SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v ZBA* [2020] QSC 4
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ZBA** (respondent)
FILE NO/S:	BS No 10345 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	31 January 2020
DELIVERED AT:	Brisbane
HEARING DATE:	20 January 2020
JUDGE:	Davis J
ORDER:	**The respondent be detained in custody for an indefinite term for control, care and treatment.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent was subject to examination by psychiatrists for the purposes of the application – where the respondent upon the application conceded that he is an unacceptable risk of committing a serious sexual offence in the absence of an order made under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (DPSOA) – where the respondent contended that the adequate protection of the community could be ensured upon his release by the imposition of a supervision order – where the medical evidence was that he could be supervised but his rehabilitation could only be achieved by treatment only available within custody – where the applicant pressed for an order for the indefinite detention of the respondent to enable him to undergo treatment

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 3, s 5, s 8, s 9A, s 11, s 12, s 13, s 13A, s 16

Attorney-General for the State of Queensland v DBJ [2017] QSC 302, cited

Attorney-General for the State of Queensland v Francis [2007] 1 Qd R 396, followed

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

Attorney-General for the State of Queensland v LKR [2018] QSC 280, cited

Attorney-General for the State of Queensland v Newman [2019] 1 Qd R 1, cited

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

Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575, cited

Thompson v Attorney-General for the State of Queensland [2018] QCA 172, cited

COUNSEL:	J Tate for the applicant C Reid for the respondent
SOLICITORS:	Crown Solicitor for the applicant Legal Aid Queensland for the respondent

[1] The respondent is presently held in custody under an interim detention order made under the provisions of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the DPSOA).[1] He was, until 23 January 2020, serving a term of imprisonment for a "serious sexual offence"[2] committed against a four year old girl (the index offence).

[2] The Attorney-General applied for orders under the DPSOA. Dr Ken Arthur, consultant psychiatrist, examined the respondent and prepared a risk assessment report.[3] On 15 October 2019, Lyons SJA, on a hearing pursuant to s 8 of the DPSOA, held that there were reasonable grounds for believing that the respondent is a serious danger to the community in the absence of an order under Part 2 Division 3 of the DPSOA and:

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1 Section 9A.

2 As defined in the *Dangerous Prisoners (Sexual Offenders) Act* 2003.

3 Dated 18 February 2019.

1. appointed consultant psychiatrists, Dr Scott Harden and Dr Andrew Aboud, to prepare risk assessment reports;[4] and

2. set the hearing date of the application for final orders as 20 January 2020.[5]

Relevant factual context

[3] The respondent is an Indigenous man who was born in 1962. He is now 57 years of age. He has a criminal history (apart from the index offence), the first entry being a conviction for wilful damage to property recorded in 1988 at the Mount Garnet Magistrates Court.

[4] Between October 1990 and April 1998, he was convicted in the Magistrates Court of minor, irrelevant offences.

[5] On 13 March 2000, the respondent was convicted in the Cairns District Court of sexual offences.[6] At the time of the commission of those offences, the respondent was 37 years of age. The victim was a 17 year old male who was known to the respondent. The respondent and the victim were drinking together and then the victim retired to bed. He woke to the respondent rubbing his stomach and chest with his penis in the respondent's mouth.

[6] The index offence was committed on 24 July 2015. At that point, the respondent was 53 years of age. The victim was a four year old girl. He and the victim were living in the same house with nine other children and some adults. The respondent and the victim were playing in the backyard of the house and the respondent inserted his penis into her mouth and thrusted his penis in and out of her mouth for a minimum of about two minutes.

[7] On 12 September 2016, the respondent was sentenced to four years imprisonment at the Mount Isa District Court, 416 days of pre-sentence custody were declared and a parole eligibility date of 12 September 2016 (the date of the sentence) was set.

[8] The respondent did not obtain a grant of parole and an application for orders under the DPSOA was filed on 23 September 2019.

Statutory scheme

[9] Section 3 of the DPSOA identifies the objects of the legislation as follows:

> "**3 Objects of this Act**
>
> The objects of this Act are—
>
> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and

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[4] *Dangerous Prisoners (Sexual Offenders) Act* 2003, ss 8, 11 and 12.

[5] Section 8.

[6] And some other offences.

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

[10] The objects of the DPSOA are fulfilled by a scheme providing for the continued detention of prisoners beyond the expiry of their sentences or, alternatively, their release to the community upon supervision.

[11] By s 5 of the DPSOA, the Attorney-General may apply for both an order under s 8 (allowing for interim detention orders to be made) and also an order under Division 3 of Part 2.[7] Division 3 of Part 2 provides for the making of final orders. Applications can only be brought under s 5 against a "prisoner".

[12] Section 5, which authorises the application for orders and which contains the definition of "prisoner", is as follows:

"**5 Attorney-General may apply for orders**

(1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.

(2) The application must—

(a) state the orders sought; and

(b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and

(c) be made during the last 6 months of the prisoner's period of imprisonment.

(3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (***preliminary hearing***) to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order.

(4) The return date for the preliminary hearing must be within 28 business days after the filing.

(5) A copy of the application and any affidavit to be relied on by the Attorney-General must be given to the prisoner within 2 business days after the filing.

(6) In this section—

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[7] In which s 13 is located.

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

[13] The definition of "prisoner" in s 5(6) introduces the concept of "a serious sexual offence". That term is defined in the Schedule as follows:

> "***serious sexual offence*** means an offence of a sexual nature, whether committed in Queensland or outside Queensland—
>
> (a) involving violence; or
>
> (b) against a child; or
>
> (c) against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years."

[14] Section 8 provides for a preliminary hearing. It is in terms:

> "**8 Preliminary hearing**
>
> (1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
>
> (2) If the court is satisfied as required under subsection (1), it may make—
>
> (a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and
>
> (b) if the court is satisfied the application may not be finally decided until after the prisoner's release day –
>
> (i) an order that the prisoner's release from custody be supervised; or
>
> (ii) an order that the prisoner be detained in custody for the period stated in the order."

[15] The term "prisoner", as used in s 8 is defined differently to the definition in s 5(6). In s 8, the term "prisoner" has the same meaning as that defined for the purposes of the *Corrective*

Services Act 2006.[8] The distinction is, though, not relevant here.[9] The respondent was clearly a "prisoner" at all times relevant to the DPSOA proceedings.

[16] Section 8 introduces the notion of "serious danger to the community". This term is defined in s 13 which is the pivotal section in Division 3 of Part 2. Section 13 is in these terms:

> "**13 Division 3 orders**
>
> (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).
>
> (2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made.
>
> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision.
>
> (4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following—
>
> (aa) any report produced under section 8A;
>
> (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
>
> (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;

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[8] *Dangerous Prisoners (Sexual Offenders) Act* 2003 s 2 and the dictionary which is the Schedule to the Act.

[9] See *Attorney-General for the State of Queensland v Newman* [2019] 2 Qd R 1.

(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;

(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;

(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;

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

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

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

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

(j) any other relevant matter.

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

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

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

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

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

(b) the court must consider whether –

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

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

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

[17] Orders which can be made under s 8 include orders that a prisoner undergo psychiatric examination. The evidence so obtained is then relied upon by the Attorney-General on the application brought under s 13. Relevant to examinations ordered under s 8, are ss 11 and 12 which are in these terms:

"**11 Preparation of psychiatric report**

(1) Each psychiatrist examining the prisoner must prepare a report under this section.

(2) The report must indicate—

(a) the psychiatrist's assessment of the level of risk that the prisoner will commit another serious sexual offence—

(i) if released from custody; or

(ii) if released from custody without a supervision order being made; and

(b) the reasons for the psychiatrist's assessment.

(3) For the purposes of preparing the report, the chief executive must give each psychiatrist any medical, psychiatric, prison or other relevant report or information in relation to the prisoner in the chief executive's possession or to which the chief executive has, or may be given, access.

(4) A person in possession of a report or information mentioned in subsection (3) must give a copy of the report or the information to the chief executive if asked by the chief executive.

(5) Subsection (4) authorises and requires the person to give the report or information despite any other law to the contrary or any duty of confidentiality attaching to the report.

(6) If a person required to give a report or information under subsection (4) refuses to give the report or information, the chief executive may apply to the court for an order requiring the person to give the report or information to the chief executive.

(7) A person giving a report or information under subsection (4) or (6) is not liable, civilly, criminally or under an administrative process, for giving the report or information.

(8) Each psychiatrist must have regard to each report or the information given to the psychiatrists under subsection (3).

(9) Each psychiatrist must prepare a report even if the prisoner does not cooperate; or does not cooperate fully, in the examination.

12 Psychiatric reports to be given to the Attorney-General and the prisoner

(1) Each psychiatrist must give a copy of the psychiatrist's report to the Attorney-General within 7 days after finalising the report.

(2) The Attorney-General must give a copy of each report to the prisoner on the next business day after the Attorney-General receives the report."

[18] Section 16 deals with the contents of supervision orders:

"**16 Requirements for orders**

(1) If the court or a relevant appeal court orders that a prisoner's release from custody be supervised under a supervision order or interim supervision order, the order must contain requirements that the prisoner—

(a) report to a Corrective Services officer at the place, and within the time, stated in the order and advise the officer of the prisoner's current name and address; and

(b) report to, and receive visits from, a Corrective Services officer as directed by the court or a relevant appeal court; and

(c) notify a Corrective Services officer of every change of the prisoner's name, place of residence or employment at least 2 business days before the change happens; and

(d) be under the supervision of a Corrective Services officer; and

(da) comply with a curfew direction or monitoring direction; and

(daa) comply with any reasonable direction under section 16B given to the prisoner; and

(db) comply with every reasonable direction of a Corrective Services officer that is not directly inconsistent with a requirement of the order; and

Examples of direct inconsistency—

If the only requirement under subsection (2) contained in a particular order is that the released prisoner must live at least 1km from any school—

1 A proposed direction to the prisoner would be directly inconsistent if it requires the released prisoner to live at least 2km from any school.

2 A proposed direction to the prisoner would not be directly inconsistent if it requires the released prisoner to live at least a stated distance from something else, including, for example, children's playgrounds, public parks, education and care service premises or QEC service premises.

3 A proposed direction to the prisoner would not be directly inconsistent if it requires the released prisoner not to live anywhere unless that place has been approved by a Corrective Services officer.

(e) not leave or stay out of Queensland without the permission of a Corrective Services officer; and

(f) not commit an offence of a sexual nature during the period of the order.

(2) The order may contain any other requirement the court or a relevant appeal court considers appropriate—

(a) to ensure adequate protection of the community; or

Examples for paragraphs (a)—

- a requirement that the prisoner must not knowingly reside with a convicted sexual offender
- a requirement that the prisoner must not, without reasonable excuse, be within 200m of a school
- a requirement that the prisoner must wear a device for monitoring the prisoner's location

(b) for the prisoner's rehabilitation or care or treatment."

[19] Section 13A deals with fixing the term of the supervision order. Section 13A provides:

"**13A Fixing of period of supervision order**

(1) If the court makes a supervision order, the order must state the period for which it is to have effect.

(2) In fixing the period, the court must not have regard to whether or not the prisoner may become the subject of—

(a) an application for a further supervision order; or

(b) a further supervision order.

(3) The period cannot end before 5 years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later."

The medical evidence

[20] The first of the three psychiatrists to interview the respondent in relation to the present proceedings was Dr Arthur. That occurred on 25 January 2019 at the Townsville Correctional Centre. Dr Arthur, in evidence before me, explained that the interview did not go well and the respondent was not particularly cooperative.[10] Drs Aboud and Harden received more cooperation from the respondent than did Dr Arthur. During Dr Arthur's cross-examination, this exchange occurred:

> "HIS HONOUR: It's fairly – just – it's fairly reasonable though, isn't it, that he may be – it's fairly reasonable to understand why he may have been less forthcoming with you than with the – Dr Aboud and Dr Harden, because at least by that stage he has had an opportunity to come to grips with the fact that he has got to face an application like this?---Yes, your Honour."[11]

[21] Dr Aboud interviewed the respondent at the Townsville Correctional Centre on 8 November 2019. Dr Harden interviewed him at the Townsville Correctional Centre on 28 November 2019. Both doctors prepared reports. However, for reasons that are not particularly clear, the respondent made significant disclosures to Dr Aboud which he did not make to Dr Arthur and did not repeat later to Dr Harden.

[22] The revelations reported to Dr Aboud included:

(i) the respondent was primarily sexually attracted to males;

(ii) the respondent is sexually attracted to children; and

(iii) the respondent had previously resorted to child pornography to achieve sexual satisfaction.

[23] Dr Aboud then diagnosed the respondent as suffering "Paedophilia, non-exclusive type, and sexually attracted to both males and females", "Alcohol Dependence Disorder", and "Antisocial Personality Disorder".

[24] Dr Aboud assessed risk, and explained his recommendations in these terms:

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[10] Transcript 1-25.

[11] T1-29.

"Taking into consideration the various actuarial and dynamic assessments of future violence and sexual violence risk that have been applied, it is my view that [the respondent's] **overall unmodified risk would currently be high in respect of sexual reoffending, and moderate in respect of general (non sexual) violence**. In coming to this conclusion I take into account: the chronicity his previous offending behaviour, his deviant (paedophile) sexual drive; his prejudicial childhood and abuse history, leading to underlying anger, shame and secretive tendencies; his significant alcohol history of alcohol abuse; his impulsivity, emotional dysregulation, and poor self control; the problems he seems to have had with problem solving and coping with stress (it seems likely that he has used alcohol, sexual preoccupation, and emotional avoidance as a maladaptive pattern of coping); his challenging, hostile, deceptive and manipulative presentation. It is noteworthy that he has declined to participate in the sexual offender treatment program and also the alcohol and substance misuse program, and until very recently, had largely been in denial about his problems and risks. His future plans are not well considered, and his self appraisal of risk is unrealistic.

It is in my view that in order to be safely released to the community, he **must first** participate in the High Intensity Sexual Offender Program (HISOP) and the Pathways (Substance Misuse) Program. **Engagement and successful completion of these programs would likely reduce his risk for sexual offending to either moderate or above moderate.** It is my opinion that, if released to the community, he would require the careful support and monitoring that could only be provided by way of a supervision order. With this measure in place, **I would consider his risk of sexual reoffending to be further reduced to below moderate.**

Should the Court choose to release [the respondent] to the community, consideration should be made of providing him with support to: establish stable and appropriate accommodation (I would suggest that he be housed in the contingency accommodation in the first instance); ensure he has no unsupervised contact with children of either gender; ensure that he remains abstinent from alcohol and illicit substances; ensure his participation in a sexual offending maintenance program; assist him in structuring his time with useful activity, such as education and/or employment; arrange engagement with a psychological therapist to address issues related to his emotional lability and reactivity, his problematic childhood and likely associated trust issues, his likely intimacy problems, his sexual deviance, his maladaptive and avoidant copying style, his manipulative interpersonal style and potential to deceive people about how he is feeling and about other matters. There might also be consideration as regards the benefits of biological treatment, specifically antilibidinal medication. Such consideration would best occur through consultation with an appropriately experienced psychiatrist, such that [the respondent] can make an informed decision in respect of this line of treatment. It is my view that he would find such medication to be a benefit, given his sexual deviance, poor self-restraint and the relative chronicity of his sexual offending history. His use of pornography has been problematic and some of it illegal; measures should be

> taken to monitor, and restrict as necessary, his use of the internet. Finally, given his underlying antiauthoritarian disposition, underpinned by trust issues, and his abbreviated formal education, efforts should be taken to carefully and patiently explain to him all conditions of his order. It is also evident that he will need support, primarily via a GP, in attending to his various physical health ailments.
>
> In summary, it is my opinion that [the respondent] currently presents a high risk of sexually reoffending, and that this risk would be considered manageable in the context of a supervision order, and once he has completed a substance misuse program and a group sexual offender program. I believe the latter should be completed in custody prior to release. Should he be made subject to a supervision order, I recommend that it be in place for at least 10 years, given his combination of risk factors and vulnerability factors."

[25] Armed with the disclosures that had been made to Dr Aboud, both Drs Arthur and Harden confirmed Dr Aboud's diagnosis of Paedophilia. The impact of that diagnosis was, fairly neatly in my view, explained by Dr Harden in his evidence before me, in these terms:

> "So my original hypothesis around the offences was that they were predominantly opportunistic, probably alcohol driven offences. There was no other material to suggest that he had a paedophilic disposition and the two victims were very dissimilar in very dissimilar circumstances, and certainly, we see that. My theory obviously has changed and the unifying hypothesis around his paedophilia is that it's longstanding in nature. That it has resulted in two offences – sorry, two convicted offences against very dissimilar victims and well separated in time as well, which suggests a very persistent paraphilia which is longstanding. It doesn't change the broad risk category, in that I already was of the view that he fell in the well above average or high risk group for sexual recidivism, but it changes the longevity of that risk, in my view - - -
>
> Yes?--- - - - in that it's not – I suspect it will not decline as fast, the risk, as it would if he didn't have a paraphilia, and certainly, that's what the literature seems to suggest because the paraphilia tends to persist and act as an ongoing risk factor. So for example, in my recommendations I would support now a 10 years supervision order - - -"[12]

[26] Each of the doctors gave evidence that the necessary treatment was only available in a custodial setting and so recommended that the respondent undergo treatment before being released on supervision. Previously, the respondent declined to participate in treatment programs. That may have been at least partially explained by the respondent's refusal to disclose and come to grips with the matters which he ultimately disclosed to Dr Aboud. There are also issues about the availability of some programs for prisoners detained at Townsville Correctional Centre.

[27] Mr Reid of counsel, who appeared for the respondent conceded, quite properly, that the psychiatrists' evidence established that the respondent is "a serious danger to the community

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[12] T1-17.

in the absence of a Division 3 order".[13] The psychiatrists' evidence to that effect was unchallenged and I accept it to the requisite standard.[14]

[28] The question is whether to make a continuing detention order, or a supervision order, or no order.[15]

[29] Each of the psychiatrists were asked whether, if the respondent was released now (untreated), the imposition of a supervision order would lower the risk of the respondent committing a serious sexual offence. Each of the doctors not only answered that question affirmatively, but the consensus of opinion was that it was unlikely that the respondent would offend whilst on supervision. However, all three doctors thought that the long term protection of the community required the respondent to complete programs and those programs were only available in custody.

Appropriate findings and orders

[30] Dr Aboud gave this evidence:

> "Do you think he could be managed at this point on a supervision order untreated?---Well, in terms of his risk, if he was released without having undergone a sex offender treatment program, but on a subject – subject to a treat – to a supervision order, the high level of restriction that is often the case when such individuals are initially released would, artificially, negate risk due to the external structure of monitoring and supervision and restriction. But the moment a decision is made to reduce the stage or level of curfew and to give him more freedom, which is in fact part of the process of progressing an individual, I think his risk would increase immediately based on a lack of any significant internal change, having not undertaken a group sex offender treatment program."[16]

Then, in cross-examination, Dr Aboud said:

> "MR REID: Just in relation to the supervision order, you spoke of a supervision order being quite restrictive, especially in the initial stages?---Yes.
>
> Would that not be sufficient, in this man's case, to be able to contain him within the community?---I think in a very limited way, when he is at that most restrictive level of supervision such that he cannot actually go anywhere, then it would be the equivalent of being in a prison outside of a prison, assuming that his placement was the contingency accommodation that is near the prison.
>
> I think we can assume that his accommodation would be in such accommodation - - -?---Yes.

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[13] Section 13(1).

[14] Section 13(3).

[15] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 525 at [109]-[113].

[16] T1-7.

- - - near a prison, this one being in Townsville rather than Brisbane?---Yes. And so at that point he would not have any opportunity to re-offend in any way. He would also have no opportunity to access alcohol or any other substance, should he care to, or he would have very limited opportunity with a very high level of supervision and monitoring around it. So I think that his risk of re-offending would be forcibly reduced in a rather artificial construct, not dissimilar to how his risk presents while he's in prison.

And wouldn't those who are handling him or who are supervising him, perhaps more appropriately, wouldn't they be informed about the level of supervision necessary because of his lack of treatment?---Well, yes. But the problem would be that, in my view, this would then require to be continued in order to maintain his low level of risk.

So the high level that is often at the beginning of a supervision program would have to be maintained throughout the supervision program until there was some treatment effected?---Well, it would have to be maintained you say until some treatment has been effected."[17]

[31] Dr Harden, on the same topic, said:

"Yes. So if he were to be released without completing the programs, you would say that would increase his risk of reoffending?---Well, his risk of reoffending – I think he's in the well-above-average group - - -

Yes?--- - - - if he just left custody without nothing else; right.

Yes, and - - -?---So I know – we know that.

And we're not suggesting that?---No. So the – I think that the problem – as identified correctly, I think, by Dr Aboud – is that you – he could come out. He could be on, you know, the no – the – the no release curfew with only escorted whatever, but the problem would be that – how do you move on from that at some point. How does he then have some – particularly – now – now, that might have been a more tenable position before we knew that he had paedophilic drives, but now it would be very difficult, then, to move to a position where people could take a calculated risk, which is what is Corrective Services are doing when they allow people to go out into the community on various levels of curfew, because we have very limited data. You know, we've got sort of – probably half an hour to an hour of conversation with Dr Aboud where this man's been probably honest about what's happening. I think we're lacking data, so we would have trouble moving to the next step. We'd be stuck there. And they've seen this with other people who fail to make progress, but this man's not yet had the opportunity to do that. So in some ways I think would be unfair to

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[17] T1-9.

him, but, yes, you can drop the risk to moderate or below with that really tight supervision."[18]

[32] Dr Arthur gave similar evidence:

"I take it from the evidence you have given today, you would not support him being released prior to completing courses in custody?---I think it would be preferable for him to complete a sexual offender treatment course in custody first prior to release, yes.

Because we don't live in an ideal world, would a supervision order reduce his risk in the community?---Yes, I agree with what Dr Harden and Dr Aboud said. It would reduce his risk by modifying those external risk factors. It would be by the use of a curfew, by the use of monitoring, restricting his movements in the community and his associations, reducing the chances of him using substances. That would certainly, you know, reduce some of those risk factors. It wouldn't have much of an effect on his internal mechanisms. So the internal aspects of his risk and the drivers for his offending. So whilst he was on that order and that order was being implemented aggressively, yes, it would reduce his risk."[19]

[33] Through his cross-examination of the psychiatrists, Mr Reid established[20] that while the respondent was on very strict supervision, he is not an unacceptable risk of committing serious sexual offences. The psychiatrists though are all of the view that if untreated, the risk will escalate once the supervision period ends.

[34] In *Attorney-General for the State of Queensland v Francis*,[21] the Court of Appeal held that where adequate protection can be ensured upon supervision, the making of a supervision order should be preferred to the making of a continuing detention order.[22] The question here is if the supervision order can be fashioned so as to provide restrictions upon movement and behaviour necessary to prevent the commission of serious sexual offences, can it be a proper exercise of discretion to make a continuing detention order to enable the respondent to access programs which may effect his long term rehabilitation?

[35] McMurdo J (as his Honour then was) in *Attorney-General for the State of Queensland v Sutherland*[23] examined the Court of Appeal's decision in *Francis*. His Honour said:

"[27] The court can be satisfied as required under s 13(1) only upon the basis of acceptable, cogent evidence and if satisfied "to a high degree of probability that the evidence is of sufficient weight to justify the

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[18] T1-21.

[19] T1-29.

[20] The evidence set out in paragraphs [30] – [32].

[21] [2007] 1 Qd R 396.

[22] At [39].

[23] [2006] QSC 268.

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

[28] The paramount consideration is the need to ensure adequate protection of the community. But where the Attorney-General seeks a continuing detention order, the Attorney-General must prove that adequate protection of the community can be ensured only by such an order, or in other words, that a supervision order would not suffice. The existence of such an onus in relation to s 13(5) appears from *Attorney-General v Francis* where the Court allowed an appeal from a judgment which had made a continuing detention order upon the primary judge's view that the Department of Corrective Services would not provide sufficient resources to provide effective supervision of the prisoner upon his release. The Court found an error in that reasoning because of the absence of evidence that the resources would not be provided. The Court observed:

> '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 principal, be preferred to a continuing detention order on the basis that 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 is warranted by the statute which authorised such constraint.'

Thus the absence of evidence of the inadequacy of resources was important because that matter had to be proved, as a step in persuading the court that only continuing detention would suffice.

[29] The Attorney-General must prove more than a risk of re-offending should the prisoner be released, albeit under a supervision order. As was also observed in *Francis*, a supervision order need not be risk free, for otherwise such orders would never be made. What must be proved is that the community cannot be adequately protected by a supervision order. Adequate protection is a relative concept. It involves the same

notion which is within the expression "unacceptable risk" within s 13(2). In each way the statute recognises that some risk can be acceptable consistently with the adequate protection of the community." (Citations omitted)

[36] His Honour's analysis of Part 2 of the DPSOA and of *Francis* has been followed on numerous occasions[24] and I follow it. However, his Honour was not considering a question like the one which arises here. As already observed, the objects of the Act are to provide "continuing control, care or treatment" of a prisoner.[25] The discretion bestowed by s 13(5) contemplates the making of a continuing detention order for the respondent's "control, care or treatment".

[37] Section 13(5) was considered by the Court of Appeal in *Francis*. There, the court said:

> "[26] The objects of the Act are expressed in s 3 of the Act as being:
>
> '(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.'
>
> [27] Section 13(6) provides that, in deciding whether to make an order under s 13(5)(a) or (b), 'the paramount consideration is to be the need to ensure adequate protection of the community'.
>
> [28] Section 13(5)(a), in speaking of a continuing detention order as an order 'for control, care or treatment', identifies the three purposes for which an order may be made: control of the dangerous prisoner, care for the dangerous prisoner, or treatment of the dangerous prisoner. These purposes are identified as alternatives. The phrase 'control, care or treatment' must, as a matter of ordinary language, be read disjunctively.
>
> [29] This disjunctive reading suggests that there may be cases where the basis for an order may be, either
>
> - the control of an incorrigible offender, or
> - the care of an offender whose propensities endanger the offender as well as others, or
> - the treatment of an offender with a view to rehabilitation.
>
> It will often be the case that more than one of these considerations will inform the making of an order.

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[24] For example, see *Attorney-General for the State of Queensland v DBJ* [2017] QSC 302, *Attorney-General for the State of Queensland v LKR* [2018] QSC 280 and *Thompson v Attorney-General for the State of Queensland* [2018] QCA 172.

[25] Section 3(b).

> [30] It may be, however, that, in some instances, a dangerous prisoner has such clear and pressing prospects of rehabilitation that the court's choice of an order under s 13(5)(a), rather than under s 13(5)(b), will turn on the answer to the factual question whether further treatment, necessary to ensure adequate protection to the community, is likely to be available or effective only while the prisoner remains in detention. If the court were to be satisfied in a particular case that further treatment of a prisoner was necessary, and likely, to reduce the risk of reoffending to acceptable levels, but that such treatment would not be made available to the prisoner in detention, then that would be a good reason to make an order under s 13(5)(b). The choice between an order under s 13(5)(a) or (b) must, of course, be controlled in the end by s 13(6) of the Act; but, in such a case, it might make little sense to make a continuing detention order for the purpose of 'control, care or treatment' of the prisoner."[26]

[38] When determining whether the applicant has proved "that a supervision order would not suffice"[27] in order to provide adequate protection of the community, relevant considerations include the availability of treatment and the respondent's long term prognosis. Against those considerations, the liberty of the subject must be considered.[28] Here, the respondent has made disclosures to Dr Aboud. The psychiatrists consider that the making of such disclosures is an important step towards rehabilitation. Programs are available while the respondent is in custody which the psychiatrists consider will assist in his rehabilitation and reduce risk. In the absence of rehabilitation, the respondent faces long term and very restrictive supervision.

[39] It is appropriate to order the respondent's continuing detention.

[40] I order the respondent be detained for an indefinite period for his continuing control, care and treatment.

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[26] See also *Attorney-General for the State of Queensland v Lawrence* [2010] 1 Qd R 505 at [17]-[20].

[27] *Sutherland* at [27].

[28] *Francis* at [39].