SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Jackway* [2018] QSC 137
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) v **DOUGLAS BRIAN JACKWAY** (respondent)
FILE NO:	BS 7422 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2018, 1 June 2018
JUDGE:	Crow J
ORDER:	**The Court affirms the decision of Acting Justice O'Brien made on 28 February 2012 that the respondent, Douglas Brian Jackway, is a serious danger to the community in the absence of an order pursuant to Division 3, Part 2 of the *Dangerous Prisoners (Sexual Offenders)* Act 2003 and orders that:** **1. The respondent, Douglas Brian Jackway, continue to be subject to the continuing detention order made on 28 February 2012.**
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 is detained under a continuing detention order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the applicant applied for the order to be reaffirmed under section 30 of the Act – where reporting

psychiatrists opined that if the respondent were released on a supervision order there would be a moderate chance of reoffending, and this could increase to high if the respondent took illicit substances or was experiencing stressors – where subsequent to the initial hearing date, the respondent tested positive to Buprenorphine, a synthetic opioid – whether the respondent should remain under the Continuing Detention Order under the Act

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 3, s 13, s 27, s 29, s 30

A-G (Qld) v Jackway [2015] QSC 26, cited
A-G (Qld) v Jackway [2016] QSC 74, cited
Attorney-General (Qld) v DBJ [2017] QSC 302, considered
Attorney-General (Qld) v Jackway [2017] QSC 67, cited
Attorney General for the State of Queensland v DJ, unreported, O'Brien AJ, SC No 7422 of 2011, 28 February 2012, cited
Attorney-General for the State of Queensland v Francis [2006] QCA 324, considered
Attorney-General for the State of Queensland v Lawrence [2010] 1 Qd R 505, cited
Director of Public Prosecutions (WA) v GTR [2008] WASCA 187, cited
Director of Public Prosecutions (WA) v Williams [2007] WASCA 206, cited
Fardon v Attorney-General (Qld) (2004) 78 ALJR 1519, cited
New South Wales v Kruse (No 2) [2014] NSWSC 128, cited
Turnbull v Attorney-General for the State of Queensland [2015] QCA 54, considered

COUNSEL: P Dunning QC with J Rolls for the applicant

J Allen QC with C Smith for the respondent

SOLICITORS: Crown Law for the applicant

Legal Aid Queensland for the respondent

[1] This is the fifth annual review pursuant to s 27 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the Act) of the continuing detention of Douglas Brian Jackway (the respondent). The applicant seeks to have the order made pursuant to s

30(2) by O'Brien AJ on 28 February 2012[1] affirmed (that the respondent presents a serious danger to the community in the absence of an order under Division 3 of the Act) and a further order pursuant to s 30(3)(a) of the Act that the respondent continue to be subject to a continuing detention order.

[2] The respondent's position, consistent with its position before Brown J on 18 April 2017, is that the evidence presented is of sufficient weight to affirm the decision of O'Brien AJ in accordance with s 30(2) of the Act. That concession continues to be a proper one on the basis of the evidence before the Court.

[3] The ultimate issue to be decided is whether, as the applicant submits, the Court ought make a continuing detention order under s 30(3)(a) or, as the respondent originally submitted, the Court ought make a supervision order under s 30(3)(b).

[4] The respondent is currently 41 years of age, having been born on 14 December 1976. Apart from a period of approximately four months between August 2003 and January 2004, the respondent has been incarcerated since 1995. That is apart from the identified period of approximately four months, the respondent has been a prisoner in an adult prison for the 23 years from 1995 to 2018. Preceding 1995, from about 1991 to 1995, between ages 14 and 18, the respondent had been the subject of extensive periods in a juvenile detention centre.

[5] On 28 February 2012, O'Brien AJ concluded that he was satisfied the respondent was a serious danger to the community in the absence of an order under Division 3 of the Act. O'Brien AJ further ordered that the respondent be detained in custody for an indefinite term of care, control and treatment. The order of O'Brien AJ was affirmed by Daubney J on 20 December 2013, by Mullins J on 9 February 2015,[2] by the Chief Justice on 7 April 2016[3] and more recently further affirmed by Brown J on 22 May 2017.[4]

Background

[6] The respondent was born on 14 December 1976. He is presently 41 years of age. O'Brien AJ summarised the respondent's prior offending as follows:[5]

> "[4] The respondent is a thirty five year old man who has spent all but about four months of his adult life in prison. He has a lengthy criminal history, a copy of which is exhibited to the affidavit of Kerry Ann

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1 *Attorney General for the State of Queensland v DJ,* unreported, O'Brien AJ, SC No 7422 of 2011, 28 February 2012.

2 *A-G (Qld) v Jackway* [2015] QSC 26.

3 *A-G (Qld) v Jackway* [2016] QSC 74.

4 *Attorney-General (Qld) v Jackway* [2017] QSC 67.

5 See *Attorney General for the State of Queensland v DJ,* unreported, O'Brien AJ, SC No 7422 of 2011, 28 February 2012.

Heenan sworn on 19 August 2010. The most significant entries in that history are those recorded in the District Court at Gladstone in December 1995 and in the District Court at Maroochydore in 2005. As to the first of these, the respondent had pleaded guilty to one count of taking a child under the age of sixteen for immoral purposes with a circumstance of aggravation, three counts of indecent dealing with a child under twelve, two counts of attempted carnal knowledge by anal intercourse of a child under twelve, one count of unlawful use of a motor vehicle and an offence of assault occasioning bodily harm.

[5] The circumstances of that offending are set out in Exhibit 12 to the affidavit of Stephanie Nicole Cooper sworn on 26 July 2011. They involve the respondent driving to Gladstone where he approached three young boys riding bicycles under the guise of seeking directions from them. One of those boys was punched and manhandled by the respondent into his vehicle. The respondent drove the boy for a short distance before his vehicle collided with a bridge. He then took the boy into some mangroves, stripped him and assaulted him by handling his genitals, licking him, kissing him on the lips and placing his tongue in the boy's mouth before spitting into his mouth and making him swallow. The respondent inserted his fingers into the boy's anus before forcing his penis into the boy's mouth and causing the boy to bend over and move backwards on to his erect penis. He was during this time using demanding language and threatening physical violence to the child.

[6] A witness to the abduction of the boy had contacted police who arrived to find the respondent standing behind the boy with his erect penis against the boy's anus. The respondent made a threat to cut the boy's throat but was subdued when the boy informed the police that the respondent did not in fact have a knife. The respondent after being apprehended continued to yell obscenities and threatened harm to the boy and to his family. The respondent was sentenced to an effective term of eight years imprisonment for this offending.

[7] In the District Court at Maroochydore in 2005, following a trial, the respondent had been convicted of an offence of rape. The victim of that offence was his sister who was aged about nine or ten when the offence was alleged to have been committed sometime between 1990 and 1994. Following his conviction the respondent was sentenced to a term of imprisonment for that offence as well as for a number of other lesser offences which were dealt with at that same time. On appeal in that matter, *R v JJ* [2005] QCA 153, McPherson J.A. referred to the respondent's prior offending as follows:-

> 'JJ was aged 29 at sentencing. He has an extensive history of prior offending starting as a child in 1992. Most involved property

> offences, such as breaking, entering and stealing and unlawful use of vehicles; but in 1994 he was convicted of aggravated assault on a child, and there are two recorded convictions for possession of a weapon or replica. It was, however, his conviction in April 1995 in the District Court at Gladstone at the age of 18 that led to the earliest of several psychiatric diagnoses carried out between 1995 and 2005. He was convicted on that occasion in 1995 of abducting a boy aged 9 from the company of the boy's companions on a bike track and attempting to have anal intercourse with him, as well as perpetrating various other acts of indecency and terror upon him. The details of the offence are related in *R v J, ex p Attorney-General* [1997] 2 Qd R 277, which reports an unsuccessful appeal from a sentence of imprisonment for 8 years for what he had done on that occasion. Since then he has been convicted and sentenced for offences committed while in prison, such as wilful damage and assaulting another prisoner. He has also been recorded making a threat to kill his sister the complainant for her part in his conviction in 2004.'"

An application under Division 3 of the Act

[7] On 23 August 2011, an application that the respondent be dealt with pursuant to Division 3 of the Act was filed. The application was heard on 31 January 2012.

[8] In making the order pursuant to s 13(5)(a) of the Act, O'Brien AJ said:[6]

> "[15] To date the respondent has not undertaken any sexual offender treatment programmes whilst in prison. Since September 2011, he has received individual psychological counselling and treatment as recommended by Mr Phelan. Subject to his progress and subject to his behaviour within the correctional facility, he could at best hope to commence the preparatory programme within a period of about four to six months. The programme itself would occupy approximately six weeks and, if successfully completed, would enable entry into the HISOP for a period of nine months. Given these matters, Mr Phelan agrees that it would be very difficult for the respondent to complete the HISOP within the next twelve months.
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> [16] There are some indications that the respondent may be benefiting to some degree from the ongoing individual psychological counselling. The extent of any such progress, however, remains uncertain. Dr Beech acknowledges that there are indications that the respondent is 'starting to mature' but there are also other indications of 'a very poor insight into

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6 *Attorney General for the State of Queensland v DJ,* unreported, O'Brien AJ, SC No 7422 of 2011, 28 February 2012.

factors that would place him at risk of re-offending'. Doctors Grant and Lawrence have expressed similar concern. Until such time as the respondent completes a sexual offenders treatment programme, the risk to the community of further sexual offender must, in my assessment of the psychiatric evidence, remain high.

...

[18] As indicated above, the respondent has not yet undertaken any form of sexual offenders treatment programme whilst in prison. In telephone conversations recorded on the 15th and 22nd October 2011, the respondent indicated an unwillingness to comply with the residential requirements of a Supervision Order and expressed a clear refusal to wear a monitoring bracelet ('I'll be cutting that bracelet clear off'). These statements confirm the concerns expressed by doctors Grant and Beech as to the likelihood of the respondent's non-compliance with a Supervision Order. The relevance of unwillingness on the part of a dangerous person to submit to the requirements of a supervisory regime has been recognised by the Court of Appeal in cases such as *Harvey v Attorney General for the State of Queensland* [2011] QCA 256 and *Attorney General for the State of Queensland v Fardon* [2011] QCA 155.

[19] The Act of course does not contemplate that arrangements under a supervisory order should be 'watertight'. The ultimate question is whether the protection of the community can be adequately ensured — *Attorney-General for the State of Queensland v Francis* [2006] QCA 324. In the light of the respondent's expressed intention to disregard the essential requirements of a Supervision Order and in the light of his failure to undertake any sexual offenders treatment programme, this is not a case in my view where the adequate protection of the community can be reasonably and practicably managed by a Supervision Order. The adequate protection of the community requires, in my view, that the respondent should be detained in custody for an indefinite term for control, care or treatment. I therefore order that he be so detained pursuant to s 13(5)(a) of the Act."

[9] O'Brien AJ accepted the psychiatric evidence which he had set out as follows:[7]

"[8] Dr Donald Grant is a psychiatrist of considerable forensic experience. In November 2010, Dr Grant provided a risk assessment report in relation to the respondent. Dr Grant concluded as follows:-

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7 *Attorney General for the State of Queensland v DJ,* unreported, O'Brien AJ, SC No 7422 of 2011, 28 February 2012.

> ‘The overall clinical risk assessment is that [the Respondent] has a high risk of re-offending, both generally and sexually. The risk to the community would be high if he was to be released without satisfactorily undergoing a suitable sexual offender treatment programme. Such a programme would have a chance of increasing [the Respondent's] self awareness of his sexual drives and providing some strategies to reduce sexual re-offending.
>
> I recommend that [the Respondent] be required to complete a sexual offender treatment programme before release into the community. However, I am somewhat pessimistic about [the Respondent's] ability to complete such a programme. His motivation is at best ambivalent and he has demonstrated in the past that he has difficulty with co-operative participation in group programmes. Such cooperation might be even less likely in a sexual offender programme.
>
> If [the Respondent] was to be released into the community without completing a sexual offender treatment programme the risk of offending would be high. Such risk might be reduced by the application of a Supervision Order, but [the Respondent] has not responded well to supervision in the past and I would see the risk of breaching an order to be high. ...
>
> In summary, release into the community will be accompanied by high risk of re-offending. That risk may be reduced by completion of a sexual offender treatment programme and could possibly be managed to some extent by a Supervision Order after release. However, breaches of supervision are likely. If supervision was to continue successfully it would, in my opinion, be required for a long term. I would suggest an order of twenty years would not be inappropriate.’

[9] Dr Michael Beech, psychiatrist has provided a detailed report which includes the following assessment:-

> ‘In my opinion [the Respondent] would be at high risk of offending if released into the community without a Supervision Order. The risk would be for general criminality, non sexual violence, and sexual violence.
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> Although there have only been two documented and adjudicated incidents of sexual violence, and these occurred in the 90's, it is my opinion that the risk of sexual violence is still high. The lack of repeated violence since the 1990's is likely to reflect the limited opportunities that [the Respondent] has had for

violence towards vulnerable persons within the community. It is also likely to reflect the limited exposure to illicit substances and the general constraints of the prison setting.

Within the community, I believe that without a Supervision Order, [the Respondent] is likely to quickly return to a criminal lifestyle as he has done repeatedly in the past. In the worst case scenario, he would return to de-stabilising influences with limited personal and psychological support. He might engage in a relationship but it would prove, as before, to be unsatisfactory. Those difficulties and any other stresses he may face in the community would lead to substance use and from there to general criminality.

Once on this trajectory he would return to violence as he has done in the community and in custody. He has a psychopathic personality and in the community he would have, as before, very limited respect for the rules and obligations of society and the consequences of offending. In a stressed, or intoxicated or generally predatory state, I believe that as part of his general violence and offending he would again resort to sexual violence. I am uncertain if he has a paraphilia and so for that reason I am uncertain whether his victims would be children or adults. Sexual violence itself is likely to include significant threats with the potential for extreme coercion and violence. The victim is likely to suffer at least psychological harm, and probably visible harm.

The more positive scenario is that by now [the Respondent] has matured and has greater control over his volatility. He would on release eschew substance abuse and would instead seek out interpersonal supports that include individual therapy and perhaps group therapy. He would maintain a low profile to avoid media attention. With the assistance of various agencies he would refrain from substance abuse and so would have a lesser need for criminality. Instead he could seek employment such as spray painting. He would move to stable accommodation, employment and support. He would abide by the rules and in particular would abide by the need for supervision.

I am very pessimistic about the latter scenario. Even in the custodial setting [the Respondent] remains prone to impulsivity, emotional outbursts, and at least threatening violence. As a prisoner he has required placement in a maximum security unit. Any changes in his demeanour have been recent ones within a highly structured and supervised setting. Prior to this there were continuing breaches of discipline that do not bode well for his community release.

In my opinion, his current circumstances indicate that [the Respondent] would have great difficulty abiding with a

> Supervision Order. It is my opinion that if he were in the community he would find it difficult to control his behaviour and outbursts. He would readily return to aggression and from there to violence when challenged by supervising officers, peers, and members of the general public.
>
> It is likely that his attitude towards supervising officers would reflect the attitudes that he has generally displayed in custody and that he would interact poorly with them, maintain a hostile stance, and resent their intrusions. There is nothing in his history, apart from the most recent changes, that indicates to me that he has the capacity to abide by the many conditions and restrictions that would be placed upon him with a Supervision Order. Rather I think that it is likely, as in the past, that he would breach conditional release and quickly return to offending. I believe that it is highly likely that he would in fact be lost to supervision and would be at large within the community. As time went on, the risk of offending violently would simply increase.'

[10] Dr Beech considers that the respondent should participate in the High Intensity Sexual Offenders Programme (HISOP) to demonstrate a capacity 'to withhold his tendency to revert to violence' and to gain insight into his sexual offending. Completion of the HISOP would provide evidence that the respondent could be managed in the community with a Supervision Order.

[11] Dr Joan Lawrence, the third psychiatrist to have assessed the respondent for the purpose of these proceedings considers that he has a high risk of re-offending sexually and potentially violently if released without a Supervision Order. Such an order, in the view of Dr Lawrence, would require inter alia established accommodation, close supervision and ongoing psychological support. Dr Lawrence reports:-

> 'The total picture, based on both the collateral history provided in my interview, led me to the belief that [the Respondent] does exhibit a significant psychopathic personality disorder. He is a "Cleckley Psychopath", as originally described by Cleckley and substantiated and scored such on the Hare Psychotherapy Checklist. This has implications for his prognosis and future outlook, as has been recorded by other psychiatrists (Doctors Elroy, Atkinson, Kar, Whiteford and, more recently, Grant).
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> In addition to his BSM-IV diagnosis of anti-social personality disorder, he demonstrates a lack of empathy and absence of remorse for his actions, has shallow affect and takes no responsibility for his actions whatever.

> This type of personality disorder has not been responsive to any biological, psychological, social or behavioural therapies to date. There is, however, evidence which indicates some maturation over time with diminution of the anti-social behaviour with age, though underlying traits are likely to continue.
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> Previous reporters have been divided as to whether this man displays a paraphilic behaviour. Whilst the diversion of opinion is understandable, it would be my opinion that this man does have homosexual paedophilic drives but that they are not egosyntonic; that is, they are not accepted by him as a part of his self concept. This adds to the minimisation and denial of such drives, probable limited expression of them, their likely emergence under conditions of intoxication and disinhibition by alcohol and drugs, and indicate difficulties in dealing with them in a treatment or rehabilitative sense.'
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> [12] In giving evidence in this application, Dr Lawrence expressed the view that the respondent should complete a sexual offenders treatment programme prior to his release from prison."

The first review

[10] By application filed 27 February 2013, the applicant sought a review of the continuing detention order that had been made concerning the respondent. The application was heard by Daubney J on 20 December 2013. His Honour stated:

> "Despite the factors I've already noted that there is somewhat of a difference between the psychiatrists with respect to their assessments of the respondent at the present time, I cannot avoid giving heed to the concern expressed by both of them that a relapse by the respondent into drug and alcohol use will catapult him into a high risk of sexual offence category. Despite the obvious and welcome improvements in his situation since the time he was made the subject of a continuing detention order, I am not satisfied that he is yet at the stage where he is 'sufficiently able to manage the risk of exposure to drugs and alcohol and otherwise manage his violent behaviour.
>
> That necessarily leads to my conclusion that he is not yet at the stage where I can be satisfied that if released under a supervision order, adequate protection of the community could reasonably and practicably be managed by a supervision order. If released on a supervision order, he is not in custody. I am not satisfied that he yet has the personal skills to ensure ongoing abstinence from drugs and alcohol, which, as I've already noted on several occasions, present on the common evidence as the trigger for him presenting a high risk of sexual offence."

The second review

[11] By application filed on 17 December 2014, the applicant sought a further review of the continuing detention order concerning the respondent.

[12] The review was heard by Mullins J on 9 February 2015. In her reasons for judgment her Honour noted: [8]

> "Both Doctors Grant and Beech acknowledged that the last sexual offence committed by Mr Jackway was almost 20 years ago. They were concerned, however, that his risk of sexual reoffending was due to a combination of his personality disorder, impulsive behaviour and the potential for disinhibition, if he turns to alcohol or drugs in order to deal with stress. Although the psychiatrists conceded in the cross examination that Mr Jackway's circumstances may be very different to many others who are under this regime, as the offence that was committed by him when he was angry and intoxicated after arguing with his family in April 1995 show, the consequences of Mr Jackway succumbing in the way that is considered the risk associated with anger in combination with alcohol or drugs and impulsive behaviour could be severe, and that explains the psychiatrists' conclusions about his high risk of sexual reoffending.
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> There is a concern expressed on Mr Jackway's part that the goalposts are moving. He has not completed the Pathways' course that was indicated when he was last before the Court, so in that respect the goalposts have not moved. These applications have to be decided on the material that is placed before the Court at the time. His behaviour in prison in the last 12 months is a relevant and different factor than his behaviour in the period leading up to the hearing before Justice Daubney."

[13] Her Honour, accordingly, affirmed the decision made on 28 February 2012, that the respondent is a serious danger to the community in the absence of an order under Division 3 of the Act and ordered that the respondent continue to be subject to a continuing detention order.

The third review

[14] By application filed 4 February 2016, the applicant sought to further review the continuing detention of the respondent. The matter came before the Chief Justice on 4 April 2016. In her reasons for judgment, her Honour observed[9]:

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8 *A-G v Jackway* [2015] QSC 26 at pages 8-9.

9 *A-G (Qld) v Jackway* [2016] QSC 74.

"[20] I have some sympathy for the argument that Mr Jackway's sexual offending was a very long time ago, committed by someone who was then a teenager and is now a middle-aged man. The difficulty is that one cannot say that his disposition to sexually offend must have changed through that lapse of time, because the simple fact is that, having been incarcerated for almost the whole of it, he has not had the opportunity. Both psychiatrists considered the risk of sexual reoffending to remain high. There is much that is unfortunate about Mr Jackway's background and his long institutionalisation, but recognition of those factors cannot distract from the issue of what community protection requires.

[21] The question is whether a supervision order can effect adequate protection of the community against the risk which the psychiatrists identify. I cannot be satisfied that it would, in light of Mr Jackway's inability to control his impulsive behaviours, even when it was so clearly in his interest to do so. It should be said that he has demonstrated considerable motivation to cooperate by undertaking appropriate courses and receiving assistance from Mr Smith; but he has not, to date, been able to consistently put what he has learned into practice. His acceptance of a "shot" while still on the Pathways programme illustrates the gap between his ability to recognise strategies he should use in dealing with situations of risk and his ability to apply them. One could almost suspect that the events of February were a form of self-sabotage; but whatever the reason for Mr Jackway's behaviour then, it augurs very badly for the prospects of a supervision order's being effective. As Dr Grant said, such orders can work well, but not when the individual concerned does not have the capacity to control his impulses.

[22] The statute does not mandate an absolute guarantee of protection, of course, but in light of Mr Jackway's recent history, one could have no confidence that he would not give way to irrational and impulsive behaviour, resulting in absconding and/or drug or alcohol use, with the outcome being further sexual offending. That could occur quite quickly and without sufficient warning to prevent it, notwithstanding the constraints of a supervision order.

[23] That is not to say that Mr Jackway might not in the future be able to demonstrate a level of stability which could give greater confidence about his ability to comply with a supervision order. Certainly his involvement with Mr Smith appears to have been beneficial and I would recommend that Corrective Services both ensure that he has regular sessions with Mr Smith (ideally, fortnightly) and give Mr Smith access to Mr Jackway's conduct records, so that he has a full appreciation of what he is dealing with. Mr Jackway should also be given the opportunity, if he wishes, to try a course of anti-depressants, which might have a stabilising effect. But for the present, I am not satisfied that

> adequate protection of the community can be reasonably and practicably managed by a supervision order."

[15] Her Honour, accordingly, affirmed the decision made on 28 February 2012 that the respondent was a serious danger to the community in the absence of an order under Division 3 of the Act and further ordered the respondent continue to be subject to a continuing detention order.

The fourth review

[16] On 18 April 2017, Brown J further reviewed the continuing detention of the respondent pursuant to s 27 of the Act. Brown J observed:[10]

> "[73] A review of the previous decisions, medical evidence, prison file reports and the present psychiatric evidence, particularly that of Dr Grant, who has had the benefit of observing the respondent over a number of years indicates that the respondent continues to improve his capacity to modify his behaviour. However, even with a supervision order in place the psychiatric evidence is that the risk of reoffending is only reduced to a moderate level.
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> [74] While I accept the evidence of both Dr Aboud and Dr Grant, Dr Grant has the advantage of having had the opportunity to observe the respondent over a period of time. In real terms however their evidence was relevantly not significantly different. Both had a level of concern that the respondent would not comply with a supervision order and a serious offence might be committed before his non-compliance was detected. Dr Aboud considers that the respondent's behaviour could spiral very quickly into reoffending, if he engages in substances abuse, without the supervision order being sufficient to constrain him. Dr Grant agreed that the respondent's behaviour could spiral out of control quickly and could occur in a number of days although he thought it more likely it would occur in weeks. The impulsivity of his actions would depend upon the extent to which he was spiralling out of emotional control. Both Dr Aboud and Dr Grant considered that the respondent needed to demonstrate that he could control his impulsivity and his response to the emotional stressors for 12 months while in custody, in order for Mr Jackway to be successfully managed in the community.
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> …
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> [76] I accept that the detention is not an environment which necessarily provides a sound indicator of how the respondent is able to manage his anti-social behaviour, impulsivity and emotional instability, given it is a very regimented environment. I consider in the present context, the more

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[10] See *Attorney-General for the State of Queensland v Jackway* [2017] QSC 67. Footnotes omitted.

important factor in terms of whether adequate protection of the community can be reasonably and practicably managed by a supervision order is whether in such an environment the respondent is able to conduct himself in a way which consistently implements the strategies he has been developing to control his antisocial behaviour and impulsivity.http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QSC/2017/67.html?stem=0&synonyms=0&query=title(Jackway%20) - fn26 While the number of his violations have reduced, the fact he still succumbed to the offer to take drugs and still responded with threats of violence when threatened and more particularly threatened to smash his cell when placed in a unit he did not want to be in, indicate he is unable to exercise control over his behaviour on a consistent basis.

…

[80] On the basis of the evidence presently before me I am satisfied that the applicant has shown that adequate protection of the community cannot be reasonably and practicably managed by a supervision order. I consider that the respondent's personality disorder has not yet settled with maturation to the point where the protection of the community from the risk that the respondent will commit a serious sexual offence is adequately ensured by the terms of a supervision order, albeit that its terms are comprehensive. This is particularly so given the respondent's impulsivity and his vulnerability to alcohol and drug abuse. His vulnerability to drug use and his impulsivity is demonstrated by the fact he took ice in September 2016, notwithstanding the court in March 2016 found in his previous review that the taking of drugs at the end of the Pathways Programme augurs very badly for the prospects of a supervision order being effective.

[81] While I accept Mr Jackway believes he can comply with the regime established by a supervision order he has not yet demonstrated an ability to do so. I have taken into account the period he has served in jail and the fact that the liberty of the respondent should be constrained to no greater extent than warranted by the legislation. The fact remains that there is a real risk that his inability to control his level of impulsivity and responses to emotional stressors, given his anti-social personality could rapidly escalate such that he would turn to alcohol and drug use to the point of reoffending notwithstanding the terms of the order, before detection.

…

[86] Accordingly, I affirm the decision of O'Brien AJ made on 28 February 2012 that Mr Jackway is a serious danger to the community in the absence of a Div 3 Order and I order that Mr Jackway continue to be subject to the Continuing Detention Order made by O'Brien AJ."

Statutory scheme

[17] The objects of the Act[11] are to provide for continued detention or supervision of a particular class of prisoner and to provide continuing control, care or treatment of a particular class of prisoner to facilitate rehabilitation.

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

[19] Once an order has been made under Division 3 of the Act, then the Attorney must make application for a review to be carried out.[12] The application for review is governed by s 30 of the Act. This provision is as follows:

> "(1) This section applies if, on the hearing of a review under section 27 or 28 and having regard to the matters mentioned in section 13(4), the court affirms a decision that the prisoner is a serious danger to the community in the absence of a division 3 order.
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> (2) On the hearing of the review, the court may affirm the decision only if it is satisfied—
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> (a) by acceptable, cogent evidence; and
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> (b) to a high degree of probability; that the evidence is of sufficient weight to affirm the decision.
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> (3) If the court affirms the decision, the court may order that the prisoner—
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> (a) continue to be subject to the continuing detention order; or
>
> (b) be released from custody subject to a supervision order.
>
> (4) In deciding whether to make an order under subsection (3)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.
>
> (5) If the court does not make the order under subsection (3)(a), the court must rescind the continuing detention order."

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11 See *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 3.

12 See *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 27.

[20] Arrangements must be made for the respondent to be examined by two psychiatrists.[13]

[21] Section 13(2) of the Act provides that a prisoner is a serious danger to the community if there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or if released from custody without a supervision order being made. This definition would be applicable and applies to the determination that is required to be made under s 30 of the Act.

[22] For the Court to make a Division 3 order, it must be satisfied that the prisoner is a serious danger to the community in the absence of such an order.[14] Subsection (2) defines what is a "serious danger to the community". There must be an unacceptable risk that the prisoner will commit a serious sexual offence if released at all, or if released without a supervision order.

[23] The Schedule to the Act defines what a serious sexual offence is:

> "'serious sexual offence' means an offence of a sexual nature, whether committed in Queensland or outside Queensland—
>
> (a) involving violence; or
>
> (b) against children."

[24] The offence must be of a sexual nature, with the added requirement that it either involve violence, or is an offence against children.

[25] The expression "unacceptable risk" is undefined by the Act. It is incapable of precise definition but is an expression which requires the striking of a balance which takes into account considerations including the likelihood of the person offending, the type of offence the person will commit and the consequences to any victim of the commission of that offence. Regard must be also had to the restriction imposed by an order under the Division 3 on the respondent.[15]

[26] The relevant risk is the risk of commission of a serious sexual offence i.e. an offence of a sexual nature involving violence or against children. Risk means the possibility, chance or likelihood of commission of such an offence. An unacceptable risk is a risk which does not ensure adequate protection of the community.

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13 See *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 29(1).

14 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 13(1).

15 See *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at [22], [60] and [225], *Director of Public Prosecutions (WA) v Williams* [2007] WASCA 206 at [63]; *Director of Public Prosecutions (WA) v GTR* [2008] WASCA 187 at [27]; *New South Wales v Kruse (No 2)* [2014] NSWSC 128 per Davies J.

[27] In *Attorney-General (Qld) v DBJ*,[16] Bowskill J recently observed:

> "[12]As to what constitutes an 'unacceptable risk', that is 'a matter for judicial determination, requiring a value judgment as to what risk should be accepted against the serious alternative of the deprivation of a person's liberty'. The test is not satisfied by evidence of any risk that the released prisoner may commit a further serious sexual offence. What must be established by the Attorney-General, to the requisite standard, is an unacceptable risk, the determination of which involves a balancing of competing considerations. The notion of an unacceptable risk recognises that some risk can be acceptable consistently with the adequate protection of the community.
>
> [13] In considering whether a risk is unacceptable it is necessary to take into account, and balance, the nature of the risk and the degree of likelihood of it eventuating, with the seriousness of the consequences if the risk eventuates. …
>
> [14] As observed in *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 at [6]:
>
> > 'Whether a risk is unacceptable depends upon the degree of likelihood of offending and the seriousness of the consequences if the risk eventuates. There must be a sufficient likelihood of the occurrence of the risk which, when considered in combination with the magnitude of the harm that may result and any other relevant circumstance, makes the risk unacceptable.'
>
> [15] For present purposes, what is required is an assessment of the risk of the released prisoner committing a serious sexual offence in the absence of a further supervision order. Relevantly, the object of the DPSOA is to ensure adequate protection of the community (s 3(a)). That does not mean the purpose of the legislation is to guarantee the safety and protection of the community. If that were the case, every risk would be unacceptable. …"

[28] It is also relevant to consider the observations made in *Attorney-General for the State of Queensland v Francis*[17]:

> "[39] Insofar as his Honour was concerned that, if the appellant began to use alcohol or drugs, he might abscond, the risk of a prisoner absconding is involved in every order under s 13(5)(b). The Act does not contemplate that arrangements to prevent such a risk must be

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16 [2017] QSC 302. Footnotes omitted.

17 [2006] QCA 324.

> "watertight"; otherwise orders under s 13(5)(b) would never be made. 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, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[29] In determining whether the decision ought to be affirmed the matters mentioned in s 13(4) of the Act must be considered. Section 13(4) provides:

> "(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 —
>
> (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
>
> (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
>
> (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
>
> (d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
>
> (e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;
>
> (f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;
>
> (g) the prisoner's antecedents and criminal history;
>
> (h) the risk that the prisoner will commit another serious sexual offence if released into the community;
>
> (i) the need to protect members of the community from that risk;
>
> (j) any other relevant matter."

[30] Section 30 of the Act permits the Court to affirm the decision 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 affirm the decision that the prisoner is a serious danger to the community in the absence of a Division 3 order.

[31] If the Court, on the review hearing, affirms a decision that the prisoner is a serious danger to the community in the absence of a Division 3 Order, then the discretion granted by s 30(3) of the Act is enlivened.

[32] Once that decision has been affirmed, then the Court is able, by s 30(3) of the Act, to order the respondent to be subject to continuing detention or be released from custody subject to a supervision order.[18]

[33] In determining whether to make such an order the "paramount consideration" is to "ensure adequate protection of the community".[19]

[34] The onus of proving that the community will not be adequately protected by a prisoner's release on supervision rests with the applicant.[20]

[35] If the Court declines to order continuing detention, then the Court must rescind the continuing detention order.[21]

Expert evidence

Report, Dr Lars Madsen, Treating Clinical Psychologist, dated 30 January 2018

[36] In a report dated 30 January 2018 Dr Lars Madsen, subsequent to eight sessions of therapy, recorded that the respondent now engaged well in the sessions. Dr Madsen notes that the respondent is *"receptive"* to the intervention and that the respondent seems to demonstrate a reasonable grasp of key concepts.

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18 See *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 30(3)(a) and (b).

19 See *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 30(4).

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

21 See *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 30(5).

Report, Dr Donald Grant, Reporting Consultant Psychiatrist, dated 18 February 2018

[37] Dr Grant most recently assessed the respondent on 15 February 2018.

[38] Dr Grant has previously assessed the respondent and prepared reports dated:

- 5 November 2010;
- 3 December 2012;
- 27 November 2013;
- 19 October 2014;
- 2 March 2016; and
- 14 February 2017.

[39] Dr Grant considers that his diagnosis is unchanged. The respondent suffers from anti-social personality disorder. He has "severe" anti-social personality traits.

[40] Dr Grant opines that the respondent qualifies for a diagnosis of psychopathic personality disorder.

[41] Dr Grant opines that the combination of these two conditions give rise to a very poor ability to empathise with others and that the respondent has demonstrated a tendency to demonstrate little remorse for his offending behaviour.

[42] Dr Grant considers it is unclear whether the respondent suffers from any sexual paraphilia. Having regard to the history, there are possible paraphilias of paedophilia or sadism which possibly exist. Despite child victims, the respondent denies any sexual attraction to children. He also denies any sadistic fantasies. Dr Grant considers that on balance, it is more likely that the respondent's sexual offending is motivated by his severe personality disorder, his impulsivity, his reaction to his own sexual abuse which was facilitated by substance abuse and intoxication.

[43] Dr Grant records a history of problems with alcohol and substance abuse. Alcohol has caused the respondent to become more aggressive and disinhibited. He is more likely to indulge in offending behaviour.

[44] Dr Grant notes that the respondent has smoked marijuana on a regular basis when not in custody.

[45] It is also recorded by Dr Grant that the respondent has used heroin and was using on a daily basis up until 1995. He has "dabbled" with methamphetamines and hallucinogenic mushrooms. He has sniffed butane gas. He has also abused prescription medications.

[46] Dr Grant notes that abuse of substances has become a lesser problem in recent years. At the time of the review on 16 April 2018, there had been no recent positive urine tests.

[47] Dr Grant notes the respondent is "highly institutionalised". He lacks life skills in an environment outside the prison setting and that will present "significant issues" with respect to reintegration in the community.

[48] Dr Grant notes that the incident occurring on 20 July 2017. He also notes the matters recorded as occurring on 24 July 2017. He notes the respondent's denial of those matters.

[49] Dr Grant records that previous assessments have indicated that the respondent is in the high risk group for future sexual offending. This remains the case. Although Dr Grant notes the risks have been modified to some extent over the years, firstly by the long period in custody and secondly, his advancing age. Middle age is often associated with a settling of the more extreme aspect of anti-social personality disorder.

[50] Dr Grant notes the respondent continues to be engaged in psychotherapy and appears to be obtaining some benefit from that although that treatment is in its "early stages".

[51] The main risk factors in Dr Grant's view are the respondent's severe anti-personality disorder with anti-social traits, immaturity, impulsivity, poor problem solving and poor decision making. The respondent's attitudes appear moderating with increasing aides in the effects of treatment but there is "no doubt" that issues related to impulsivity, emotional discontrol and inter-personal trust will be constant and could interfere with the respondent's rehabilitation. Institutionalisation is also identified as an "ongoing issue".

[52] Dr Grant considers that the dynamic factors reduced the current risk of future sexual offences being moderate "… provided he is able to stay away from drugs and alcohol and take advantage of assistance and therapy in the community".

[53] Dr Grant observes:

> "The question of when he would be safe to release into the community on a Supervision Order really depends on assessment of how well controlled Mr Jackway is in terms of impulsivity and potential aggression or sexual acting out. It would be very encouraging if he could demonstrate ongoing control of himself such that there are no breaches in prison for a significant period of time, such as 12 months. He has not yet achieved that length of time with a lack of any breaches."[22]

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22 Report of Dr Donald Grant, dated 18 February 2018 at page 15.

[54] Dr Grant considers that release on supervision there would be a risk of breaches which would mainly involve being emotionally uncontrolled, aggressive either physically or verbally being uncooperative with supervision or relapsing into abuse of drugs and alcohol.

[55] Dr Grant perceives that any supervision order would need to be in place for ten years. The risk if the respondent is released creates is described as *"long term"*.

Report, Dr Andrew Aboud, Reporting Consultant Psychiatrist, dated 14 March 2018

[56] Dr Aboud examined the respondent on 2 February 2018.

[57] Dr Aboud has previously reported on the respondent on one occasion by report dated 9 March 2017.

[58] Dr Aboud, as a result of his assessment of the respondent and consideration of the material with which he was provided,[23] considers the respondent to be suffering from anti-social personality disorder with prominent psychopathic traits. This causes the respondent's anti-authoritarian disposition, wide-ranging criminal offending and tendency to breach rules.

[59] Dr Aboud also considers the respondent has some emotionally unstable traits which gives rise to a fragile emotional state, fears of abandonment and *"trust issues*". Vulnerabilities are more pronounced from the respondent's experience of psychological stress caused by inter-personal conflict or personal or social instability. Further, the respondent is at high risk of using alcohol or abuse by a means of coping with his emotions. Dr Aboud considers the respondent meets the criteria for diagnosis of alcohol abuse and polysubstance abuse.[24]

[60] Dr Aboud considers that the abuse of alcohol and opiates to be of such severity to give rise to a consideration that the respondent suffers from dependence on those substances.

[61] Dr Aboud could not find any strong evidence of sadism nor does he believe the respondent is an exhibitionist. However, Dr Aboud considers the respondent "likely" has an underlying paedophilic drive but he is unsure whether he meets the criteria for a diagnosis of paraphilia. Dr Aboud considers that "… his offence against the 9 year old boy was committed when he was behaviourally discontrolled with alcohol and substances, and this allowed a latent and suppressed homosexual paedophilia to express itself".

[62] Dr Aboud has administered a number of risk assessment instruments on the Static-99R when previously assessed in 2017, the respondent achieved a score of 9 placing him in the high risk of reoffending. This is unchanged.

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23 Report of Dr Andrew Aboud, dated 14 March 2018 at page 1.

24 Opiates, stimulants, cannabis, sedatives.

[63] On the Risk Matrix 2000/S, which is used to predict the risk of sexual recidivism, the respondent was placed in the group regarded very high risk of reoffending. This assessment is unchanged.

[64] On the Risk Matrix 2000/V, the respondent was placed in the group upon assessment regarded as being a very high risk of reoffending. This was unchanged.

[65] On Psychopathy Checklist, the respondent achieved a score which was above the cut off point for diagnosing psychopathy. This score is unchanged.

[66] With respect to the HCR-20, the respondent was considered to have an overall risk in the moderate to high range with a clear static loading. It indicates there is a risk of future destabilisation in a community setting should there be a lack of monitoring, supervision support and structure.

[67] On the Risk for Sexual Violence Protocol (RSVP), the respondent was noted to have positive scores for the following items:

- chronicity of sexual violence;
- diversity of sexual violence;
- escalation of sexual violence;
- physical coercion in sexual violence;
- psychological coercion in sexual violence;
- extreme minimisation or denial of sexual violence;
- problems with self-awareness;
- problems with stress or coping;
- problems resulting from child abuse;
- sexual deviance;
- psychopathic personality disorder;
- problems with substance abuse;
- problems with intimate relationships;
- problems with non-intimate relationships;
- non-sexual criminality;
- problems with planning;
- problems with treatment; and
- problems with supervision.

[68] Dr Aboud also considered that the respondent would have partial scores for the following items:

- attitudes that support or condone sexual violence;
- violent or suicidal ideation; and
- problems with employment.

[69] Dr Aboud considers that there are two "pathways" the respondent might take should he reoffend. It is possible that the respondent would opportunistically attempt to coerce a vulnerable female into sexual activity. Such an individual might be a child or disabled or otherwise vulnerable. The respondent would not likely be angry and he would not likely use excessive physical violence.

[70] Secondly, the respondent might be at risk of assaulting a male child in the context of substance disinhibition or psychological stress. This might occur in relation to inter-personal conflict or frustration. Alcohol and drug abuse is maladaptive coping strategy. Further escalation or his behavioural discontrol in acting out of violence and anger driven sexualised feelings would follow. The respondent would be emotionally unstable, would act impulsively and make poorly considered decision expressing anger towards the victim, issue threats and use excessive force. He would try to engage the victim in various sexual behaviours. This offending might involve abducting a stranger child from a public place.

[71] Overall, Dr Aboud considers the respondent to be at high risk of sexual and general violence.

[72] When previously assessed, Dr Aboud expressed the view that the context of a supervision order the respondent's risk would be reduced to moderate but he was not confident he would be able to comply with an order. In order to be confident that the respondent could be managed in the community, Dr Aboud considered it is necessary that to first see behavioural evidence that he can manage the various stressors appropriately within the prison environment. Dr Aboud considered that the respondent needed to demonstrate, for a twelve month period, that he would undertake no physically violent behaviour, no avert threats of violence to its officers or other inmates and no ingestion of contraband substances.

[73] Time spent in a detention unit or maximum security unit would not count as part of this twelve month period. Dr Aboud remains of this view. He considers the incident of 20 July 2017 to be evidence that the respondent is not capable of managing his emotions, impulsive tendencies and behaviour. Dr Aboud would consider that the date[25] the respondent transferred to the Capricornia Correctional Centre would reasonably reflect

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[25] 27 September 2017.

the beginning of the continuous twelve month period during which he needs to demonstrate stability.

[74] Should a supervision order be made, the respondent would require close monitoring. He would require support. He would need to have abstained from substances or alcohol and illicit substances. He would need to be tested regularly for such. He would need psychological treatment and he would need to be assisted in a structured way gaining useful employment and enhancing his support network. Any such supervision order should last for ten years.

Reports of Dr Lars Madsen, Treating Clinical Psychologist dated 12 February 2018, 26 February 2018, 12 March 2018 and 4 April 2018

[75] The treating report of Dr Lars Madsen of 26 February 2018 (Exhibit LBM-5) is a report which garnered an amount of excitement among the expert witnesses. Relevantly it provided:

> "Doug reported that he had a difficult couple of weeks. [He] [i]dentified an incident that had occurred over the weekend which had triggered him strongly and prompted him to consider using violence against a staff member. Doug identified his experience of feeling humiliated and put on show to others to have been a trigger to revenge fantasies and violent urges. He reported that he had been prepared to assault the custodial officer who had put him on show, however, did not do so because he was not accessible. … To his credit, however, he did discuss the incident situation and appeared quite genuine in his self-report, reactions and so forth."[26]

[76] This information may be referred to as "the February incident". In his psychological progress report of 4 April 2018, Dr Lars Madsen has concluded that after the five sessions employing forensic schema therapy, the respondent has engaged reasonably well, is receptive to the treatment modality and has spoken candidly about the challenges he experiences in custody. The respondent's self-report to Dr Madsen was that he was attempting to keep a low profile, was constantly vigilant, had been targeted by other prisoners who had threatened and assaulted him, and had "almost" lost control with other prisoners and staff but had not done so.

Further Evidence – Report, Dr Andrew Aboud, Reporting Consultant Psychiatrist, dated 28 March 2018

[77] Dr Andrew Aboud provided an updated report of 28 March 2018 in response to Dr Madsen's aforementioned updated reports. In addition, Dr Aboud provided evidence in a careful and considered manner in Court. Dr Aboud stressed that due to the unreliability of the alleged incident of 24 July 2017 (threats of harm to a custodial

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26 Supplementary report of Dr Lars Madsen, dated 26 February 2018 at page 1.

officer with a shiv which was unproven, a search did not detect a shiv), he ignored that incident in forming his opinion. Although Dr Aboud was cross-examined about the apparent inconsistency in the second paragraph of page 19 of his report of 14 March 2018 to the effect that incident of 24 July 2017 constituted evidence of an inability of the respondent to control his behaviour, Dr Aboud reiterated his opinion was not based upon acceptance of the incident of 24 July 2017.[27] I accept Dr Aboud's evidence in this regard and would further note that it would incongruous for Dr Aboud to have accepted the allegations of 24 July 2017 as fact, involving as they do allegations of extreme violence against a custodial officer, as being consistent with Dr Aboud's view that a mere 12 months of good behaviour needs to be demonstrated before Dr Aboud would consider that the respondent would have displayed sufficient stability and control to be the subject of a supervision order. As Dr Aboud said in his report and in his evidence, the acceptance of the conduct of 24 July 2017 "would be quite damning".[28]

[78] Moreover, Dr Aboud's oral evidence concerning the February 2018 incident was to the effect that it was a positive factor in the respondent's favour as he disclosed the event and failed to act upon the February 2018 incident.[29]

[79] Dr Aboud, in his supplementary report of 28 March 2018, therefore expressly confirmed the opinion that he propounded in his report of 14 March 2018, namely:

> "I would therefore consider that the date he was transferred to Capricornia Correctional Centre (27 September 2017) would reasonably reflect the beginning of the continuous 12 month period in which he needs to demonstrate stability."[30]

[80] Dr Aboud considered the February incident did not extend the period of 12 months, but rather considered it was evidence that, the 12 month period not having yet elapsed, the respondent needed to continue with his schema focus therapy.

[81] I note that all of the risk assessment tools used by Dr Aboud place the respondent at a high or very high risk of offending. However, as Dr Aboud concedes, they are based upon North American research and are static and therefore must be treated with caution.[31]

[82] I place more weight upon Dr Grant's analysis that:

> "[T]aking into account the changes over time, the high level of static risk is now moderated such that I would rate his current risk of a future

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27 T1-40/37-38.

28 T1-41/27-28.

29 T1-44/7-10.

30 Report of Dr Andrew Aboud, dated 14 March 2018 at page 19.

31 T1-45/25-31.

> sexual offence as being moderate, providing he is able to stay away from drugs and alcohol and take advantage of assistance and therapy in the community. However, if he were to become uncooperative, absent himself from assistance and resume drug and alcohol abuse, the risk of sexual reoffending as well as general reoffending would rise to a high level."[32]

[83] The concern expressed by Dr Grant is that, because of his anti-social personality disorder and because of his history of past abuse of drugs and alcohol, it is extremely difficult for the respondent to "stay away from drugs and alcohol".[33] This forms the basis of Dr Grant's (and Dr Aboud's) opinion that a minimum 12 month period of good conduct needs to be demonstrated in order to provide sufficient evidence that the respondent has the ability to control himself.

[84] Although I found Dr Aboud and Dr Madsen's evidence of assistance, I found Dr Grant's evidence to be even more of assistance. Dr Grant has not only the benefit of his very considerable experience in treating dangerous prisoners, but also Dr Grant has the benefit of independently assessing the respondent on seven occasions, 5 November 2010, 3 December 2012, 27 November 2013, 19 October 2014, 2 March 2016, 14 February 2017 and 15 February 2018. Dr Grant is well placed to assist the Court in assessing the respondent's psychiatric condition and more importantly the alterations in the respondent's psychiatric condition over a period of more than seven years.

[85] Dr Grant was adamant that the February 2018 incident should not "be regarded as a reason for delaying release from prison in the longer term …".[34] Dr Grant was somewhat critical of the reporting of the February 2018 incident in the treating psychologist's report as he had an underlying concern that the reporting of incidents adverse to the respondent would undermine the therapeutic relationship which he considered to be critical.[35] Whilst from a practitioner's perspective it is quite reasonable and understandable that sensitive and adverse disclosures be kept confidential, it must be appreciated that the Court's focus is pursuant to the Act and quite different. Section 30(4)(a) of the Act expressly provides:

> "the paramount consideration is to be the need to ensure adequate protection of the community …"

[86] Whilst the paramount consideration is the need to ensure adequate protection of the community, it is accepted that the starting point is that a supervision order is to be preferred over a continuing detention order.

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32 Report of Dr Donald Grant, dated 18 February 2018 at page 13.

33 T1-62/20.

34 T1-61/6.

35 T1-53/15-28, T1-61.

[87] Given the preference for a supervision order and that the paramount consideration to ensure adequate protection of the community, each application must be assessed according to all of the available facts which may materially change over a period of time.

[88] In the respondent's case there has been a very long period of incarceration which brings its own challenges, particularly with respect to institutionalisation. The respondent has a long-standing diagnosis of anti-social personality disorder and psychopathy which makes it most difficult for the respondent to control his behaviour, however, after many years of incarceration and taking part in all available programs to assist him with his control, the critical issue is whether the courses the respondent has undertaken, the therapy which the respondent has received, together with his medication, is sufficient to enable him to control his conduct.

[89] As Dr Grant says of the February incident in his supplementary report of 25 March 2018:

> "This new material confirms the previous awareness that Mr Jackway has considerable difficulties in experiencing angry affects during negative interactions with others, particularly if he feels threatened or humiliated. When such events occur he tends to have thoughts of violence and revenge. This is clearly a longstanding pattern for him and a pattern that is likely to lead him into trouble in the future if he does not develop good control and insight into it.
>
> On the one hand, the reported incident is of concern in that it indicates that Mr Jackway has continuing difficulties with controlling his anger and also considerable problems with insight into his emotional reactions and the appropriate way to deal with them.
>
> On the other hand, it appears from this material that Mr Jackway did not on this occasion overtly act upon any of his aggressive thoughts and fantasies and when he next had contact with the officer concerned he did not act in any way negatively. Also to his credit, he discussed the incident in detail with his psychologist in his therapy sessions."[36]

[90] Dr Grant concluded that the respondent, in not acting upon his anger at the time of the incident or subsequent to the incident is on balance a matter in his favour in displaying an increased degree of insight and control.[37] Dr Aboud agreed and also thought that it also evidenced a decrease in psychopathic traits. As Dr Grant said, society should not get to the point where one "should be punishing anyone for thinking things. Even if they are thought of violence or sexual matters, because they're just thoughts …"[38]

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36 Supplementary report of Dr Donald Grant, dated 25 March 2018 at page 3.

37 T1-61/36.

38 T1-53/47-54/2.

[91] Dr Grant considered the critical issue was the control that a patient has, that is, the ability of a patient to control themselves not to act upon a violent or sexual thought. Whilst therefore acknowledging Dr Grant's undisputed long-standing expertise and his natural disinclination for the breach of patient/client confidence (and for good reason) in dangerous prisoner matters, where the ability of the prisoner to control his actions is critical, it is of benefit for the Court to have as much evidence as possible upon the issue of control. As noted, on balance, the incident of February 2018 evidences an increased ability in the respondent to control himself and that is another matter in his favour.

Submissions

[92] In detailed submissions the applicant adopts the consistent professional opinion that a minimum of 12 months of good and controlled behaviour is required in order to demonstrate sufficient control for a person with the respondent's psychiatric condition to be the subject of a supervision order. In essence the applicant urges that I adopt the approach of Daubney J in his judgment of 20 December 2013 where his Honour said:

> "I cannot avoid giving heed to the concern expressed by both of them that a relapse by the respondent into drug and alcohol abuse will catapult him into a high risk of sexual offence category. Despite the obvious and welcome improvement in his situation since the time he was made the subject of a continuing detention order, I am not satisfied he is yet at a stage where he is sufficiently able to manage the risk of exposure to drugs and alcohol and otherwise manage his violent behaviour. …"

[93] The respondent submits that the 12 month period proffered by the experts is arbitrary and cannot be regarded as the sole test.

[94] It is the case that the experts both opine that the period of 12 months is an appropriate period of time to assess the ability of the respondent to control himself. Both experts concede that a 12 month period is arbitrary, but consider that it does take into account the respondent's diagnosis and his history.

[95] The respondent argues, and I accept, that the allegations concerning issues of threats against custodial staff on 24 July 2017 ought to be totally disregarded. The matter was investigated, and no evidence was found to support the allegation which was made by a fellow prisoner. This may be contrasted with the respondent's full and frank admissions concerning his misconduct of 20 July 2017 which has been accepted as a major breach, although it did not result in any actual violence.

[96] Following the incident of 20 July 2017, which involved a threat of violence to a custodial officer, the respondent was placed in the detention unit at Wolston Correctional Centre. Both psychiatrists consider that the placing of the respondent in the detention unit cannot be considered in the critical time period of 12 months by which the respondent needs to demonstrate sufficient control of his emotions as there is little scope to display any control in a detention unit.

[97] Dr Grant agrees with Dr Aboud's suggestion that the 12 month period ought to run after the respondent's release from the detention unit and entry into the Capricornia Correctional Centre on 27 September 2017. Insofar as the respondent submits that the incident of 20 July 2017 is not of sufficient seriousness to deny the respondent a supervision order, I reject that submission. The conduct of the respondent on 20 July 2017 is of concern as it evidences a lack of personal control by the respondent in a highly controlled area of the Wolston Correctional Centre.

[98] The respondent argues that his response to the February 2018 incident is at least a neutral factor, if not one in his favour, in demonstrating improved control. I accept the latter submission, that is, the disclosure of the February 2018 incident and the respondent's lack of response to it is more to the respondent's favour than neutral and shows that the respondent has continued his long journey in improving his ability to control his anger.

[99] Doctors Grant and Aboud opined that as the respondent matures in his 40's and into his 50's, that his anti-social personality disorder will lessen.

[100] At the hearing on 16 April 2018 the respondent submitted the following in support of his submission that the respondent ought to be released from custody and made the subject of a supervision order:

1. There has been no illicit drug use since September 2016 (and with evidence that drugs are easily obtainable in correctional facilities);

2. There have been no incidents of actual violence for a considerable period of time;

3. The respondent has completed all possible available courses and refresher courses, including most recently a Low Intensity Substance Intervention (LISI) program;

4. The respondent has engaged extremely well with his new therapist, Dr Madsen after completing several years of therapy with Mr Smith;

5. The respondent has, despite trying times in correctional facilities (being targeted, threatened and assaulted), shown sufficient control not to respond so as to be the subject of any breach for eight months since 20 July 2017;

6. The proposed supervision order includes GPS tracking, curfews, regular alcohol and drug testing, i.e. at least twice a week, more effective therapy, close management and supervision.

[101] There are other matters in the respondent's favour. One matter is the respondent's demeanour in Court. The hearing necessarily revisited the two principal offences which have resulted in the respondent to be incarcerated for 23 years, namely the abduction and serious sexual assault of the nine year old boy in Gladstone in 1995 and the subsequent conviction of the respondent for the rape of his younger sister. The respondent was subjected to additional security measures in attending Court and throughout the entire day's proceeding and was able to control his emotions.

[102] With respect to the offence of rape it has always been the respondent's position that he has denied the offence he was convicted of. More recently, the respondent alleges that his sister, the victim, has contacted him with a view to a re-establishment of a proper relationship. The potential re-establishment of the relationship between the respondent and his sister would require an alteration to the usual stringent conditions provided in a supervision order prohibiting contact with any past victim. Whether the respondent's sister wishes to continue to establish a relationship with the respondent is a matter for her.

[103] The ability of the respondent to control his emotions throughout the hearing is a matter in his favour, however, I do accept the applicant's submission that it is not a matter that ought to be afforded much weight as the respondent is well aware of the importance of demonstrating control.

[104] From July 2017 up until the positive drug test on 17 May 2018, I accept that the respondent did make considerable efforts to improve.

Re-opening on 1 June 2018

[105] On 1 June 2018 the applicant applied to reopen the evidence in respect of the application. That application to reopen was not opposed. Exhibits 2 and 3 were tendered. Exhibit 2 evidences that on 17 May 2018, one month after the initial hearing date, the respondent tested positive to Buprenorphine, a synthetic opioid. Exhibit 3 is the offender case file of Queensland Corrective Services with case notes from 26 March 2018 through to 29 May 2018. In the case notes between 26 March 2018 and 25 May 2018 the respondent was well behaved, often being referred to as being "polite and compliant". The case note of 26 May 2018 records the respondent was given a copy of the breach relating to the Buprenorphine, and on 29 May 2018 the case notes record the respondent pleading guilty to the breach notice concerning the Buprenorphine. The respondent was then subject to a search which resulted in "nil illicit items found". The positive result to Buprenorphine on 17 May 2018 is a significant setback in the respondent's rehabilitation and falsifies the submission which was made on 16 April 2018[39] of no illicit drug use since September 2016.

[106] On 1 June 2018 Mr Allen of Queen's Counsel candidly conceded that the positive result to the Buprenorphine was a serious matter such that he would no longer oppose the Court making the continuing detention order.

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[39] See [100] above.

[107] In *Turnbull v Attorney-General for the State of Queensland*[40], the Court 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 the order the court has to reach a positive conclusion that the supervision order will provide adequate protection."

[108] As the expert evidence of Doctors Grant and Aboud, which I accept, suggests a longer period (i.e. 12 months) of demonstration of control, I cannot reach a positive conclusion that a supervision order will provide adequate protection.

[109] On the basis of the evidence presented before me and in particular the lack of evidence sufficient to show that the respondent, with his anti-social personality disorder, has demonstrated a reasonable ability to control himself, I am satisfied that the applicant has shown that the adequate protection of the community cannot be reasonably and practically managed by a supervision order. Whilst I accept the respondent's personality disorder is settling with maturation, treatment and medication, it is not yet settled to the point where the protection of the community from the risk the respondent will commit a serious sexual offence is adequately ensured by the terms of the supervision order (Exhibit 1). The respondent has in the past shown that he is impulsive and vulnerable to alcohol and drug abuse and, with his anti-social personality disorder, it makes it particularly hard for the respondent to gain control of his condition.

[110] I accept the applicant's submission, adopting the approach of Daubney J, that the Court ought to rely upon and heed the expert advice in the present case. The expert advice from Doctors Grant and Aboud is consistent, logical and based on a careful examination of all of the relevant material (and in Dr Grant's case over a period of more than seven years). I accept therefore that the respondent, being a person with an anti-social personality disorder, must demonstrate a minimum period of 12 months of good behaviour in an ordinary prison population (outside of a detention unit) before being considered suitable to be partially integrated into the community by means of a supervision order.

[111] I affirm the decision O'Brien AJ made on 28 February 2012 that the respondent is a serious danger to the community in the absence of a Division 3 order and I order that the respondent continue to be subject to a continuing detention order made by O'Brien AJ.

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[40] [2015] QCA 54 at [36] per Morrison JA with whom Philippides JA and Douglas J agreed.