Attorney-General of the NT v EE (No. 2) [2013] NTSC 68

PARTIES:	Attorney-General of the NT
	v
	EE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	62 of 2013(21328402)
DELIVERED:	21 OCTOBER 2013
HEARING DATES:	25 SEPTEMBER 2013
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

STATUTORY INTERPRETATION – JURISDICTION, PRACTICE AND PROCEDURE – Where applicant applied for a final continuing detention order under s 23 of the *Serious Sex Offenders Act* – respondent a "qualifying offender" as per s 22 – Court retains jurisdiction to make relevant order – respondent considered a "serious danger to the community" as per s 31 – standard of proof is to a "high degree of probability" – purpose of Act preventative not punitive – intensive supervision recommended by health professionals – final supervision order considered appropriate to meet risk of re-offending – final supervision order made – *Serious Sex Offenders Act* ss 6, 10, 16, 22, 23, 31, 32, 58, 71, 89.

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; *Attorney-General (QLD) v Francis* [2006] QCA 324; *M v M* (1988) 166 CLR 69; *WA v Latimer* [2006] WASC 235; *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, cited

Attorney-General for the State of Queensland v Sybenga [2009] QCA 382, distinguished

Attorney-General (QLD) v Francis [2006] QCA 324, applied

REPRESENTATION:

Counsel:

Applicant:	Mr Anderson
Respondent:	Mr Wild QC, Mr Brock

Solicitors:

Applicant:	Department of Attorney General and Justice (NT)
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Attorney-General of the NT v EE (No. 2) [2013] NTSC 68
No. 62 of 203 (21328402)

BETWEEN:

Attorney-General of the Northern Territory
Applicant

AND:

EE
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 21 October 2013)

Introduction

[1] On 1 July 2013 the *Serious Sex Offenders Act* (NT) (the Act) commenced. By amended originating motion filed 4 July 2013, the Attorney-General (the applicant) sought orders for a final continuing detention order, and alternatively a final supervision order in relation to the respondent. At the conclusion of the preliminary hearing on 16 July 2013, (conducted in accordance with s 25 of the Act), an interim supervision order was made pending the final hearing. The date for the hearing was set down for 25

September 2013.[1] A medical assessment order was made as required by s 26(2)(b) naming Dr Walton and Dr Raeside.

[2] I reserved my decision after the substantive hearing on 25 September 2013. Since that hearing, further written submissions have been filed on behalf of both parties. I have taken those submissions into account.[2] These are the reasons for making a final supervision order. The applicant submitted a final continuing detention order was the appropriate order; the respondent submitted the Court should make no order; but if an order was to be made, a supervision order should be made.

[3] The respondent has been on a strict interim supervision order since his release from prison as a consequence of the order made on 16 July 2013. He has been subject not only to supervision by Correctional Services, but the material before the Court indicates he has received significant additional support from Correctional Services staff as well as the North Australian Aboriginal Justice Agency (NAAJA), Mission Australia, Danila Dilba Health Services and a Lutheran Pastor. As will be seen in the reasons that follow, this extra support is a positive, possibly unexpected outcome of the operation of the Act and appears to have motivated the respondent towards more positive behaviours, rehabilitation and taking responsibility. In my opinion, however, the respondent presently remains at the level of risk

[1] *Attorney-General of the Northern Territory v EE* [2013] NTSC 35
[2] Supplementary submissions on behalf of the respondent filed 2 October 2013; on behalf of the applicant, filed 14 October 2013.

sufficient to enliven the provisions of the Act. The protection of the community is the predominant object of the Act.

Whether the Court retains Jurisdiction

[4] Senior counsel for the respondent challenged the Court's jurisdiction to proceed to make final orders at the substantive hearing, arguing that the Act envisaged the whole process be commenced and concluded *within* the last 12 months of a respondent's sentence. As this respondent was a "qualifying offender" only until 18 July 2013, the preliminary hearing under s 25 of the Act was necessarily expedited.[3]

[5] As the order made at the preliminary hearing was an interim supervision order pending the substantive hearing, it was argued that the order expired at the hearing on 25 September 2013 by operation of s 16(2) of the Act. As a final order could only then be made at the conclusion of the substantive hearing, it was submitted that the respondent was no longer, at the time of the conclusion of the hearing a "qualifying offender" under the Act and the court's jurisdiction had lapsed.

[6] Section 31 of the Act provides that on the hearing of an application under s 23 of the Act,[4] the Supreme Court may make a final continuing detention order or a final supervision order in relation to the "qualifying offender", if satisfied the "qualifying offender" is a serious danger to the community.

[3] This is dealt with in *Attorney-General of the Northern Territory v EE* [2013] NTSC 35 at [1].
[4] Section 23 provides the Attorney-General may apply for a final order.

[7] Section 22 defines a ‘qualifying offender’ as a person who has been convicted of a serious sex offence; and either:

(i) he or she is under sentence of imprisonment for that offence; or

(ii) subsection (4) applies to him or her

“Under sentence of imprisonment” means the person is in custody serving the sentence; or is subject to certain enumerated orders pursuant to the *Sentencing Act* or the *Parole of Prisoners Act*. None of those are relevant here. Section 22(4) refers to a person who has served their sentence for the *serious sex offence* and is under sentence of imprisonment for another offence or is in custody for any other reason, *other* than a continuing detention order; *and* the person has not ceased to be under sentence of imprisonment; *or* in custody for any other reason.

[8] It is argued the respondent was no longer a “qualifying offender” as he no longer met the criteria in s 22 of the Act by the time of the hearing on 25 September 2013. In terms of other indications in the Act that might inform this question, it is argued s 10, (that specifies when a continuing detention order comes into force), and s 16, (that provides when a supervision order comes into force), do not create powers to be exercised by the Court, but rather set out the mechanism regulating when orders come into force. It may be noted, however, the mechanism that provides for the commencement of supervision orders in s 16 of the Act permits two alternatives: *if* (emphasis added) the supervisee is a qualifying offender when the order is

made – when he or she ceases to be a qualifying offender; *or otherwise* – at the time the order is made. I agree s 16 does not fully answer the issue posed, but by its terms s 16 contemplates the circumstances relevant to this hearing.

[9] I do not agree with the submission that ss 58 and 71 detract from the indications drawn from ss 10 and 16. Sections 58 and 71 deal with separate fundamental issues of revocation on proof of contravention of orders and the review of certain orders. That a supervisee or detainee who is the subject of an application under ss 58 or 71 is not a "qualifying offender" is unexceptional given the processes envisaged prior to the need to resort to those sections. Those sections do not, as far as I can tell, inform the interpretation issue raised.

[10] It was submitted that the three categories of persons who may be subject to continuing orders under the Act are "qualifying offenders" under s 31; a supervisee in contravention of their order who is then made subject to continuing detention, and a detainee made subject to a further order on review. The respondent, it was argued, does not come within any of these three circumstances. It was argued the Act is structured in this way to avoid the abhorrent result of a person being at liberty and returned to custody when they had not committed any further offence. The Act, in a narrow set of circumstances, does not prohibit this result, although it might be expected that in other cases it will operate in the manner suggested.

[11] The respondent referred to the following portion of the second reading speech:[5]

> The application must be made within the period of 12 months before which the imprisonment sentence is due to end. The fact that a person may not be in custody because of parole or under a suspended sentence or home detention, or community custody does not affect the period in which an order can be sought.
>
> It is important to note these detention and supervision orders will not, as a general rule, interfere with the parole process or any other process under which a person is released from prison prior to the time when their prison sentence is due to expire.

[12] This part of the second reading speech does not in my view express the limitation suggested. The "application" refers to the application being made; not the totality of the process. The second paragraph refers to a "general rule", but in any event is referring to the special situation of preservation of conditional release orders.

[13] Senior counsel also referred, by way of comparison to s 4 of the *Serious Sex Offenders (Detention and Supervision) Act* (Vic) and s 10 of the *Dangerous Sexual Offences Act* (WA). Clearly those provisions permit in express terms, applications to proceed beyond the release date. That does not detract from the terms of this Act.

[14] Senior counsel for the respondent also referred to the interpretation of s 19(2)(a) *Sentencing (Crime of Murder) and Parole Reform Act* (NT) that provides the Director of Public Prosecutions *must* make an application to

[5] Serious Sex Offenders Bill, Second Reading Speech, 14 February 2013

extend the non parole period of certain prisoners beyond 20 years "not earlier than 12 months" before the minimum 20 year period is due to expire. It was said that the whole application was to be heard and determined within 12 months. I have been unable to locate any relevant authority on this point, however, that provision is in the context of sentencing orders; a different context than this Act. It also strikes me that the reason such an interpretation may have been adopted is because if the Director's application were proven to be unsuccessful, the prisoner would be disentitled to apply for parole at the 20 year mark for as long as the application was agitated.

[15] Statutes of this kind require strict interpretation. The Act is not to be read in a way that expands its reach beyond that which is necessarily produced by a strict reading. Substantial questions of civil liberty arise.[6] The primary object of the Act is to enhance the protection and safety of the community; the secondary object is to provide for rehabilitation, care and treatment of offenders. Statutes of this kind have been held to be preventive[7] rather than to be punitive in nature, although the consequences of an order are so serious in respect of a respondent's liberty, if there is ambiguity in the provision, it must be construed in favour of a respondent.

[16] Both parties submit a plain reading of the Act supports their respective arguments in relation s 31. Both suggest clear and unambiguous language support their respective positions.

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[6] *Fardon v Attorney-General (QLD)* (2004) 223 CLR 575 Gleeson CJ at [3]
[7] *Attorney-General (QLD) v Francis* [2006] QCA 324 at [31] citing Gummow J in *Fardon v Attorney General for Queensland* (2004) 223 CLR 575.

[17] The respondent was a "qualifying offender" under s 22 of the Act when the amended originating application was filed. At the conclusion of the preliminary hearing a hearing date pursuant to s 25(2)(a) of the Act was set and medical assessments ordered. An interim supervision order was made in relation to the respondent, pending determination of the application. At all times during that process the respondent was a "qualifying offender".

[18] The whole purpose of the merits hearing after the medical evidence is obtained, is to determine whether to make a final continuing detention order or a final supervision order under s 31 of the Act. If the application had been filed after the release of the respondent, clearly the respondent would no longer be a "qualifying offender" for the purposes of the Act and the application would be dismissed. Section 31, where it relates to "qualifying offender" is in my opinion, clearly referring to a respondent as a "qualifying offender" at the time of the filing of the application; not at the final hearing of the matter. Section 31 provides the Court may make final orders "on hearing an application made under section 23". Section 23 authorizes the applicant to make an application in relation to a "qualifying offender"; but not earlier than 12 months before the offender ceases to be a "qualifying offender" and only if the offender will be over 18 years of age when they cease to be a "qualifying offender". Section 31 provides:

> (1) On hearing an application made under section 23, the Supreme Court may make a final continuing detention order or final supervision order in relation to the qualifying offender if satisfied that the qualifying offender is a serious danger to the community.

(2) If the Court makes a continuing detention order, it may state in the order a review period for section 65.

(3) If the Court makes an order in relation to a person who is subject to a parole order, the Court may revoke the parole order.

[19] In my view the Court retains jurisdiction to hear the matter. The text of the provision in its proper context is clear.[8] The interim order is made to the date of the hearing to enable finalisation of an application validly made. If the respondent's argument was accepted, the Court's jurisdiction to make final orders would depend on extraneous matters such as time lines, (including any delays) and listings rather than on the merits.

Is the Respondent a "Serious Danger" to the Community?

[20] If satisfied the respondent is a "serious danger to the community" the Court may make a final continuing detention order or final supervision order. Section 6(1) states a person is a "serious danger to the community" if there is an "unacceptable risk" that he or she will commit a serious sex offence unless he or she is in custody or subject to a supervision order. It may be noted s 6(1) uses the phrase 'unacceptable risk', reflective of a relative risk, not an absolute concept of 'no risk'.[9] It is not a 'remote risk' but in a sense, refers to a real possibility or a real risk that is unacceptable given the likely nature and gravity of recidivism.[10]

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[8] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4]
[9] This observation was made with respect to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 by McMurdo J in *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 at [50]
[10] See discussion of "risk" in *M v M* (1988) 166 CLR 69 at 78, as reproduced in *Fardon v Attorney-General QLD* (2004) 223 CLR 575 at 606; see also *WA v Latimer* [2006] WASC 235 at [16].

[21] In deciding whether a person is a "serious danger to the community", a Court must have regard to the likelihood of the person committing another serious sex offence and the need to protect people from the impact of such offences, in particular victims, their families and members of the community.[11] The applicant bears the onus of satisfying the Court that it is appropriate to make a final continuing detention order or final supervision order[12]. Section 7 provides that proof that a person is a "serious danger to the community" must be to a high degree of probability that there is acceptable and cogent evidence of sufficient weight to justify the decision. It may be noted this is a higher standard than the usual civil standard, being on the balance of probabilities but less than the criminal standard of beyond reasonable doubt. Nevertheless proof must be to this higher and much enhanced level of satisfaction beyond the usual civil standard.

[22] After examination of the reports received as a result of the medical assessment order from Dr Lester Walton and Dr Craig Raeside, as well as a further report tendered on behalf of the respondent from Dr Olav Nielsson, and after hearing evidence from Dr Walton and Dr Raeside, I am satisfied to a high degree of probability the respondent is a "serious danger to the community" within the meaning of the Act.

[23] In reviewing the psychiatric material, a background consideration is the general consensus of the psychiatrists themselves that predicting behaviours

[11] Section 6(2) *Serious Sex Offenders Act*.
[12] Section 32 *Serious Sex Offenders Act*.

such as serious sexual offending is by no means a precise science. This is expressed in various ways in the evidence, however, having given consideration to the respondent's history of sexual offending, the psychological and psychiatric examinations that have been conducted both recently and in the past, and the voluminous material available from correctional services, the psychiatrists who have provided reports have been prepared to make assessments as to the respondent's risk of committing a serious sex offence.

[24] Dr Nielssen noted the various scales of the actuarial instruments used to predict sexual offending cannot tell which offender will re-offend or when the offence might occur. He said it was not possible to predict with any certainty whether a person who has committed previous sexual offences will go on to commit another offence, let alone a serious offence. Dr Walton referred to psychiatric predictions as unreliable and largely abandoned. He stated inaccuracy becomes greater in proportion to the length of time to which the prediction applies.

[25] Dr Raeside said he did not agree with Dr Walton's statement that the science of psychiatric prediction has largely become abandoned as so unreliable to be hazardous. Dr Raeside agreed, however, that such predictions can be hazardous and unreliable, but he disagreed predictions had been largely abandoned. He said if the person being considered has no psychiatric illness then predictions need to be qualified. He also noted that in a "narrow sense" his report is not that of a psychiatric opinion, given it is not primarily

concerned with mental illness, however, in the broader context, issues to do with personality functioning, substance abuse and offending can be assessed by a forensic psychiatrist. I agree it is an appropriate area for assessment by a forensic psychiatrist. In any event the Act deems the reports admissible.[13]

[26] Dr Raeside's opinion is that the respondent remains a "moderate to high risk of further offending, general and sexual offending in particular".[14] It is important when dealing with applications under this Act that the focus is on the risk of sexual offending. As was observed in the preliminary hearing, the respondent has also committed many other types of offending but an order cannot be made under this Act for a risk of general offending. Nevertheless, it is Dr Raeside's opinion that the respondent is at a high likelihood of committing another "serious sex offence" when he finds himself in the community. Dr Raeside has indicated that even with treatment efforts the respondent's risk is likely to remain unacceptably high. Dr Raeside explained that he used the terminology "moderate to high risk" as it may be considered that at the minimum, the respondent is a moderate risk, but more likely to be towards the high risk.[15]

[27] Dr Walton's report states that it is probable the respondent might engage in a further act of serious offending; that he cannot assert that there is a high degree of probability; alternatively, neither can he exclude that proposition.

[13] Section 89 *Serious Sex Offenders Act*
[14] Report, Dr Raeside, 10 September 2013 at 24
[15] 25 September 2013 at T 17

[28] Dr Walton was asked whether he agreed with Dr Raeside's assessment that the risk, at a minimum was moderate but more likely to be a high risk. Dr Walton said he believed there was a significant risk of re-offending and would not have difficulty describing it as moderate;[16] within the limits of being able to answer accurately, he placed the risk at moderate or moderate to high. Dr Walton's report, although not as definite in its conclusions as Dr Raeside's states that he cannot "easily...set aside" the risk that it is highly probable the respondent may engage in relevant re-offending. I have taken Dr Walton's opinion about risk as being assessed at a similar level as Dr Raeside assessed.

[29] Dr Nielssen's report states there was general agreement that the respondent does not have a disorder of abnormal interests, or any compulsion to commit sex offences and that his previous sexual offending was part of the general pattern of reckless substance use and anti-social conduct. The history of sexual recidivism suggests the respondent has significant impairment in regulation and impulse control. Those deficiencies are probably part of a personality disorder arising from the circumstances of his upbringing and reinforced by the effects of long term institutional care which removes the need for any form of planning and decision making.[17]

[30] In terms of assessing risk, Dr Raeside said that it is important to consider risk in terms of likelihood, magnitude, imminence and frequency. I found

[16] T 24
[17] Report of Dr Olav Nielssen, 20 September, 2013 at 8

this analysis helpful and persuasive. He explained that he meant it was not just how likely someone is to do something but it is the magnitude if they were to do it, which of course is relevant when considering serious sexual offending. The other issue is how frequently they are likely to offend, and the further issue is imminence.[18]

[31] In relation to frequency Dr Raeside said that on the one hand it might be said that the respondent has not offended often in the last 15 years, however, taking account of opportunity to offend, when he has had the opportunity to, he has offended generally but also sexually. The imminence is also a relevant factor because he has re-offended fairly quickly upon being given the opportunity to offend.

[32] Having regard to the totality of the psychiatric evidence; in my opinion the respondent meets the criteria in s 6 of the Act, that there is an unacceptable risk that he will commit a serious sex offence unless in custody or subject to a supervision order.

Mental State Diagnosis of the Respondent

[33] All the reports before the Court have had regard to the significant amount of material that was before the Court on the last occasion. All three doctors are of the opinion the respondent suffers at least a low grade chronic depression. The respondent exhibits depressive symptoms of fluctuating

[18] T 25 September 2013 at 12

gravity but the overall medical opinion is the respondent does not suffer a major mental illness.

[34] Dr Nielssen diagnosed substance use disorder (in remission) and Dysthymic disorder, or low grade depression. The history of depression included a suicide attempt in 2000 and other previous documented histories and incidents contained in earlier assessments. He agreed that the respondent does not have a major mental illness requiring specific psychiatric treatment, however, he said the respondent may derive some benefit from the trial of treatment with SSRI anti-depressant medication. He thought this could result in some improvement in his mood and reduce propensity for self defeating behaviour. It may be noted the Director of Correctional Services has also expressed concern in relation to the respondent's mental state given statements consistent with an intention to self harm.

[35] Dr Raeside and Dr Nielssen agree the respondent has a personality disorder. Dr Raeside provides a primary diagnosis of "mixed personality disorder with anti-social and border line traits". He explains this represents a lifelong history of difficulties with relationships, unlawful behaviour, impulsivity, irritability and anger, failure to sustain consistent work, and a childhood history of conduct disorders. It is often associated with a history of childhood abuse, neglect and poor educational and social opportunities and entertainment. As was noted at the preliminary hearing, the respondent was himself a victim of sexual abuse. Dr Raeside said the personality disorder

may be a form of chronic post traumatic stress disorder arising from early and repetitive trauma, but the actual causes are unclear.

[36] Dr Raeside agreed he had discussed with the respondent the possibility of using drugs to assist with reducing offending. He agreed the respondent was happy to try that and that this was a positive sign. If medication were to be used it would need to be administered and monitored by an experienced psychiatrist who is familiar with the treatment of libido lowering medication and he was not aware there was such a person in the Northern Territory. He said if the Court was minded to release the respondent on a supervision order that would be a necessity. The opinions on this form of medication are mixed, particularly its availability in the Northern Territory and whether it could only be administered in a custodial setting. Dr Nielssen seems to suggest availability in the community.

[37] Dr Walton did not express an opinion specifically in relation to anti-libidinal medication as he said he is not particularly enamoured with that intervention.

[38] Dr Raeside agreed that if what is being assessed is the difference between incarceration or supervision, then his attempts to rehabilitate are important.[19] Dr Raeside said that prior to reading the Director of Correctional Services report, he was suggesting high levels of supervision which he now understands are not practical. Dr Raeside said he was aware

[19] 25 September 2013 at T 13

that for certain purposes under the current supervision arrangements the respondent is able to go to a public area for a cigarette; and he was aware that he attends the city of Darwin to go shopping.

[39] Dr Nielssen said it was reasonable to conclude that extended supervision and support after release from custody could reduce the risk of both sexual offences and other types of offences. He suggested that there was no reason to believe that if the respondent completed another sex offenders course it would reduce his propensity to commit further sexual offences. He states there is some evidence to support the advocacy of libido lowering medication and that the respondent expressed his willingness to undergo a trial of that medication.

Other Relevant Material Before the Court

[40] I will summarise the other material, (aside the Director of Correctional Services report, which is discussed later) placed before the Court. The further material is not of great weight in the decision on whether to make an order or the type of order, but overall, the recent engagement with services has been a positive development. It does not affect the opinions of the psychiatrists in a significant way. Dr Walton describes the respondent embracing rehabilitation as favourable.

[41] Further material received was from Mr Peter Laming, a psychologist who has been counselling the respondent. Mr Laming states the respondent feels shame and guilt in relation to his offending. He has discussed the influence

of alcohol and drugs on his behaviour. (It must be recalled, however, that the last set of offences were committed when the respondent was not affected by alcohol, however, substance abuse features significantly elsewhere in his history). Mr Laming reported the respondent was very surprised and distressed by the new laws and the prospect of going back to gaol even though he has finished his sentence. Mr Laming reports he has discussed further education in Darwin, and the respondent's interest in his father's family tree and the Hermannsburg area. Mr Laming notes the respondent's engagement with others and states this "unfortunate detention has provided him with an unusually thorough reintroduction to mainstream society".

[42] Mr Kieran Boylen, the prison based "through care" support worker at NAAJA provided a letter stating that since the application was served on the respondent he has visited the respondent almost everyday including weekends. He notes his living circumstances have been extremely challenging; that he has had to develop a range of new skills after living for many years as a prisoner including cooking, laundry and bedding. He has been polite, friendly and willing to converse on a wide range of subjects. Mr Boylen has facilitated referrals to a Lutheran Pastor and the Danila Dilba Health Service. The respondent wishes to continue researching and gaining more knowledge about his connections to Hermannsburg and the late Albert Namatjira. He is a keen painter but has stopped painting because of the anxiety he has in relation to Court. Mr Boylen also reported about the

respondent seeking further education; that he is an experienced horseman and hopes to operate a horse riding program at his homeland west of Alice Springs. Mr Boylen says he believes the respondent has the capability and motivation to comply with an order that would require him to abide by Corrections supervision. Mr Boylen states he would be able and willing to continue to work with him to provide ongoing and intensive support.

[43] A letter before the Court from Pastor Jeff Kuchel confirms he has been meeting with the respondent. He has given the respondent a copy of an English Bible, an Arrernte Bible, an Arrernte Workshop Book and an Arrernte Catechism. These form the basis of reading, reflection and discussions of a religious nature. Pastor Kuchel says when it is appropriate he plans to introduce the respondent to his community of worshippers. The respondent has written to the Court demonstrating his insight into his behaviour, his current circumstances and aspirations.

Final Continuing Detention Order or Final Supervision Order?

[44] On behalf of both parties, detailed arguments have been submitted on whether "may" in s 31 provides a discretion to make an order or not; or whether it is mandatory to make an order once the criteria is met. Respectable arguments may be made supporting both approaches. As I am of the view that an order should be made, I decline to make a ruling at this time on that particular point.

[45] The weight of psychiatric opinion before the Court favours the making of a supervision order, (albeit two of the psychiatrists suggest it should be with 24 hour supervision), rather than a final continuing detention order. I appreciate it is a serious order, with serious consequences if there is a breach; the Act requires it must be made for a five year minimum. It is also an intensive obligation to be undertaken by Correctional Services. Application may be made, however, pursuant to the Act[20] for revocation and variation should circumstances change.

[46] Although it is undoubtedly the case that the community is protected from further offending by a final custody order, this is a case where intensive supervision is recommended on balance, by the health professionals. The paramount consideration is the need to protect the community and potential victims. A secondary consideration is the desirability of providing rehabilitation, care and treatment for the person.[21]

[47] Although at first blush Dr Raeside supports a custodial order, he initially favoured supervision until reading the Director of Correctional Services report about availability and resources. Because historically the respondent's responses to various interventions have not been successful, rehabilitation in the view of Dr Raeside is similarly unlikely to be successful. Dr Raeside said that unless a supervision order provides a high level of supervision similar to being incarcerated or with strong home

[20] Part 4, Divisions 1 and 2 of the *Serious Sex Offenders Act*
[21] Section 14 *Serious Sex Offenders Act*

detention restrictions, (24 hours supervision), urine drug testing and breath analysis several times a week then he would still have concerns about the respondent's risk of further offending. Dr Raeside said he took into account the prioritising of community safety and protection above rehabilitation when considering his future risks, as required by the Act.

[48] In addition to treatment with an anti-depressant and libido lowering medication, Dr Nielssen was of the view that the best prospects of rehabilitation lay in the respondent's placement in the community and receiving assistance and monitoring for substance use and unsuitable association.

[49] Dr Walton agreed with Dr Raeside's suggestion of 24 hours supervision, however, he said it need not be as onerous as it might sound at first. He said supervisory responsibility could be delegated to a responsible friend or relative or other person in the community. It may be noted the Act places the responsibility of supervision with Correctional Services, however, that does not exclude assistance from others. At this time, there are a number of agencies assisting the respondent.

[50] In cross examination Dr Walton commented, (as he did in his report), that the respondent was thoroughly cooperative and described it as positive that he has been trying to do the right thing with various persons. He commented that while one could say the respondent tried to paint himself in a good light given his current circumstances, that is still positive. He said

his current motivation is positive but the question is how long he will be able to sustain it. He noted the current situation or a gaol environment was ultimately counterproductive. Dr Walton said he understood that protection of the community has priority. He took the view that what is in the best interests to rehabilitate the respondent is also in the community's best interest and that if the respondent were to serve an extended period of imprisonment, that will reduce the likelihood of the respondent being able to integrate back into the community. He said that people who are institutionalized usually promptly re-offend, significantly enough to get them back into prison.[22] His report suggests further incarceration may have the opposite affect of what is being sought, that is, elevating the risk of re-offending.

[51] Dr Walton advised that a supervision order would be appropriate and that further incarceration would be likely to be deleterious and counterproductive. He noted the respondent, for a relatively brief period thus far in the context of the interim supervision order has responded positively. He said, however, in the current strict supervision environment as a result of the interim supervision order there was a significant risk that the respondent may experience intolerable frustration.

[52] It is an important consideration tending towards the conclusion of supervision that the respondent does not have a compulsion to commit

[22] T 26

sexual offences.[23] Further, Dr Raeside said he was not aware of any sexual offending on the part of the respondent when in gaol; this seems to support the opinion that the respondent lacks compulsion to commit sexual offences.[24] Dr Raeside agreed that is an important factor in that if the respondent was totally unable to control his sexual impulses, he would be sexually assaulting people around him in the prison. That form of inability to control would usually relate to someone who is extremely cognitively impaired. He said that type of person may not need to be locked up but there might be medication that could increase their control or decrease their aggression.

[53] In considering the need for protection of the community and victims the Court must have regard to the likelihood of the person committing another serious sexual offence; and whether it will be reasonably practicable for the Director of Correctional Services to ensure the person is appropriately managed and supervised in accordance with s 63 of the Act and whether adequate protection could only reasonably be provided by making a continuing detention order in relation to the person.

[54] Section 9 of the Act provides the Court can only make a continuing detention order after having regard to "whether adequate protection could reasonably be provided by making a supervision order".

[23] Report of Dr Nielsson 20 September 2013 at 8
[24] 25 September 2013 at T 18

[55] While the risk of re-offending remains high, (and by the terms of the Act any person against whom a relevant finding is made will have a high risk of re-offending), I conclude the risk is significantly minimized and managed, if the supervision, as recommended, is ordered. It may be noted, albeit with high level support from Correctional Services and the persons and agencies discussed already that the risk has been well managed in the interim. The consensus is that the supervision needs to be intensive, in that there will need to be surveillance on a 24 hour basis. Surveillance has not been on a 24 hour basis thus far, although the supervision may fairly be described as intensive.

[56] The Director of Correctional Services has provided a very helpful and illuminating report in accordance with s 88 of the Act. The Director and staff of Correctional Services have examined a number of possibilities. First the Director has authorised the current situation under the interim supervision. No appropriate alternative accommodation has thus far been able to be sourced for the respondent despite numerous efforts by Corrections staff. Correspondence tendered on the respondent's behalf indicates that may change, but at the time of hearing no alternative accommodation was available.

[57] The Court must, importantly, have regard to whether it will be reasonably practicable for the Director of Correctional Services to ensure that the person is appropriately managed and supervised in accordance with s 63 of the Act.

[58] The Director of Correctional Services is concerned about the level of resources involved in continuing supervision, particularly at the suggested level. Such intense attention and therefore precious resources that might be required for the supervision of the respondent will mean diverting resources from correctional services delivered to other persons who are subject to other types of correctional orders. The Director concluded that supervision of the type to manage the risk and ensure the safety of the community was not reasonably practicable.

[59] In relation to this issue, there would still be a cost to Correctional Services if the respondent were detained in custody. If the current form of supervision were to continue, as I understand the Director's evidence, the cost per day would be $344; the cost of a person in custody per day in the Northern Territory is $203 per day, although the Director fairly acknowledged that different costing models and reporting purposes may produce a greater figure;[25] $243 per day was suggested. The Director's concern, as he explained, was that it was not about how much money Corrections has or requires, but how best they can deliver the service they get for the money received.

[60] Whether this respondent is in custody or under supervision under this Act, he is in a different situation to other persons who are the subject of correctional orders, because he is not being dealt with for committing an offence. His sentence finished in July. The purpose of any restraint on him

[25] 25 September 2013. T at 32

is first, for the protection of the community and second for his rehabilitation. Persons subject to orders under this Act might be expected to attract more resources than other correctional services clients.

[61] Although the Director's evidence was that when the new prison opens there will be appropriate cottage accommodation for the respondent (and others under the Act); that accommodation is not yet available. Neither are devices for electronic monitoring, although the Act sets out electronic monitoring as an optional condition for supervision orders. That too may change in the near future.

[62] To the credit of the Director and the Department, extensive consultations have been undertaken at Hermannsburg Community in relation to the possibility of the respondent residing at an outstation; however, the cost of supervision at Hermannsburg or the outstation would be prohibitive and there are no service providers to assist with counselling or drug testing. There may also be unresolved cultural issues that the Director has referred to in his report. In my view, at this time, it is not reasonably practicable for the respondent to be supervised at Hermannsburg or at the outstation.

[63] Although it is at a greater cost than the daily cost of a prisoner serving a sentence in the prison, I am firmly of the view that supervision meets the risk of re-offending, the primary object of the protection of the community and the secondary object of rehabilitation.

[64] Should the Director deem it appropriate to provide 24 hour supervision, the cost is estimated at $1648.10 per day if two surveillance officers are deployed, reducing to $966.82 per day for one surveillance officer, (not the preferred option from the Director's point of view). That is a significant cost, however, it may well be that with further supervision, support and treatment, if the risk is further moderated, that high level of supervision would no longer be required. In relation to treatment, the evidence is mixed in relation to the availability of libido lowering medication. It is also mixed as to whether a sex offender's course would be of benefit. Common sense would seem to support Dr Walton's view that sex offender treatment may reinforce what gains the respondent has achieved already. It should be recalled also that Mr Ward, in his report tendered during the preliminary hearing saw value in counselling aimed at relapse prevention. There is also the possibility of the respondent contributing financially himself to the cost of housing as he is now in receipt of social security payments. Ideally with assistance, he would find work. Clearly there is a case on the basis of the psychiatric material for the respondent to be treated for depression.

[65] I have had serious regard for what the Director of Correctional Services has said about the resources of his Department. It seems to me there are options available, but at a cost. Given the particular situation of this respondent and the evidence that if he spends an extended period in prison it will reduce the likelihood of assimilation back into the community, it is reasonable in my opinion that a form of intensive supervision be ordered, even if that will

mean a readjustment of resource distribution within Correctional Services. In the longer term, a supervision order supports the primary object of protection under the Act and is preferable to detention. I do not characterise what is being ordered as "the impossible, or even the impracticable" as was said in *Attorney-General for the State of Queensland v Sybenga*,[26] in relation to 24 hour per day supervision. In *Sybenga* the respondent had been shown to be unwilling to participate in the sex offender programme of the Wacol precinct; there were no indications of improvement or the reduction of the risk while under supervision. Here, Dr Raeside notes the respondent has been generally compliant with supervision.

[66] The validity of legislation of this kind is sourced in its preventive and protective operation. If it is punitive in its operation, it has been held in other jurisdictions that its legitimacy becomes questionable. It is important therefore that for persons who fulfil the criteria under the Act, yet for whom supervision is the appropriate order, an appropriate level of supervision should be provided. In this circumstance high level supervision is reasonable. With respect I adopt what was said in *Attorney-General (QLD) v Francis:*[27]

> It is possible, too, that the view taken by Gummow J in *Fardon v Attorney-General for Queensland* supports an argument that executive government repudiation of the preventive objects of the Act in a particular case (as, for example, by the refusal of treatment to a prisoner clearly capable of, and amenable to, rehabilitation) could lead the court to refuse to make any order at all. If it were to

[26] [2009] QCA 382 at [23]
[27] [2006] QCA 324, Keane, Holmes and Dutney JJ at [34]

> appear to the court that any further detention would be truly punitive in character and, thus, contrary to the intention of the legislation, there would be no basis for the court to make an order of any kind under the Act.

[67] In short, if I were to make a final continuing detention order, in circumstances where intensive supervision would meet the objectives of the Act, albeit with some extra cost, it would be permitting the Act to operate punitively. That is to be avoided as it is not the objective of the Act.

[68] The respondent is ordered to be subject to a final supervision order commencing today. My intention is that the conditions will be the same or similar to those of the interim supervision order. The Director of Correctional Services does not suggest any further conditions. The conditions of the interim supervision order are flexible enough to increase or decrease monitoring of the respondent as the Director sees fit.