apart from family and he is reluctant to utilise family as support. He has had serious substance abuse problems previously when living in the community although he maintains that he has been abstinent during this most recent prolonged period in custody. His overall prognosis would be guarded."⁴³

[78] His report continues:

"His ongoing unmodified risk of sexual re-offence in the community in my opinion is most likely in the Well Above Average (High) range.

His greatest risk factors are his general pro criminal attitudes, substance misuse, problems with intimate relationships, lack of concern for others and management of previous sexual behaviour. He has had problems with cooperating with supervision in the community in the past although he has shown a more cooperative approach in custody in more recent years.

⁴³ Dr Harden's Report, 18.

If he were to be placed on a supervision order in the community in my opinion this risk will reduce to Average (Moderate)."⁴⁴

Clinical recommendations

[79] The ongoing treatment and management of the respondent, whether in jail or in the community, were discussed by each of the reporting psychiatrists. The clinical views of the psychiatrists are highly relevant, given the nature of the respondent's diagnosed disorders, personality structure and refusal in recent years to undertake available sexual offender maintenance programs.

[80] Dr Timmins states:

"If the court is of a mind to release [the respondent] it is likely he will need stable accommodation, engagement in substance abuse treatment and placement on a maintenance program to continue to address his sexual offending behaviour.

In addition he will need psychological interventions to further develop his skills in managing emotions, substance use and reintegration into the community.

It is likely [the respondent] will need a significant level of support to reintegrate into the community due to his lengthy period of incarceration since 2002."⁴⁵

[81] Dr Arthur states:

"I believe a supervision order would reduce [the respondent's] risk of sexual recidivism to low.

He should remain abstinent from all drugs of abuse including alcohol and any prescription medication should be closely monitored for abuse potential.

He should undergo regular urine/breathalyser analysis to ensure abstinence. Whilst he claims to have been voluntarily abstinent whilst in jail, he would benefit from further treatment programs such as Alcoholics Anonymous or other drug rehabilitation group programs run in the community. The goal would be to reinforce his expressed desire to remain abstinent from drugs and to develop a prosocial peer group around this issue.

[The respondent's] associations should be monitored and socialising with antisocial peers discouraged. As such, it would be reasonable to place limits on his access to licensed premises.

[The respondent's] relationships should also be scrutinised and monitored.

He would benefit from psychological therapy with a Forensic Psychologist to work with him on improving his coping strategies, addressing his avoidance behaviours,

⁴⁴ Dr Harden's Report, 19.

⁴⁵ Dr Timmins' Report, 43-4.

and addressing his attitudes towards sex/relationships. The goal of therapy would be to improve the quality of both his intimate and non- intimate relationships as well as working on issues pertaining to trust and self-esteem.

Involvement in the SOMP may be of use in revising previous learnings from the MSOP. I do not believe that repeating the MSOP prior to release will be of any great benefit in further reducing his risk of recidivism at this time.

A supervision order would need to be for a minimum of 5 years to provide [the respondent] with supervision and monitoring sufficient to ensure successful transition into the community, the development of prosocial networks and ongoing abstinence from substance abuse."⁴⁶

[82] Dr Harden states:

“He should undertake individual psychological treatment focused on his sexual offending and substance abuse. He should also undertake the group maintenance sexual offending program.

If placed on a supervision order he should have restrictions on substance use an appropriate random testing. Given his significant difficulties with substances in particular opiates consideration should be given to his participation in an Opiate Replacement Program if he develops difficulties in the community.

There is no need for provisions restricting contact with young people on any supervision order.

If placed on a supervision order this should be for five years."⁴⁷

Will a supervision order reduce the relevant risk to an acceptable level?

[83] Whether the opinion is expressed in terms of reducing an unmodified risk from well above average (high), to average (moderate) (Dr Harden), or to low (Dr Arthur), the parties agree that the proposed supervision order will provide adequate protection of the community. I agree.

[84] As the oral evidence of Dr Harden and Dr Arthur explained, a supervision order will by its very nature inhibit access to potential victims to a certain extent. This is due to the “very nature of the monitoring, the constant checking, the surveillance – there’s an inhibitory effect upon contact with victims, particularly contact with victims in an environment where they are at higher risk.”⁴⁸ The biggest effect of a supervision order is in relation to potential substance abuse. In addition, supervision orders by their nature also provide a significant degree of support. Regular appointments with case managers, a requirement to structure activities and

⁴⁶ Dr Arthur’s Report, 46-7.

⁴⁷ Dr Harden’s Report, 19.

⁴⁸ Transcript 25 March 2019, 1-9 | 45 – 1-10 | 5 (Dr Harden).

a requirement to submit plans about their activities, provide this support.⁴⁹ According to Dr Harden, the provision of specialist individual therapy, which is otherwise not easy to obtain, usually with very competent practitioners over a substantial period of time, works to reduce risk in terms of “integrating pro-socially, dealing with the internal structural personality issues and some of the views that may predispose to offending – for example, somewhat paranoid views about women ...”⁵⁰ Dr Arthur considers that a supervision order will reduce the respondent’s unmodified risk to low and that such a reduction arises because the respondent’s offences were related to general anti-social behaviour and significant substance abuse. The respondent normalised violence to some degree and his substance abuse disinhibited him. A supervision order would address those core risk factors.⁵¹

What should be the duration of the supervision order?

- [85] As noted, this is a question for the Court, assisted by expert opinion, if any, about the reduction in risk over time. The respondent, upon his release, will move to approved accommodation with his mother in South East Queensland and avoid the challenges and the pitfalls of being accommodated in a correctional precinct with other sex offenders, including paedophiles, for a substantial time.
- [86] The respondent’s written submissions relied upon Dr Harden’s view that any supervision order should be for five years, and submitted that there is insufficient evidence upon which the Court could conclude a supervision order for a period of 10 years is necessary to ensure protection of the community. I had difficulty with this submission, and at the start of the hearing attempted to identify my concerns with a view to obtaining evidence and submissions about what is likely to change after five years. In short, my concerns related to:
- The respondent’s poor attitude to authority in general and his failure to appreciate the need for a supervision order in his case;
 - His resistance in recent years to undertaking programs and his mixed performance on the MSOP;
 - The lack of support which he has in the community;
 - The evidence of a consistent pattern of minimising, avoiding or denying the extent of his offending.

More generally, his anti-social personality disorder and psychopathy, as evidenced by his lack of remorse and general lack of empathy for his victims, seems unlikely to change in the next five years. Then there is his appalling attitude to women.

Attitude to authority and preparedness to undertake counselling

- [87] His poor attitude to authority and his resistance to undertaking certain programs in custody called into question, in my mind, his degree of co-operation and commitment to undertaking

⁴⁹ Ibid 1-10 ll 10-15.

⁵⁰ Ibid 1-10 ll 13-19.

⁵¹ Transcript 25 March 2019, 1-23 ll 30-40 (Dr Arthur).

individual counselling in the community. While the respondent's approach to authority and custodial conduct has improved in recent years, he is far from a model prisoner. He was sacked from his employment as a barber due to stealing items. The theft was observed on CCTV, yet he blamed the unit officers for his actions. In July 2017 he refused to engage in a panel review regarding his classification and progression plan. In the same year he displayed a poor attitude towards work, and in December 2017 he declined to be interviewed in relation to a rehabilitation needs assessment review. It appears that he took the attitude that he was going to be released upon his full-time discharge date and move to New South Wales. He had a limited understanding of a supervision order, and explained to Dr Arthur that he knew that he would have to wear a bracelet and do what the authorities wanted. He also stated "I think it's crap ... it's for child molesters like Fardon."⁵² If the respondent does not understand that supervision orders are for adult rapists as well as paedophiles, he is hardly likely to adopt a co-operative and constructive approach to gaining the benefits which it may offer his rehabilitation and reducing his risk of re-offending.

- [88] I have previously noted the respondent's refusal to undertake a Sexual Offending Maintenance Program in order to consolidate the gains he made through the MSOP. The respondent's refusal to participate was explained by his not wishing to have contact in a group with child sex offenders. That attitude may be understandable, given the sexual abuse he suffered as a young person. His refusal to accept an offer of a place in the Low Intensity Substance Abuse Intervention Program cannot be explained on this ground.
- [89] Despite these concerning aspects, the respondent is prepared to engage in individual counselling under a supervision order. He has had some involvement with counselling in the context of a civil claim over his abuse in an institution, and it seems likely that he will be prepared to engage with a counsellor under a supervision order. The respondent is likely to want to focus on the sexual abuse he suffered at Boys Town rather than confront the sexual abuse he perpetrated on his victims.
- [90] The respondent's personality traits make it likely that he will only have "an instrumental view of things" and will attend for therapy because he understands he is required to under the supervision order. Nevertheless, the evidence is that counselling will assist him. Not all therapy is about emotional catharsis, and for someone like the respondent the therapy is likely to be targeted at helping him to "redesign his life so that it is not an offending lifestyle".⁵³ It will be about "pragmatic coping" and looking at past patterns of behaviour and how to avoid them. Dr Harden observed that sometimes it is easier with people who are "a bit more psychopathic" because they see what they have lost and what is in it for them. Also, if they are a little older, they have lost some of their aggression and impulsivity, and can better understand how they could work towards having a better life.⁵⁴
- [91] Dr Arthur agreed with Dr Harden about the respondent's reduction in impulsivity and aggression since he has been in jail, and noted that this occurs over time with people with anti-social personality disorders as they approach their 50's. Their anti-social personality disorder becomes less aggressive, but more anxious. Dr Arthur was asked whether, given the respondent's history of refusing places on programs in recent years, one can have any

⁵² Dr Arthur's report [220].

⁵³ Transcript 1-13 ll 5 (Dr Harden).

⁵⁴ Ibid at ll 10-15.

confidence that he will engage with any form of counselling or psychological intervention in the community. He answered that if the respondent was given the option of receiving counselling or not, he probably would not. However, an order did not give him a choice and the respondent had expressed an interest in pursuing some further psychological therapy surrounding his sexual abuse. In Dr Arthur's considerable experience in treating patients on supervision orders, if the respondent has to attend a clinical psychologist or a psychiatrist for a period each week, then it is very hard not to engage with that process. Accordingly, Dr Arthur was confident that the respondent would engage "to some degree with the therapeutic process on an order, but if you gave him an option he probably wouldn't."⁵⁵

Lack of support in the community

- [92] The respondent lacks a network of support in the community. He has declined to engage with members of the indigenous community. His mother is aged about 73. He has a niece in gainful employment. However, he has had limited contact with his family whilst he has been in custody. The relevant documentation indicates that in 2014 he stated that he did not intend to reinstate communication with his family and he subsequently reported that he had ceased contact with his family whilst incarcerated as he felt in the past this contact had not been beneficial for him. In any event, the respondent instructs, and I accept, that he has had telephone and correspondence contact with his mother in recent times.
- [93] Re-engaging with his family is likely to be a difficult process. One of his brothers is said to be a drug user and, apart from the issue of potential access to drugs, one might anticipate some conflict between the respondent and some of his siblings about domestic arrangements and finances. Another matter of concern raised by me, given the importance of the respondent's relationship with his mother, is how the respondent will cope when his mother passes. No-one can predict these things, but the respondent's past difficulties in relationships and his personality traits suggest that he will not cope very well at all. If, by then, a supervision order has expired it would not serve to constrain his behaviour and a possible relapse into substance abuse as a means of coping with his mother's passing.

The passage of time

- [94] Some factors, unrelated to the respondent's individual circumstances, warrant consideration in deciding the appropriate duration of the supervision order. In general, the longer the supervision order the greater the protection of the community, after taking into account the negative effects of any supervision order in terms of prejudice to rehabilitation, including by being labelled a "Dangerous Prisoner Sex Offender" and stigmatised in the general community. A supervision order that is too long may actually prejudice a person's rehabilitation and diminish protection of the community. It may prevent timely transition into a normal life and ongoing rehabilitation. A supervision order of excessive duration may be counterproductive and, like an excessive term of imprisonment, prove crushing, jeopardise rehabilitation and, as a result, actually diminish protection of the community.
- [95] While at a level of generality one can say that a supervision order of seven or ten years, compared to one of five years, gives the order a better chance of achieving its intended objective of risk reduction, a balance must be struck.

⁵⁵ Transcript 1-25 ll 13-15.

- [96] The duration of any supervision order is informed by general studies of recidivism. If an offender does not commit a further offence during a period of five years, then the risk of recidivism is substantially reduced. These statistics about recidivism are based upon large-scale groups of offenders. However, the point remains that the longer an offender remains offence-free, the lower is his risk of re-offending at that point. So after a five year period of compliance, the respondent's risk of recidivism will reduce significantly.
- [97] Account should be taken of the respondent's age and reports that whilst in custody in recent years he has shown less impulsivity. The psychiatrists do not suggest that his libido will be much-reduced in five years. As Dr Harden explained in his oral evidence, the respondent is an anti-social adult rapist, and re-offending rates for that category of sexual offender decline after 40 and quite significantly after 50, not because of loss of sexual drive, "because that is not what the rape is really about, but because of decreasing impulsivity, decreasing aggression and a general slowing of their physical restlessness. They tend to think more and reflect a little more".⁵⁶ Accordingly, I take into account that there may be a reduction in risk simply by virtue of the passage of time for an offender aged in his 50's with the respondent's personality and offence history.

The respondent's anti-social personality disorder

- [98] I have regard to the statistical basis for concluding that the respondent's risk of recidivism will be less in five years' time if he does not commit further offences during that time, and also that the passage of time might reduce his impulsivity. However, even after five years, most of the factors noted in Dr Arthur's report will remain. Using the Risk for Sexual Violence Protocol (RSVP), Dr Arthur identified numerous factors relevant to the future risk of sexual recidivism which I have quoted in [72].

Expert opinion about reduction in risk over time

- [99] Dr Harden expressed the view in his oral evidence that if the respondent has "five years living in the community, having to organise plans, looking for work, meeting with ... someone who understands working with people who have this kind of personality, yes, I think his risk will really reduce significantly over that period".⁵⁷ With age, impulsive, self-defeating behaviour tends to decrease. Whilst the respondent's level of empathy may not increase over that five year period, Dr Harden observed that his level of empathy is not really the issue: his behaviour is the issue.⁵⁸ The respondent's substance abuse problem is currently in remission due to his incarceration. Assuming compliance with the supervision order, he will continue to abstain from illicit drugs for its duration.
- [100] If the supervision order was to be for five years then the issue arises as to what will constrain him from giving in to temptation after that date to use illicit drugs like methylamphetamine. Dr Harden observed that the respondent will have had five years of abstinence in the community which will be of assistance and, although in the absence of routine drug testing, he could easily resume drug use, the chance of his doing so is decreased after that period.⁵⁹ As to

⁵⁶ Transcript 1-13 ll 25-30.

⁵⁷ Transcript 1-13 ll 37-39.

⁵⁸ Transcript 1-15 l 4.

⁵⁹ Transcript 1-15 ll 13-20.

the risk of his resuming substance abuse after a five year supervision order, one is comparing him at 58 to the period of his substance abuse in his 30's. Dr Harden thought his risk of resuming substance abuse would be substantially diminished, particularly if he has "a new template of being in the community and having a rewarding life in the community for a period of time". Understandably, Dr Harden could not quantify the reduction in risk after five years, but instead pointed to the matters I have mentioned, including statistics based on groups of offenders.

- [101] When asked the question of at what point in the future will the respondent's unmodified risk of serious sexual re-offending reduce to low, Dr Arthur frankly and helpfully said he did not know. He accepted the recidivism literature referred to by Dr Harden, with its limitations, indicated that if an offender does not re-offend in the community for five years, then the risk does reduce significantly. Dr Arthur noted that a related issue is whether or not someone on a supervision order can be seen as being in the community as such, given the amount of control exerted over them and the restrictions they have. He accepted that the respondent's risk will reduce over time, and the longer he goes without re-offending, that risk will reduce. However, it was difficult to say how long that would be until it was low. Dr Arthur favoured a period that was longer than five years, partly because of the diagnostic uncertainties involved in assessing the risk of the respondent re-offending.
- [102] The factors that inclined Dr Arthur to conclude that a longer order would be necessary include the unresolved issue of whether there is a degree of paraphilia.⁶⁰ There were some elements of sadism to his offences and other reports indicated that he had some predilection for rough sex and became aroused at his partner's pain. Another factor, in Dr Arthur's view, is the presence of psychopathy, which increases the respondent's risk of recidivism. It cannot be treated, as such, only managed with cognitive behaviour therapy and other types of therapy to improve an individual's function and general attitudes. However, the respondent's underlying personality structure means that he is going to remain psychopathic. In Dr Arthur's experience in treating patients on supervision orders, a combination of psychopathy and anything else tends to increase the treatment process.⁶¹ In addition, some people on such orders tend to be able to behave reasonably well for a certain length of time. Some people on five year orders do very little for five years, and largely wait out the expiry of the order, whereas people on longer orders tend to have more motivation to change their lives, improve contact with family, engage in work and engage in relationships. If that is encouraged then it brings them into emotional and interpersonal conflicts. Therefore, a longer duration of order certainly gives people more time to address these matters in an environment where they are still supported. As Dr Arthur explained, the management of the order "allows people to be pulled back from the brink, so to speak".⁶²

Conclusion on duration

- [103] There are a number of uncertainties about the respondent's likely response to supervision, possible resistance to treatment and therapy and the stability of his expected domestic environment. There can be no great confidence that the respondent will build a productive therapeutic relationship with a clinician at an early stage of a supervision order. Dr Arthur's

⁶⁰ Transcript 1-28 | 40.

⁶¹ Transcript 1-29 | 12.

⁶² Transcript 1-29 | 31.

evidence, which I accept, is that it is unknown how long it will take for a therapeutic relationship to be built between the respondent and the clinician.⁶³

- [104] The position would be very different if the respondent had recently completed a sexual offending program in custody upon which individualised treatment under a supervision order could build. Instead, in recent years he has declined to participate in a sex offender maintenance program and even declined to complete a low intensity substance intervention program. As Dr Arthur notes in his report, the respondent appears to have retained little from the MSOP program.
- [105] Any therapy and counselling does not start from a solid foundation of recently completed programs or a commitment to obtaining the benefits of supervision and support under a supervision order. The respondent appears to have a very poor understanding of the purpose of a supervision order in a case such as his. His past attitude towards programs makes it likely that he will attempt to “game” the system to his advantage or at least be resistant to supervision.
- [106] The respondent has a very poor work history in the community and has displayed an indifferent work ethic in jail. His prospects of obtaining employment seem poor. He has not acquired the vocational or other skills that would equip him to do voluntary work in the community or develop a pro-social environment by attending a program like a Mens’ Shed. The respondent lacks support in the community and, even with the ongoing support of his mother and stable accommodation, is unlikely to develop a strong network of pro-social, supportive relationships.
- [107] The respondent has an appalling attitude to women and is unlikely to form a positive, respectful relationship with any woman. As Dr Arthur reported “his persistent distorted attitudes towards women, relationships and sex are also risk factors, along with psychopathic personality features”.⁶⁴
- [108] I acknowledge that it is possible that the factors identified by Dr Harden and Dr Arthur will reduce the respondent’s risk of serious sexual offending to an acceptable level after five years, assuming compliance with the supervision order and the benefits it provides in terms of abstinence from drugs, support and therapy aimed at improving the respondent’s behaviour. The supervision order should not be longer than it needs to be because of its severe intrusions upon the liberty of an individual who has completed a sentence and the risk that, over time, it may prove to become counter-productive to the respondent’s rehabilitation and a consequent reduction in risk. While it is possible that a supervision order of only five years could see a material reduction in risk to a sufficiently low and acceptable level, the paramount consideration remains the protection of the community. The uncertainties concerning the respondent’s attitude to supervision, his instrumental and likely resistant engagement with therapy, his past performance on programs, his poor work history and poor work prospects, the uncertain nature of his relationships with members of his family, his lack of a broader social network to support him and his underlying personality disorders and psychopathy mean that I am not satisfied that his risk of re-offending in the absence of a supervision order would be reduced to an acceptably low level after five years. The evidence of the respondent’s

⁶³ Transcript 1-30 ll 5-8.

⁶⁴ Dr Arthur’s Report [275].

current condition and informed predictions about the future lead me to conclude that the appropriate duration of the supervision order is 10 years.

Exercise of discretions under s 13

- [109] Having regard to each of the matters stated in s 13(4) and, in particular the risk assessments to which I have referred, I am satisfied to the high degree required that the respondent presents an unacceptable risk of committing a serious sexual offence if released from custody without a supervision order being made. The evidence is cogent and satisfies me to a high degree of probability.
- [110] The respondent concedes that a supervision order should be made. That concession is correctly made. Having regard to the evidence, including the expert evidence, I independently conclude that the respondent poses an unacceptable risk of committing a serious sexual offence in the absence of a supervision order. The applicant correctly acknowledges that adequate protection of the community can be ensured by the making of a supervision order.
- [111] The respondent has a poly-substance abuse which is currently in remission in his controlled environment. A supervision order is necessary to ensure that he does not abuse substances and, whilst under their influence, commit a serious sexual offence. More generally, it is not simply the respondent's poly-substance abuse (in remission) which justifies the making of a supervision order. The respondent's personality traits, in conjunction with the risk of his reverting to drugs and anti-social behaviour, makes him an unacceptable risk of committing a serious sexual offence in the absence of a supervision order.
- [112] While the respondent has undertaken some programs in custody which were aimed at assisting him to address his offending behaviour, they were several years ago. His refusal of an offer of a place on the Sexual Offending Maintenance Program and on the Low Intensity Substance Abuse Intervention program is a matter of concern, notwithstanding the respondent's explanation that his reasons for not accepting those offers was that he did not wish to consort with paedophiles.
- [113] The respondent is amenable to receiving counselling treatment if released on a supervision order.
- [114] Reduction of his risk to an acceptable level depends upon the respondent being suitably accommodated and supported, and also continuing to obtain treatment. Absent indications to the contrary, I proceed on the basis that the requirements of the proposed supervision order can be reasonably and practicably managed by Corrective Services officers.
- [115] I have regard to the expert evidence about the respondent's current risk of sexual re-offending and the level to which it will be reduced if a supervision order is made. Assisted by that evidence and the submissions of the parties, I conclude on the basis of the evidence before me that the respondent is likely to remain an unacceptable risk in the absence of a supervision order for a period of ten years. Expressed differently, the evidence suggests that the respondent will reach a point at which he is an acceptable risk without a supervision order in ten years' time. Therefore, it is appropriate that the supervision order be for a period of ten years.
- [116] I propose to make a supervision order in accordance with Annexure A.

ATTACHMENT**SUPERVISION ORDER**

Before: Justice Applegarth

Date: 28 March 2019

Initiating document: Originating Application filed 11 October 2018 (CFI No. 1)

THE COURT, being satisfied that there are reasonable grounds for believing that the respondent is a serious danger to the community in the absence of an Order made under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (the Act), ORDERS THAT:

1. The respondent be subject to the following requirements until 8 April 2029:

The respondent must:

Mandatory Requirements:

- (1) be under the supervision of a Corrective Services officer for the duration of the order;
- (2) report to the Queensland Corrective Services Probation and Parole Office closest to his place of residence between 9am and 4pm on the day of the making of this order and at that time advise the officer of the respondent's current name and address;
- (3) report to, and receive visits from, a Corrective Services officer at such times and at such frequency as determined by Queensland Corrective Services;
- (4) notify a Corrective Services officer for every change of the respondent's name, place of residence or employment at least two (2) business days before the change occurs;
- (5) comply with a curfew direction or monitoring direction;
- (6) comply with any reasonable direction under section 16B of the Act given to him;
- (7) comply with every reasonable direction of a Corrective Services officer that is not directly inconsistent with a requirement of the order;
- (8) not leave or stay out of Queensland without the permission of a Corrective Services officer;

- (9) not commit an offence of a sexual nature during the period of the order;

Employment

- (10) seek permission and obtain approval from a Corrective Services officer prior to entering into an employment agreement or engaging in volunteer work or paid or unpaid employment;
- (11) notify a Corrective Services officer of the nature of his employment, or offers of employment, the hours of work each day, the name of his employer and the address of the premises where he is or will be employed at least two (2) days prior to commencement or any change;

Accommodation

- (12) reside at a place within the State of Queensland as approved by a Corrective Services officer by way of a suitability assessment and obtain written approval prior to any change of residence;
- (13) if the accommodation is of a temporary or contingency nature, comply with any regulations or rules in place at this accommodation and demonstrate reasonable efforts to secure alternative, viable long term accommodation to be assessed for suitability by Queensland Corrective Services;
- (14) not reside at a place by way of short term accommodation, including overnight stays, without the permission of a Corrective Services officer;

Indictable Offences and other Behaviour

- (15) not commit an indictable offence involving violence during the period of the order;

Movements, Associates and Disclosure

- (16) respond truthfully to enquiries by a Corrective Services officer about his activities, whereabouts and movements generally;
- (17) not have any direct or indirect contact with a victim of his sexual offences;
- (18) disclose to a Corrective Services officer the name of each person with whom he associates and respond truthfully to requests for information from a Corrective Services officer about the nature of the association, address of the associate if known, the activities undertaken and whether the associate has knowledge of his prior offending behaviour;
- (19) submit to and discuss with a Corrective Services officer a schedule of his planned and proposed activities on a weekly basis or as otherwise directed;

- (20) if directed by a Corrective Services officer, make complete disclosure of the terms of this supervision order and the nature of his past offences to any person as nominated by a Corrective Services officer, who may contact such persons to verify that full disclosure has occurred;
- (21) notify a Corrective Services officer of all personal relationships entered into by the respondent;

Motor Vehicles

- (22) notify a Corrective Services officer of the make, model, colour and registration number of any vehicle owned by or generally driven by him, whether hired or otherwise obtained for his use;

Drugs and Alcohol

- (23) abstain from the consumption of alcohol and illicit drugs for the duration of this order;
- (24) submit to any form of drug and alcohol testing including both random urinalysis and breath testing as directed by a Corrective Services officer;
- (25) disclose to a Corrective Services officer all prescription and over the counter medication that he obtains;
- (26) take prescribed drugs as directed by a medical practitioner and disclose details of all prescribed medication as requested to a Corrective Services officer;
- (27) not visit premises licensed to supply or serve alcohol, without the prior written permission of a Corrective Services officer;

Medical and Treatment

- (28) attend upon and submit to assessment, treatment, and/or medical testing by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by a Corrective Services officer at a frequency and duration which shall be recommended by the treating intervention specialist;
- (29) permit any medical, psychiatrist, psychologist, social worker, counsellor or other mental health professional to disclose details of treatment, intervention and opinions relating to level of risk of re-offending and compliance with this order to Queensland Corrective Services if such a request is made for the purposes of updating or amending the supervision order and/or ensuring compliance with this order;
- (30) attend any program, course, psychologist, social worker or counsellor, in a group or individual capacity, as directed by a Corrective Services officer in consultation with treating medical, psychiatric, psychological or other mental health practitioners where

appropriate;

Images and Pornography

- (31) not access pornographic images on a computer or on the internet or purchase or obtain pornographic material in any other format without the prior written approval of a Corrective Services officer, in consultation with the treating psychiatrist or psychologist;

Computers, telephones and technology

- (32) obtain the prior written approval of a Corrective Services officer before accessing a computer or the internet;
- (33) supply to a Corrective Services officer details of any email address, instant messaging service, chat rooms, or social networking sites including user names and passwords;
- (34) allow any other device including a telephone to be randomly examined. If applicable, account details and/or telephone bills are to be provided upon request of a Corrective Services officer;
- (35) advise a Corrective Services officer of the make, model and telephone number of any mobile telephone owned, possessed or regularly utilised by him within 24 hours of connection or commencement of use, including reporting any changes to mobile telephone details;
- (36) except with prior written approval from a Corrective Services officer, not own, possess or regularly utilise more than one mobile telephone.

Signed:

Registrar of the Supreme Court of Queensland