R v AT [2016] NTSC 20

PARTIES:	THE QUEEN
	v
	AT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING CRIMINAL JURISDICTION
FILE NO:	21534966
DELIVERED:	11 April 2016
HEARING DATES:	8 March 2016
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – *Sentencing Act 1995* (NT) – *Serious Sex Offenders Act 2014* (NT) – similarities between the *Serious Sex Offenders Act* (NT) and *Sentencing Act* (NT) – whether the Court may have regard to the existence of the *Serious Sex Offenders Act* in determining whether to impose a definite sentence – *Serious Sex Offenders Act* taken into account in imposing a definite sentence

CRIMINAL LAW – *Sentencing Act 1995* (NT) – indefinite sentences for violent offences – offences of a sexual nature – judicial discretion to impose indefinite sentence – severity of the violent offence – serious danger to the community – whether the nature of the offence is exceptional – whether there is a substantial or real risk that the offender will remain a danger to the community at the time of release – not categorised as severe – application for indefinite sentence refused.

CRIMINAL LAW – *Serious Sex Offenders Act 2014* (NT) – ongoing detention order once an offender is under a sentence of imprisonment – post

sentence regime rather than preventative – finite sentence imposed – subject to ongoing detention and supervision orders under the *Serious Sex Offenders Act*.

CRIMINAL LAW – Parameters of a Pre-Sentence Report – exhaustive list of matters that may be contained in a Pre-Sentence report– request for a direction pursuant to section 4(2)(a) of the *Uniform Evidence Act* – Section 71 *Sentencing Act* requires a high standard and quality of evidence – order under the *Uniform Evidence Act* refused – objections to the Pre-Sentence Report allowed in part.

Sentencing Act 1995 (NT) s 65(2), s (8), s (9), s (10), s 71, s 106(1)
Serious Sex Offenders Act 2014 (NT) s 9
Sentencing Act 1991 (Vic) s 5(2BD)
Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)

Buckley v The Queen (2006) 224 ALR 416; *Carolan v The Queen* [2015] VSCA 167; *Murray v The Queen* (2006) 200 FLR 89; *Green v The Queen* (2000) 9 NTLR 138; *The Queen v Stewart Gurruwiwi* [2015] NTSC 21433326 (18 June 2015) Sentencing Remarks, referred to.

REPRESENTATION:

Counsel:

Applicant:	M Chalmers
Respondent:	J Hunyor

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v AT [2016] NTSC 20
No. 21534966

BETWEEN:

THE QUEEN
Applicant

AND:

AT
Respondent

CORAM: BLOKLAND J

APPLICATION FOR AN INDEFINITE SENTENCE PURSUANT TO s 65 OF THE *SENTENCING ACT* – REASONS FOR DECISION

(Delivered 11 April 2016)

Introduction

[1] Today I sentenced AT to a total term of 14 years imprisonment as follows:

Count 1: Aggravated Assault: Convicted and sentenced to two years imprisonment

Count 2: Gross Indecency: Convicted and sentenced to three years imprisonment to commence after the service of the term of imprisonment on count 1.

Count 3: Gross Indecency: Convicted and sentenced to four years imprisonment to commence after the service of two years imprisonment imposed for count 2.

Count 4: Sexual Intercourse without consent: Convicted and sentenced to seven years imprisonment commencing after the service of three years of the sentence imposed on count 3.

[2] I set a non-parole period of 11 years imprisonment. The sentences were determined on the basis of a reduction of twenty percent in recognition of early pleas of guilty and cooperation. Further consideration of this factor of reduction is dealt with in the Sentencing Remarks delivered today and I respectfully refer counsel and interested persons to those Sentencing Remarks.

[3] The Crown applied for an indefinite sentence pursuant to s 65 of the *Sentencing Act* in respect of counts 2, 3 and 4. Although the procedural and substantive requirements of s 65 were largely met, I declined to set an indefinite sentence and now set out my reasons for doing so.

Circumstances of the Current Offending

[4] In summary, the sentencing facts were that on 15 July 2015 AT approached the victim, Ms JC, a 48 year old woman who was returning to her parked car in the undercover car park at Casuarina Shopping Centre. She recognised him as a man she had seen being escorted out of the shopping centre earlier by security. When he came close to Ms JC he suddenly lunged at her, making a grabbing motion toward her groin area. Afraid, Ms JC said “sorry I can’t help you” at which point he lunged again. His hand became caught in the strap of her bag. She feared being robbed. He then lunged at her a third time, slapping her on the buttocks and saying “you’ve got a nice arse”.

He then walked off. He was observed to be staggering. This assault is not the subject of the application under s 65 of the *Sentencing Act*, however forms some part of the background to the other offending.

[5] Shortly after the first assault he walked towards the Kmart entrance of the shopping centre. The second victim, Ms P, aged 19 had just finished work in one of the shops and was leaving the centre with her uncle and cousin. At 5:36 pm she walked down the footpath outside Kmart. Without warning, AT walked up behind her, reached his hands through her upper legs and grabbed her vagina on the outside of her leggings, causing her to jump up, grab him by the arm and say "get the fuck off me". He lost his balance and fell down.

[6] Shortly after this offending, at 5:40 pm he approached the third victim, who was 10 years old, walking with his mother. While the victim's mother was loading the shopping, he approached the victim from behind. He reached out and jabbed at his anus with one of his fingers, on the outside of his shorts, making contact with the anus through the shorts and causing him to become shocked and frightened. The assault was witnessed by the child's mother who rushed at AT, pushed and swore at him before alerting security staff inside the centre and rang 000. She prevented him from leaving the scene in a taxi by telling the taxi driver what had just happened. He then swore at the victim's mother saying "I didn't do that". He then walked off towards the Casuarina bus interchange.

[7] Upon arriving at the bus interchange AT rapidly approached the next victim from behind. She is an eight year old child who was waiting for a bus with

her mother and her little brother aged three. He grabbed her anal area and pushed a finger or fingers upwards penetrating the child's anus through her leggings. She was very frightened, pulled away and huddled into her mother. He then stood in front of the family and said to the victim's mother (who at that time did not know what had happened) "are you alright?" He then sat down next to the family and could be seen on CCTV reaching out in an attempt to touch the child again. At this point, security personnel and the mother of the victim with respect to count 3 arrived on the scene and intervened.

[8] AT was arrested at the scene, and was assessed as being intoxicated. He had a small amount of cannabis in his possession. The next day he participated in a record of interview. He told police that he had been at Casuarina, admitted the offences and blamed the fact that he was drunk, but said he did not know why he had done it. He has been remanded in custody since being arrested on 15 July 2015.

[9] The impact of the offending on the victims is relevant to the assessment of the severity of the offending. The victim to count 2 stated she had to hire a security guard due to not feeling safe, and states she will not go anywhere unless she is accompanied by another person. She has also suffered financially as she lost work due to fear of leaving her house and told the Court of a number of negative financial consequences.

[10] The mother of the victim to count 4 stated both her children are affected by the incident and are afraid to get on buses. She said that her daughter now

screams if anyone gets too close to her. On the day of offending, she said her daughter was shaking, crying and vomiting from stress.

Application of the Indefinite Sentence Legislation

[11] For the purposes of s 65(2) of the *Sentencing Act* (NT), counts 2, 3 and 4 are "violent offences" and are the relevant counts to be considered for this application.

[12] Section 65(2) of the *Sentencing Act* (NT) provides the Supreme Court may sentence an offender convicted of a violent offence or violent offences to an indefinite term of imprisonment. The section makes provision for certain procedural matters that are not in issue here.

[13] Section 65(8) provides the Supreme Court must not impose an indefinite sentence on an offender unless it is satisfied that the offender is a serious danger to the community because of any of the following:

(a) The offender's antecedents, character, age, health or mental condition;

(b) The severity of the violent offence;

(c) Any special circumstances.

[14] When assessing this matter, s 65(9) provides that in determining whether the offender is a serious danger to the community, the Supreme Court must have regard to the following:

(a) Whether the nature of the offence is exceptional;

(b) The offender's antecedents, age and character;

(c) Any medical psychiatric, custodial, correctional facility or other relevant report in relation to the offender;

(d) The risk of serious physical harm to members of the community if an indefinite sentence were not imposed;

(e) The need to protect members of the community from the risk referred to in paragraph (d).

[15] Pursuant to s 65(10), the Court is not limited to having regard to those matters in s 65(9) when determining whether or not to impose an indefinite sentence.

[16] Section 71 of the *Sentencing Act* (NT) provides that the Court may make a finding that an offender is a serious danger to the community only if it is satisfied:

(a) By acceptable and cogent evidence;

(b) And to a high probability, that the evidence is of sufficient weight to justify the finding.

[17] In respect of s 65(8)(a) of the *Sentencing Act* (NT), AT's antecedents, character and to some degree his health and mental condition when taken together with the expert evidence, well justify a finding, that he is a serious danger to the community. In terms of health and medical condition, I include his history of chronic depression and conduct disorder in childhood, previous hearing problems and alcohol dependency. His antecedents and

character alone supported by the expert evidence are sufficient to make the finding to the standard required by s 71 of the *Sentencing Act* (NT).

[18] Section 65(8) of the *Sentencing Act* (NT) requires only one of the factors listed in 65(8)(a)(b) or (c) to be made out to the relevant standard. With respect to "severity of the violent offence", although any sexual or violent offending with respect to children is readily and properly regarded as "severe" within the meaning of s 65(8)(b), I am not satisfied that counts two (the victim was a young adult) and count three meet that criteria. Although of course both counts are examples of serious offending, charges of gross indecency that involve in large part contact on the outside of and through clothing and for a short period of time would not generally be considered in the upper range of offending of this kind. It is serious offending for other reasons, however in this particular context I cannot conclude it would be categorised as "severe". Count 4 may be regarded as severe given the victim is a young child and digital anal penetration was committed. It is not at the highest level of gravity of offences of that kind given its short duration and absent other elements of depravity often associated with this form of offending. Given the brazen nature of the offending after attempts were made to stop him and the impact of the offending on the victim, the description 'severe' is appropriate.

[19] In any event, the primary matters that inform the finding that the respondent is a serious danger are his antecedents and character, followed by health and

mental condition as those terms are understood within s 65(8)(a) of the *Sentencing Act* (NT).

[20] The application of these provisions has been discussed in detail in this jurisdiction in *Murray v The Queen,*[1] and *Green v The Queen*.[2] I have had regard to those decisions. In *The Queen v Stewart Gurruwiwi,*[3] Chief Justice Riley had regard to the principles in *Murray v The Queen* to make clear that the discretion to exercise the power to impose an indefinite sentence is confined to those cases where the exercise of the power is demonstrably necessary to protect society from the commission of offences by the offender.

[21] The relevant question is 'whether or not there is a substantial or real risk that the offender will remain a danger to the community at the time of his release assuming a definite sentence were to have been imposed'.[4] In considering the impact of the available finite sentence upon the risk posed by the offender, the authorities indicate that the Court is to assume the sentence will be served in full.[5]

[22] Counsel for AT submitted that by virtue of the *Serious Sex Offenders Act,* a mechanism does exist in the Northern Territory which would allow for ongoing detention should release not be suitable in the future. It was submitted that it is permissible for the Court to have regard to the existence

[1] (2006) 200 FLR 89.
[2] (2000) 9 NTLR 138; *Green v The Queen* (2006) 19 NTLR 1.
[3] [2015] NTSC 21433326 (18 June 2015) Sentencing Remarks.
[4] *Murray v The Queen* 115 [91]; *Green v The Queen* 146 - 8 [22] (Angel J), 160 [56] - [57] (Mildren J, with whom Thomas J agreed).
[5] Defence Submissions p3; *Murray v The Queen* 115 [91].

of the *Serious Sex Offenders Act* given the breadth of the matters that the Supreme Court may take into account in determining whether to impose an indefinite sentence.[6]

[23] Counsel for the Crown emphasized the *Serious Sex Offenders Act* would only apply once an offender was "under a sentence of imprisonment", as opposed to an indefinite term and that it must be borne in mind the *Serious Sex Offenders Act* is a post sentence regime, rather than a preventative regime envisaged by s 65 of the *Sentencing Act*. Further, there is no indication that such an application is contemplated.

[24] I will deal with this argument further in respect of whether the discretion to impose an indefinite sentence should be exercised in favour of the Crown application.

Section 65(9) *Sentencing Act* Considerations

[25] I turn to consider the matters the Court must have regard to in s 65(9) of the *Sentencing Act*.

(a) Whether the nature of the offence is exceptional;

[26] In this context, in order for an offence to be "exceptional", there may "be a need to identify some feature or features of the offending which attracts sterner punishment …"[7] The court does not require an offence to be

[6] Defence Submissions [18].
[7] *Green v The Queen* (1999) 9 NTLR 138 [21] applying *R v Moffatt* (1998) 2 VR 229 [562] - [575].

exceptional before the Court can make a finding that an offender is a serious danger to the community.[8]

[27] What is exceptional about the offending in counts 2, 3 and 4 is the random, indiscriminate and highly intrusive nature of the offending that took place during the day in a public place. Interventions by others to attempt to stop the offending were unsuccessful. Counts 3 and 4 involved child victims in the company of a parent. Count 4 involved penetration, albeit fortunately was a brief episode compared to other cases of this kind, but nevertheless may readily in my view, be said to be exceptional. It is the kind of offending that understandably creates great alarm in the community.

[28] None of the offences are exceptional to the same degree as comparable cases where orders imposing indefinite sentences have been made in this Court. For example in *Green v The Queen,*[9] Angel J considered the seizing of an eight year old from a public area, physically carrying him away to a secluded area and orally raping him to be exceptional. Given the features already described in this matter, this offending may nevertheless be regarded as exceptional.

(b) The Offender's antecedents, age and character;

[29] AT was born at Daly River but raised principally at Peppimentari. He is 39 years old. The Court was told during sentencing proceedings he is a fully

[8] *Green v The Queen* (1999) 9 NTLR 138.
[9] Ibid.

initiated Aboriginal man, and in the past has occupied the role of teaching younger people about Aboriginal culture. He is 39 years of age.

[30] He is the youngest of seven siblings, although he has no contact with his siblings. His father died when he was three years old. He has some recollections of his father being violent. His mother remarried when he was young and his stepfather was also violent man.

[31] When he was approximately eight years old he was sexually assaulted a number of times after school by younger boys. This is documented in Ms Crawley's psychological report, referencing DCC documentation. The details and time frames were not clear given AT's distress at the time of relating those matters in the earlier reports.

[32] He was also the victim of sexual abuse by his stepfather, a brother and other adult males when he was 11 years old. He was subjected to genital fondling and on occasions anal penetration. He left school prematurely when he was 12 years old and made his way to Darwin, where he became involved in criminal offending and was placed in youth detention.

[33] Growing up he learnt both his traditional Indigenous language Nganggkurrungurr as well as English. He did not achieve English language literacy and has had significant hearing communication and language problems. He had worked as a fencer in the past, as well as undertaking CDEP work as a ranger.

[34] During the sentencing proceedings the Court received a work reference from IW, a Ranger Supervisor, who knew AT when he was working with the rangers. The reference is in positive terms, both with respect to work, work ethic and behaviour at work. Further details of this reference are set out in the Sentencing Remarks. The impression gained from the reference is that AT was more engaged in a positive way when on his own country.

[35] AT married in 2006, however by 2007 the relationship broke down. He acknowledged to Ms Crawley he has an issue with anger when he drinks alcohol and it makes him "do crazy stuff". He has some recognition that being in Darwin led him to drink alcohol, offend and consequently become imprisoned. He has also stated he had inhaled petrol the day prior to the most recent offending behaviour. There is a background of inhalant abuse as a younger person but the precise dimensions of that issue are not clear.

[36] He has a substantial criminal history, including a number of convictions for sexual assault of varying types against women and children.[10] The most relevant matters from his history are as follows:

[37] On 30 August 1996, when he was 19 years old and on bail for aggravated assault against a female, he accosted a 24 year old woman in a car park at suburban shops, grabbed her hair and pushed her forward, pursued her into a shop, phone booth and across a road. He grabbed her around her neck to get her onto the ground, got on top of her and put his hand down her shorts to

[10] Information for Court, 16 July 2015; "Chronology of Serious Offending".

touch her vagina. He was charged with an act of gross indecency and aggravated assault.

[38] On 8 May 1996, he approached a woman and her eight year old daughter walking to a bus stop, asked for money, and then pulled out his erect penis in front of them. They walked away. He came up behind the mother, put his hand between her legs and grabbed her genital area. He was charged with indecent assault and an act of gross indecency. He completed the sex offender treatment program whilst serving his sentence. According to the records tendered for both sets of offending, he was sentenced to three years imprisonment with a non-parole period of 20 months. He was released in August 1998.

[39] A short time after his release he was charged with aggravated assault when he grabbed a 15 year old girl on her groin after she refused him a cigarette. On 11 November 1998 he was sentenced to six months imprisonment.

[40] On 1 March 2000, when he was 22 years old, he committed two assaults on different women aged 29 and 27 years within a two week period. Both assaults were aggravated by indecency. Both assaults were committed during the day, in public and a member of the public intervened. He was sentenced to 44 months imprisonment with a non-parole period of 32 months.

[41] On 14 February 2004, when he was 26 years old, he approached a group of children, in Nauiyu community, telling them he wanted oral sex and exposed

his erect penis to them. He was charged with exposing a child to an indecent act. He was sentenced to 12 months imprisonment, suspended after five months.

[42] In 2006, he had been residing at Emu Point with his partner but came to Darwin to attend Hospital for a shoulder injury and to do some shopping. He had been drinking alcohol and smoking cannabis. He dragged a 25 year old woman off of the street and pushed her onto the ground until a member of the public intervened. He was charged with attempt sexual intercourse without consent and deprivation of liberty. When sentenced for this offending in 2007, the sentencing judge warned him that further offending may lead to an application for an indefinite sentence. While in custody serving his four year sentence with a non-parole period of three years, he completed 18 sessions of the sex offender treatment program before it was discontinued.

[43] On 7 September 2011, he was charged with indecent assault. According to the Information for Courts, he was given a five month sentence backdated to 8 September 2011, the balance suspended on 23 January 2012, for 12 months, with conditions. This was the last conviction of violent or sexual offending until the present offending.

[44] He has other convictions for an array of offences including stealing, disorderly behaviour in public, trespass, damage to property, unlawful entry, arson, and for breach of bail.

[45] In terms of the application for an indefinite sentence, consideration of his character and antecedents well illustrate the respondent is a serious danger to the community.

> *(c) Any medical, psychiatric, custodial correctional facility or other relevant report;*

[46] The Court has been provided with a psychiatric assessment from Dr Lester Walton and a psychological assessment from Ms Kate Crawley. These reports also draw on earlier reports.

[47] Dr Walton described AT's background as 'blighted' from the outset due to dysfunctional family, and being the victim of repeated physical and sexual abuse. Dr Walton said polysubstance abuse and criminal offending unsurprisingly, commenced early. Dr Walton diagnosed substance-dependency and antisocial personality disorder. Further, at times, he has suffered a depressive disorder. Dr Walton describes him as a severely psychologically damaged individual. Substance abuse is centrally relevant to his offending by means of disinhibited behaviour, chemically-induced.

[48] Dr Walton summarised his current situation as follows: "it would seem highly probable that if AT was released into the community again he will probably lapse back into drug and alcohol abuse which is a very significant factor in terms of his risk of re-offending generally, and engaging in violent conduct in particular".[11] Dr Walton expressed the view that he is in a high risk category of offending generally and did not see any differential risk in

[11] Report of Dr Walton dated 2 February 2016 [3].

and of itself with an urban compared with a regional placement.[12] Dr Walton did however state that factors may indirectly arise from a different type of environment relevant to the risk of reoffending. Factors such as the presence or absence of family support and constraint, access to liquor and illicit drugs, the availability of medical and rehabilitation services and the opportunity for cultural and work-like participation would be relevant.

[49] In her psychological report, Ms Crawley described his offending behaviour as impulsive and opportunistic sexually violent behaviour that is diverse, chronic, and involves physical coercion on stranger victims. Ms Crawley holds the opinion that his risk to offend against children is high if located in the Darwin urban region and low to moderate if located in Wadeye, if he is abstinent from alcohol and the appropriate external risk management structures are instituted.

[50] Ms Crawley notes AT gravitates to Darwin, despite orders to the contrary in the knowledge that he is likely to be subject to temptation in respect of alcohol and therefore putting himself at risk of committing alcohol fuelled offences. Treatment programmes have not curtailed the risk.

[51] Ms Crawley states it is difficult to ascertain whether he experiences deviant sexual fantasy or whether his offending behaviour is an example of disinhibited and impulsive needs gratification whilst under the influence of alcohol, reflective of extremely poor coping, social, communication,

[12] Report of Dr Walton dated 2 February 2016 [5].

problem solving skills and immaturity. It is however, unlikely that he meets the criteria for paedophilia disorder or paedophilic sexual orientation

[52] As indicated, Ms Crawley's opinion is that under conditions of being in the urban area, under the influence of alcohol and/or cannabis, at times when angry, he engages in impulsive and opportunistic sexually violent behaviour that is diverse, chronic and involves stranger victims.

[53] The Pre-Sentence Report ordered for these proceedings states that community corrections could not provide the level of supervision that would be required in the community. The report indicated that interventions such as Sex Offender Treatment Program and Alcohol and Drugs Program would be best implemented in a custodial setting.

[54] I will deal with certain objections taken to parts of the pre-sentence report.

[55] On the question on whether to make an order pursuant to s 65 of the *Sentencing Act*, it is necessary for the Court to find an offender to be a serious danger to the community. The Court can do this only if satisfied by acceptable and cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the finding. Given the high standard to be applied to fact finding and the ultimate conclusion in this context, I find it unnecessary to order that the *Uniform Evidence Act* applies to these proceedings. I appreciate it is open to the Court to order that the *Uniform Evidence Act* may apply, however the statutory test set out in s 71 of the *Sentencing Act* achieves the same outcome and requires a high

standard and quality of evidence before a finding that the offender is a serious danger can be made.[13]

[56] Ordinarily I may not entertain such objections, but because of the high standard required, I make the following rulings in response to the objections taken:

[57] Objection 1 is allowed in part only. Circumstances of current offending is not a matter listed in s 106(1) of the *Sentencing Act*. Given the high level of cogency required in respect of s 65, I do not propose to use that material as proof of the circumstances of the offence, however much of it is relevant to AT's social background history and special needs. These matters are relevant in respect of s 106(1) and I give the material some weight in that respect only.

[58] Objection 2 is not accepted. Criminal history is relevant to the pre-sentence report. Section 106(1)(f) provides for the "circumstances of other offences of which the offender has been found guilty…" I would however exclude the word "impulsively" as referred to in objection 2(a) as it is not clear whether that term is simply a lay observation or is being used in a way that an expert would use it. It does not meet the requirements of acceptable and cogent evidence.

[59] Objection 3 is allowed. I agree this material is highly prejudicial. There is no possibility of testing it in any practical sense. These statements do not

[13] *Sentencing Act* s 71.

meet the criteria for the purposes of the s 65 application. It is not acceptable and cogent evidence in terms of s 71 of the *Sentencing Act*.

[60] Objection 4 is allowed. Impact on the victims is provided by the victim impact statements tendered in the sentencing proceedings.

[61] Objection 5 is upheld in part. Section 106(1)(b)(c) and (d) readily allow material of this kind. The passages on page 6 are admitted. The opinion expressed on page 7 is obviously lay opinion. Although alcohol and its effects may be the subject of either lay or expert opinion, depending on the circumstances, the expressions "inherent lack of self-control" and "danger to the community" are properly the subject of expert evidence in the context of the indefinite sentence application and are excluded from the pre-sentence report.

[62] Objection 6 is not upheld. Addiction matters are relevant to s 106(1)(b) "Social history and background", (c) "Medical and psychiatric history" and (j) "Special needs". The information is clearly sourced in previous court transcripts and reports. The weight given to this material is less than would be given to an opinion expressed by an expert in the field. The subject of this objection is more appropriately dealt with as a matter of weight than exclusion.

[63] Objection 7 is not upheld. This material is relevant to social history. It is a matter more appropriately dealt with by a consideration of weight.

[64] Objection 8 is upheld in part. The statement "He is not motivated to change his behaviour and reluctant to engage in future treatment programs" is relevant to s 106(l)(f)(j)(k). As a submission by the author, it is more appropriately dealt with as a matter of weight. For the purposes of assessing whether an order is to be made under s 65(1) I exclude the balance of the material outlined in objection 8 as it does not meet the appropriate standard of cogent evidence set out in s 71 of the *Sentencing Act*.

[65] The Pre-Sentence Report records AT's further significant health problems including a history of hearing loss, tuberculosis at an earlier age and self-harming behaviours. He has been in breach of many community based orders but is compliant in custody. Community corrections could not provide the level of supervision required. He would like to again live in Wadeye, however whether he would be welcome to reside there again is considered doubtful at this time.

> *(d) and (e) The risk of serious physical harm to members of the community if an indefinite sentence were not imposed and the need to protect members of the community from risk;*

[66] The risk of serious physical harm of the type that resulted from the most recent offending is high if he is not incarcerated, given his history and the type of offending he engages in. This is indiscriminate sexual offending primarily against women and children. There is a strong need to protect the community from this risk. Whether that requires an indefinite term to be set in the face of a lengthy sentence coupled with the availability of an application being made under *Serious Sex Offenders Act* is not so clear.

[67] If the offending were of a type that required, for proportionality reasons, a relatively modest sentence be imposed, or if there were no further mechanism such as the orders available under *Serious Sex Offenders Act*, then an indefinite term may be the only way to provide proper protection for the community, however, given primarily those two factors, I am not persuaded that it is appropriate or necessary to impose an indefinite sentence. Those two factors operate well to protect the community from the risk, including future risk posed by AT. I was referred to and have regard to the comments in *Buckley v The Queen:*[14] "an indefinite sentence is not merely another sentencing option. Much less is it a default option. It is exceptional, and the necessity for its application is to be considered in light of the protective effect of a finite sentence".

[68] It is a matter of discretion whether the Court imposes an indefinite sentence, even though as in this case, most of the criterion is clearly met under s 65 of the *Sentencing Act*. Section 65(10) provides that the Court is not limited with respect to the matters it may have regard to in determining whether to impose an indefinite sentence.

[69] I appreciate the Crown's submission that mere exposure to another regime does not mean that any such application is being contemplated. Exposure to a future application would apply to any offender who qualified under the test for an order under the *Serious Sex Offenders Act*. There is one matter that differentiates this offender from many others that is the lesser risk when

[14] (2006) 224 ALR 416, 418 [7].

he is no in an urban setting. Further, he does not meet the criteria for paedophilia.

[70] As pointed out by counsel for AT, in the Northern Territory, unlike the situation in Victoria, the availability of another statutory regime has not been excluded as a consideration with respect to the question of setting an indefinite term or indeed any sentence. After being referred to *Carolan v The Queen*,[15] I have come to the conclusion the Court is obliged to have regard to the availability of the *Serious Sex Offenders Act*. It is directly relevant to the assessment of risk to the community. The tests are the same under the two regimes.

[71] Although *Carolan v The Queen*,[16] involved a review of an indefinite sentence, the Victorian Court of Appeal considered whether s 5(2BD) of the Victorian *Sentencing Act* (Vic), that precludes a court from having regard to any possibility or likelihood of an application under the *Serious Sex Offenders (Detention and Supervision) Act* (Vic) when sentencing an offender, applied to a review of an indefinite sentence. The Court of Appeal noted that the prohibition at all contained in s 5(2BD) did not apply to a review. No prohibition is contained in the *Sentencing Act* (NT).

[72] Further, the Victorian Court of Appeal, in the context of reviewing an indefinite sentence said the court should assume the relevant authorities will

[15] [2015] VSCA 167.
[16] [2015] VSCA 167.

exercise the powers conferred upon them for the purpose of protection of the community when it is necessary to do so.[17]

[73] I see no reason not to make the same assumption.

[74] As has already been indicated, there are a number of compelling factors favouring the order being made. On behalf of the Crown, Ms Chalmers pointed out that as well as the fact that AT meets the criteria for the imposition of an indefinite sentence, there is the problem of his attitude towards rehabilitation both in the past and at the time of assessment with respect to the current offending. Ms Chalmers pointed out the courses or treatment programmes he has had access to during incarceration: literacy and numeracy, ending offending, anger management, alcohol and other drugs, stress and relaxation, victim awareness and the Sex Offender Treatment Program in both 1998 and 2008. In 2008 he withdrew from the programme prior to completion. He declined to participate in July 2009 in the Sex Offender Treatment Program and the Illicit Drug Program. On behalf of the Crown it was submitted that an indefinite sentence will not only protect the community but will provide proper incentive for him to meaningfully engage in rehabilitation. It may be that once he understood the purpose of a review of an indefinite sentence, he would be motivated to complete further programmes.

[75] The possibility of applying for parole in the distant future may also provide the same suggested incentive; although I proceed on the basis he will serve

[17] *Carolan v The Queen* [2015] VSCA 167 [91].

his full sentence. The possibility of further detention at the conclusion of the sentence is likely to provide a similar incentive as the incentive suggested on behalf of the Crown with respect to a review of an indefinite sentence. The tests or criteria under the two legislative regimes are effectively the same. I have also considered the observation by Professor Freiburg,[18] that legislation enacted in almost all jurisdictions that empowers the courts to order the detention or supervision of dangerous offenders following the expiration of their sentences has effectively displaced indefinite sentencing in the "sanctions armoury".

[76] An examination of the criteria in the *Serious Sex Offenders Act* illustrates the similarity of the two regimes. Section 6 of the *Serious Sex Offenders Act*, for present purposes, is in the following terms:

> (1) 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.
>
> (2) In deciding whether a person is a serious danger to the community, a court must have regard to the following:
>
> (a) The likelihood of the person committing another serious sex offence;
>
> (b) The impact of serious sex offences committed, or likely to be committed, by the person on:
>
> (i) Victims of those offences and the victims' families; and

[18] Fox and Freiberg's, Sentencing, State and Federal Law in Victoria, 740. See also Keyzer and McSherry 'The Preventative Detention of Sex Offenders: Law and Practice' 38 UNSW Law Journal, 792.

(ii) Members of the community generally;

(c) The need to protect people from those impacts.

[77] The *Serious Sex Offenders Act* allows for ongoing detention or supervision orders to ensure that the community will be properly protected from the danger posed by someone in AT position at the completion of a definite sentence.

[78] Section 9 of the *Serious Sex Offenders Act* provides that in deciding whether to make, confirm or revoke a continuing detention order in relation to a person, a court must have regard to the following:

(a) As the paramount consideration – the need to protect:

(i) Victims of serious sex offences committed, or likely to be committed, by the person; and

(ii) The victims' families; and

(iii) Members of the community generally;

(b) As a secondary consideration – the desirability of providing rehabilitation, care and treatment for the person.

[79] In considering the need for protection mentioned in subsection (1)(a), the court must have regard to the following:

(a) The likelihood of the person committing another serious sex offence;

(b) Whether adequate protection could reasonably be provided by making a supervision order in relation to the person.

[80] There is a further factor relevant to the exercise of the discretion in this particular case that may not be relevant to other offenders in similar situations. Ms Crawley takes the view that the risk posed by this offender may be mitigated if he is in a community such as Wadeye and is restricted in terms of access to alcohol. In 2004, he did commit one offence at Nauiyu, but there are no other reports of offending away from urban settings. Dr Walton did not see a differential risk as between urban and regional placements, but did consider environmental factors to be significant, at least indirectly. The difficulty as Ms Crawley makes clear is compliance. Ms Crawley does make the point that with oversight, there was a hiatus in offending of three years. I conclude that the risk posed by AT would be mitigated when he is living in a regional community with support, away from alcohol and other drugs. To genuinely mitigate the risk however, he would still need to be under some form of coercive supervision as he has a history of coming to Darwin, drinking and offending in the way that he did in 2015. Although I am not to be taken as suggesting this would be appropriate for many years to come, he may in the future be a person amenable to not only detention under the *Serious Sex Offenders Act*, but could be considered within the context of that regime for supervision if the risk to the community is lessened by virtue of the environment and having served a lengthy term of imprisonment.

[81] The length of the finite sentence imposed on this occasion, coupled with the inevitability of an application under the *Serious Sex Offenders Act* should the finite sentence not be adequate protection, in my view manages the

acknowledged serious risk posed by this offender. It is therefore not necessary with respect to this particular offender to order an indefinite term. I decline to make an order for an indefinite term of imprisonment.
