The Attorney-General of the Northern Territory v JD (No. 2)
[2016] NTSC 12

PARTIES:	THE ATTORNEY-GENERAL OF THE NORTHERN TERRITORY v JD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY ORIGINAL JURISDICTION
FILE NO:	36 of 2015 (21518615)
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JUDGMENT OF:	BARR J

CATCHWORDS:

SERIOUS SEX OFFENDERS ACT – Assessment by Court as to whether there is an unacceptable risk of the respondent committing a serious sex offence unless he is in custody – Court satisfied that the respondent is a 'serious danger to the community' – final continuing detention order made

Serious Sex Offenders Act s 3, s 4, s 6, s 7, s 9, s 22, s 23, s 25, s 79, s 90, s 92, s 94, s 97.

Director of Public Prosecutions (WA) v GTR (2008) 38 WAR 307, followed.

REPRESENTATION:

Counsel:

Applicant:	T Anderson
Respondent:	M Thomas

Solicitors:

Applicant:	Solicitor for the Northern Territory
Respondent:	

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

The Attorney-General of the Northern Territory v JD (No. 2)
[2016] NTSC 12
No. 36 of 2015 (21518615)

BETWEEN:

THE ATTORNEY-GENERAL OF THE NORTHERN TERRITORY
Applicant

AND:

JD
Respondent

CORAM: BARR J

REASONS FOR DECISION

(Delivered 29 February 2016)

[1] On 3 December 2015, I made a final continuing detention order in relation to the respondent, pursuant to s 31 *Serious Sex Offenders Act* ("the Act"). I was satisfied that the respondent is a "serious danger to the community", within the meaning of that term in s 6(1) of the Act, in that there is an unacceptable risk that he will commit a serious sex offence unless he is in custody. In accordance with s 7(1) of the Act, I was satisfied, to a high degree of probability, that there was acceptable and cogent evidence of sufficient weight to justify my decision. After considering the matters specified in s 6(2) and s 9(2) of the Act, I was satisfied that it is very likely that the respondent would commit another serious sex offence if he were at

large in the community, and that adequate protection of the community could not reasonably be provided by making a supervision order pursuant to s 14 of the Act. My reasons follow.

Scheme of the Act and history of the proceeding

[2] The purpose and scheme of the Act was explained by Mildren J in *The Attorney-General of the Northern Territory v JD* [2015] NTSC 28,[1] and it is not necessary for me to repeat his Honour's detailed explanation. In brief, the Act permits this Court, in the exercise of its civil jurisdiction, to make an order for the continued detention or supervision of a "qualifying offender", after the offender has served his sentence, and even though he has committed no further offence.

[3] Before the Court may make an order of the kind referred to in [2], it must be satisfied that the offender is a serious danger to the community.[2] A person is a serious danger to the community if there is an unacceptable risk that he will commit a serious sex offence unless he is in custody or subject to a supervision order.[3]

[4] Relevantly, a "serious sex offence" is an offence listed in Schedule 1 of the Act (including an offence that was in Schedule 1 at the time it was committed). The offences listed in Schedule 1 include sexual intercourse and gross indecency without consent, and a range of other sexual offences where the maximum penalty is seven years or longer.

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[1] *The Attorney-General of the Northern Territory v JD* [2015] NTSC 28 at [3] – [10].
[2] *Serious Sex Offenders Act* s 31(1).
[3] *Serious Sex Offenders Act* s 6(1).

[5] In deciding whether a person is a serious danger to the community, the Court must have regard to (1) the likelihood of the person committing another serious sex offence; (2) the impact on victims, their families, and members of the general community of serious sex offences committed or likely to be committed by the person; and (3) the need to protect people from those impacts.[4]

[6] Pursuant to s 7(1) of the Act, the Court must be satisfied, to a high degree of probability, that there is acceptable and cogent evidence of sufficient weight to justify a decision that a person is a serious danger to the community. The subsection, as drafted, is concerned with *adequacy of evidence*: the matter about which the Court must be satisfied to a high degree of probability is that the evidence is cogent and of sufficient weight to justify the decision. The subsection does not impose a standard of proof to a high degree of probability that a person is a serious danger to community.[5] It would follow that the civil standard of proof still applies, namely this Court must find the applicant's case proved on the balance of probabilities taking into account, inter alia, the nature of the subject matter of the proceeding, and the gravity of the matters alleged.[6] However, somewhat confusingly, s 95(1) of the Act

[4] *Serious Sex Offenders Act* s 6(2).
[5] The observations of Mildren J in relation to s 71 *Sentencing Act* in *Leach v The Queen* (2005) 16 NTLR 117 at [14] are apposite to s 7(1) *Serious Sex Offenders Act*. The *Serious Sex Offenders Act* (NT), s 6(1) and s 7(1), may be contrasted with s 7(2) *Dangerous Sexual Offenders Act 2006* (WA), which specifies that the standard of proof of unacceptable risk (of commission of a serious sexual offence) is to "a high degree of probability".
[6] *Serious Sex Offenders Act* s 94(4); *Evidence (National Uniform Legislation) Act 2011* ("ENUL"), s 140. The reference in s 140(2)(c) ENUL to "the gravity of the matters alleged" reflects the judgment of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362: "The seriousness of an allegation made … or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences."

provides that "the standard of proof as to whether a person is a serious danger to the community is as mentioned in s 7(1)", whereas s 95(2) provides that the standard of proof for "all other matters" under the Act is the balance of probabilities. This suggests that the legislature may have intended that s 7(1) specify a standard of proof, and that such standard be a higher standard of proof than proof on the balance of probabilities; alternatively it might reflect the draftsman's understanding (or misunderstanding) of s 7(1). My conclusion was that s 7(1) did not specify a higher standard of proof than proof on the balance of probabilities; rather it reflects the common law position that the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove, and the consequences flowing from a particular finding.[7]

[7] If, after hearing an application made under s 23 of the Act, the Court is satisfied that a person is a serious danger to the community, the Court must make a final continuing detention order or a final supervision order.[8] Although s 31(1) of the Act says the Court *may* make a final continuing detention order or final supervision order if satisfied that a qualifying offender is a serious danger to the community, 'may' in the context means 'must', in the sense that the Court must make one of two orders if relevantly

[7] See, for example, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, at 171 (proof of fraud).
[8] *Serious Sex Offenders Act* s 31(1).

satisfied.[9] Having regard to the context, general scope and objects of the Act, it would be inconceivable that the Court would retain a discretion if it had found that there was an unacceptable risk that a qualifying offender would commit a serious sex offence if not in custody or subject to supervision.

[8] A "final continuing detention order" is "a continuing detention order … under which the detainee is to be detained indefinitely".[10] A "final supervision order" is "a supervision order under which the supervisee is to be supervised for a stated period of at least five years."[11]

[9] The paramount consideration in the Court's decision to make a continuing detention order in relation to a person is the need to protect victims, their families and members of the general community.[12] In its consideration of protection, the Court must take into account not only the likelihood of the person committing another serious sex offence, but whether adequate protection could reasonably be provided by making a supervision order in relation to the person, rather than a detention order.[13]

[10] On 28 April 2015, the Attorney-General filed an application by originating motion pursuant to s 23(1) of the Act for a final continuing detention order, alternatively a final supervision order, in relation to the respondent. On

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[9] *Julius v Bishop of Oxford* (1880) 5 App Cas 214 at 225; *Ward v Williams* (1955) 92 CLR 496 at 505 - 506; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134 - 135. See also *Director of Public Prosecutions (WA) v GTR* (2008) 38 WAR 307 at 323 [51], per Steytler P and Buss JA.
[10] *Serious Sex Offenders Act* s 8(2)(a).
[11] *Serious Sex Offenders Act* s 13(2)(a).
[12] *Serious Sex Offenders Act* s 9(1) and 9(2). The desirability of providing rehabilitation, care and treatment for the person is stated as "a secondary consideration".
[13] *Serious Sex Offenders Act* s 9(2)(a) and (b).

12 May 2015, a preliminary hearing took place pursuant to s 25 of the Act to decide whether the matters alleged in the application would, if proved, satisfy the Court that the respondent was a serious danger to the community. On 21 May 2015, Mildren J decided that the matters alleged in the application would, if proved, satisfy the Court that the respondent was a serious danger to the community. His Honour then set a date for the final hearing and ordered medical assessment by two medical experts.[14]

[11] The two medical experts were Dr Michael Beech and Dr Lester Walton, both specialist psychiatrists. I will refer to their evidence later in these reasons.

Preliminary issue

[12] Because the Court's jurisdiction under s 31(1) of the Act to make a final continuing detention order or a final supervision order is dependent upon the respondent being a "qualifying offender" within the meaning of s 22(1) of the Act, a preliminary issue for determination is whether the respondent is a "qualifying offender" as defined. Section 22(1) of the Act reads as follows:

> 22 Meaning of qualifying offender
>
> (1) A person is a ***qualifying offender*** if:
>
> (a) he or she has been convicted of a serious sex offence; and
>
> (b) either:
>
> (i) he or she is under sentence of imprisonment for that offence; or

[14] *Serious Sex Offenders Act* s 25(2)(b); s 79.

(ii) *not relevant*

[13] I concluded that the respondent was a "qualifying offender". He had been convicted of a serious sex offence, and thus satisfied s 22(1)(a) of the Act. Although he had been convicted of two serious sex offences, the first in January 1988 and the second in March 2005, only the second of those was relevant to my conclusion that the respondent was a "qualifying offender" because the respondent completed the sentence imposed for the 1988 offence many years ago. However, at the time the application was made, the respondent was still under sentence of imprisonment for the second serious sex offence, and hence satisfied s 22(1)(b)(i) of the Act.

[14] Mr Thomas of counsel for the respondent contended that the term "qualifying offender" in s 22 of the Act should be construed by reference to the following object stated in s 3(1) of the Act, which refers to serious sex "offences" and which, counsel contended, requires that the respondent must have committed more than one serious sex offence:

> The primary object of this Act is to enhance the protection and safety of victims of serious sexual sex offences and the community generally by allowing for the control, by continued detention or supervised release, of offenders who have committed serious sex offences and pose a serious danger to the community. [underline emphasis added]

[15] Mr Thomas also referred to s 6(2)(b) of the Act which requires the Court, in deciding whether a person is a serious danger to the community, to have

regard to the impact of "serious sex offences committed, or likely to be committed" by the person on victims and others.

[16] Finally, Mr Thomas referred to the second reading speech made by the Attorney-General in relation to the Serious Sex Offenders Bill,[15] part of which is extracted below:

> The threshold test is also an important aspect of the legislation as it defines the offenders who may potentially be the subject of an application by the Attorney-General. As I have said, this legislation is not aimed at all sex offenders, only those offenders who are likely to commit further sexual offences at the most serious end of the scale. In general terms, the threshold test in the Bill is that it only captures prisoners who have been convicted of an offence of a sexual nature which is punishable by seven years or more imprisonment.
>
> … The Attorney-General will not be obliged to apply in relation to all prisoners who fall into the criteria of eligibility under the Act. In other relevant Australian jurisdictions, assessment committees have been established to identify, assess and refer prisoners for orders. Most of these committees consist of government employees, including Corrections, police officers and health professionals. These committees monitor and assess serious sexual offenders while they are still under a sentence of imprisonment and advise the relevant Attorney-General as to the prisoners who truly pose a serious risk to the community.
>
> This ensures the schemes are appropriately targeted and avoids costs associated with unnecessary court procedures. It is proposed to establish a similar vetting arrangement in the Northern Territory. The Department of Correctional Services will be responsible for developing the guidelines around the assessment of offenders for referral to me, or any of my successors as Attorney-General, for an application. The legislation will not commence before these administrative guidelines and supporting processes are in place.

[15] Hansard, 14 February 2013, Second Reading Speech for the Serious Sex Offenders Bill (Serial 18) by Mr Elferink, Attorney-General and Minister for Justice.

> My intention is that, other than in exceptional cases, applications will not be made unless a sex offender has committed three sex offences. I consider this kind of discretion should not be regulated by the legislation. Accordingly, the Bill does not try to articulate how these decisions about applications are to be made. [underline emphasis added]

[17] I rejected the respondent's contention that, to be a "qualifying offender", a person must have been convicted of more than one serious sex offence. In my opinion, the respondent's reliance on the drafting of s 3(1) of the Act was misplaced. The only reason the objects section refers to "serious sex offences" in the plural is that it had almost immediately before referred to "offenders" in the plural, the plural references entirely consistent with the object or objects of the statute being stated as having general application to serious sex offenders in the community. Moreover, s 22(1)(a) is drafted in very clear terms insofar as it requires that a person be convicted of a serious sex offence, consistent with the statement by the Attorney-General in the second reading speech that "the threshold test in the Bill is that it only captures prisoners who have been convicted of an offence of a sexual nature which is punishable by seven years or more imprisonment."

[18] Insofar as the respondent relied upon the Minister's stated intention that, other than in exceptional cases, applications under the Act would not be made unless a sex offender had committed three sex offences, it is clear that the Minister's statement was about setting policy in relation to the decision to make an application under the Act, and that such policy was expressly excluded from the legislative scheme. The Minister's statement has no role

in the interpretation of s 22(1)(a) of the Act. The meaning and effect of the text of a statute are not to be displaced by statements in secondary materials.[16] The words of a Minister must not be substituted for the text of the law.[17]

The respondent's offending history

[19] Before referring in detail to the offending which led to the respondent's conviction on the two serious sex offences, I set out some general background.

[20] The respondent was born at Wadeye on 14 May 1969. There were nine children in his family.

[21] The respondent lived in Wadeye for most of his childhood and teenage years. He spent significant periods of time at the family outstation, Nardidi, situated at the mouth of the Moyle River, about 150 kilometres by road from Wadeye. As a child, his home environment appears to have been happy and stable. He attended Our Lady of the Sacred Heart School at Wadeye from 1976 to 1984. He had significant behavioural problems while at school. Those problems included aggression, resentment towards authority, lack of classmate friendships, inappropriate laughter and inappropriate advances towards females, particularly female teachers. He had learning difficulties and required remedial teaching. He was seen as a loner. He had a short

[16] *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33]; *Kline v Official Secretary to the Governor General* [2013] HCA 52, at [32].
[17] *Re Bolton and anor; Ex parte Beane* (1987) 162 CLR 514 at 518, per Mason CJ, Wilson and Dawson JJ.

attention span and teachers found it difficult to engage and maintain his interest.

[22] When he was assessed by a psychologist in 1984 to investigate concerns about lack of peer friendships, learning difficulties and sexually inappropriate behaviour towards teachers, there was no evidence of formal thought disorder or psychotic disorder. In October 1984 the respondent was examined by CT scan to investigate possible temporal lobe lesion caused by encephalitis. No abnormality was detected. In May 1985 the respondent was admitted to the psychiatric unit at the Royal Darwin Hospital for assessment and treatment of his behaviour problems.

[23] In June 1986 the respondent vandalised his family home and threatened his parents with various weapons, apparently because his father had asked him to put away a video. When his parents sought out the community nurse for assistance, the respondent locked himself inside the clinic with his parents, creating a ‘siege’ situation. When a nurse and a visiting medical officer attempted to calm him down, he grabbed the nurse by the throat and swung a large stick at the medical officer.

[24] In 1987, the respondent unlawfully entered his school and rang the school principal from the principal’s office.

[25] In October 1987, Dr Joan Ridley, psychiatrist, determined that the respondent did not suffer from a psychiatric illness but said that it seemed

most likely that he had suffered from a conduct disorder and that he had an anti-social personality disorder.

[26] On 2 November 1987, the respondent was sentenced to six months' imprisonment for the aggravated unlawful entry of a dwelling and related property offences. He was released after serving one month and was to be subject to supervision for a period of 12 months from the date of release.

[27] The respondent was released from prison on 1 December 1987.

Offending in January 1988

[28] About six weeks after his release, on 16 January 1988, the respondent first engaged in serious sexual offending. He was 18 years and eight months old. He came before the Supreme Court on 20 July 1988, charged with one count of aggravated sexual assault and one count of aggravated assault. He entered pleas of guilty to both charges.

[29] In 1988, s 192 Criminal Code read, relevantly, as follows:

> 192. SEXUAL ASSAULTS
>
> (1) Any person who unlawfully assaults another with intent to have carnal knowledge or to commit an act of gross indecency is guilty of a crime and is liable to imprisonment for 7 years.
>
> (2) If the person assaulted is under the age of 16 years and the offender is an adult, he is liable to imprisonment for 14 years.

> (3) If he thereby causes bodily harm to the person assaulted or commits any act of gross indecency, he is liable to imprisonment for 14 years.

[30] The facts of the offending on 16 January 1988 were as follows. The respondent invited two 6-year-old boys into his parents' house at Wadeye and took them into his bedroom. The boys were naked and the respondent was sexually aroused. The respondent threatened one of the boys by pointing a large knife at his face. He told the boy to lie on a mattress in the bedroom. The boy was frightened and began to cry. The respondent told him to get up and leave the room. After the first boy left, the respondent, still holding the knife, told the other boy to lie on the mattress. The second boy was frightened and crying, but complied. The respondent removed his own clothes and lay on top of the boy. He made numerous attempts to anally penetrate the boy. After the respondent had ejaculated, he threatened the second boy with the knife by holding it at the boy's throat, to stop him crying. He then told the boy to leave, which he did. When examined at the clinic, the boy's anus was tender, with a slight tear and abrasions.[18] The sentencing judge concluded that the respondent had not fully penetrated the victim.[19]

[31] The maximum penalty for the charge of aggravated sexual assault was 14 years. Both s 192(2) and s 192(3) applied to the respondent's offending.

[18] Transcript of sentencing proceedings before Asche CJ 20 July 1988 p 12.
[19] Transcript of sentencing proceedings before Asche CJ 20 July 1988 p 29.

[32] Asche CJ sentenced the respondent to terms of imprisonment of five years on the first charge and one year on the second charge, to be served concurrently. His Honour fixed an overall non-parole period of two years and six months.

[33] The Criminal Code was amended in 1994 to repeal s 192, as it stood in 1988, and substitute a new s 192.[20] The amendment had the effect of deleting the specific offence of assault with intent to have carnal knowledge or with intent to commit an act of gross indecency. Relevantly, however, the amending Act introduced a wide definition of "sexual intercourse", so as to include the insertion by a person of his penis into the anus of another person. The amending Act made it an offence, punishable by imprisonment for 14 years, for an adult to attempt to have sexual intercourse without consent with a person under the age of 16 years.[21] In addition, the amending Act made it an offence, also punishable by imprisonment for 14 years, to commit an act of gross indecency upon another person without that person's consent.[22]

[34] The aggravated sexual assault offence committed by the respondent in 1988 is properly characterised as a "serious sex offence" within the meaning of that term in s 4 of the *Serious Sex Offenders Act*, in that the offence was "an offence of attempting"[23] "an offence substantially corresponding to"[24] an

[20] *Criminal Code Amendment Act (No 3) 1994* Act No. 13 of 1994 s 12.
[21] *Criminal Code Amendment Act (No 3) 1994* s 12. The same provision is still contained in s 192(6) Criminal Code.
[22] That provision still survives, in a slightly amended form, in s 192(4) Criminal Code.
[23] Paragraph (d) of the definition of "serious sex offence" in s 4 *Serious Sex Offenders Act* .
[24] Paragraph (c) of the definition of "serious sex offence" in s 4 *Serious Sex Offenders Act*.

offence listed in Schedule 1 of the *Serious Sex Offenders Act*. Schedule 1 includes the offences, described in this abbreviated way, of "Sexual intercourse and gross indecency without consent", contrary to s 192 Criminal Code. The reference to "sexual intercourse … without consent" is to the offence of having sexual intercourse with another person without the consent of that person, contrary to s 192(3) of the Criminal Code. With specific reference to s 192(3), s 192(5) provides that any person "who attempts to commit the crime defined by subsection (3)" is liable to imprisonment for seven years. If the person attempting to have sexual intercourse with another person is an adult, and the 'other person' is under the age of 16 years, s 192(6) provides a maximum penalty of imprisonment of 14 years. If the person attempting to have sexual intercourse with another person causes harm to the other person, s 192(7) likewise provides a maximum penalty of imprisonment of 14 years.

[35] The offence of which the respondent was convicted, unlawful assault of another with intent to have carnal knowledge, carried a maximum penalty of imprisonment of seven years under the repealed s 192(1) Criminal Code. The maximum penalty was increased to 14 years where the person assaulted was under the age of 16 years and the offender was an adult. The maximum penalty was also 14 years where the offender caused bodily harm to the person assaulted (or committed any act of gross indecency). The respondent pleaded guilty to and was convicted of the charge that, being an adult, he unlawfully assaulted a named person under the age of 16 years, namely six

years, with intent to have carnal knowledge of him and thereby caused bodily harm, contrary to s 192(1), (2) and (3) of the Criminal Code.[25]

[36] The repealed s 192 of the Criminal Code was replaced by the existing s 192, which contains several offences of, and relating to, serious sexual assault. The offence committed by the respondent against the repealed s 192, sexual assault with intent to have carnal knowledge, substantially corresponds to the offence of attempting to have sexual intercourse with another person without consent, contrary to the existing s 192(5) of the Criminal Code. It is an element of the offence of unlawful assault that the person assaulted not consent to the act of assault. An unlawful assault with intent to have carnal knowledge is effectively the same as an attempt to have sexual intercourse without consent. The substantial correspondence between the offences is evidenced also by the common penalty and aggravated penalty provisions, seven years and 14 years respectively.

[37] The respondent might also be charged with the following offences against the Criminal Code if the respondent offended today in the same way as he offended in 1988:

- an offence contrary to s 127(1)(b) Criminal Code of committing an act of gross indecency upon a child who is under the age of 16 years;

- an offence contrary to s 132(2)(a) of the Criminal Code of indecently dealing with a child under the age of 16 years;

[25] Transcript of sentencing proceedings before Asche CJ 20 July 1988 pp 3, 9 – 10 and 24.

- an offence contrary to s 192(4) of performing an act of gross indecency on another person without the other person's consent.

[38] However, the test of substantial correspondence is not in relation to the offending conduct, and how it might be charged, but rather the offence of which the qualifying offender was convicted, and whether that offence substantially corresponds with existing Schedule 1 listed offences.[26]

[39] I should clarify that my finding in [34][27] and the discussion in [35] to [38] were not relevant to my conclusion in [13] that the respondent was a "qualifying offender" within the meaning of s 22(1) of the Act. The respondent satisfied s 22(1)(a) of the Act as a result of being convicted for his offending in March 2005. Moreover, if the respondent's contention were correct, and that to be a "qualifying offender", a person must have been convicted of more than one serious sex offence, that test was satisfied in the respondent's case.

[40] On 10 May 1988, some four months after the offending in January 1988 but prior to being sentenced in July 1988, the respondent was seen by Dr Bartholomew, a psychiatrist. Dr Bartholomew's report, tendered in evidence at the sentencing hearing, read in part as follows:

[26] The offence appears also to substantially correspond to two offences specified as "offences of a sexual nature" in Schedule 2 to the Act: an offence contrary to s 188(2)(k) of the Criminal Code of aggravated indecent assault, and an offence contrary to s 193 of the Criminal Code of assault with intent to commit a sexual offence. However, this correspondence is not presently relevant.

[27] The finding that the aggravated sexual assault offence committed by the respondent in 1988 was properly characterised as a "serious sex offence" within the meaning of that term in s 4 of the *Serious Sex Offenders Act*.

> The prisoner admitted the offences saying it was the first time, that the boy started it, that it was a mistake, and would never happen again.

[41] The respondent's perception that the child victim was in some way responsible for the respondent's offending was, and remains, a matter of concern. When the respondent gave his account of the incident to psychiatrist, Dr Michael Beech, on 19 June 2015, he denied that he had engaged in any sexual behaviour and denied that he had used a knife. He said that the victim had been playing in his room and that he had slapped him. He claimed that the police had made up the story, consistent with police having lied about other men having sex with boys in a conspiracy to put the men into gaol.[28]

Offending between 1988 and 2005

[42] The respondent was released from prison on 16 July 1990, having served two years and six months of the sentence imposed on 20 July 1988 (which had been backdated to 17 January 1988).

[43] On his release, he entered into an arranged marriage with his sister-in-law (the sister of the man who had married the respondent's sister).

[44] On 25 August 1990, the respondent's new wife attended a disco. The respondent's wife left the function with another man. The respondent found his wife and assaulted her by slapping her to the face before dragging her home where he continued to assault her by hitting her to the lower back,

[28] Report Dr Beech 6 July 2015 p 6 lines 310 - 320.

buttocks and upper thigh with a broomstick. When he spoke to police about the assault, the respondent said, "[she] run away and I wanted her for myself. She's my woman". He admitted to the offending. In retrospect, the extent of the respondent's moral culpability for this offending is somewhat unclear. The pre-sentence report indicated that both the victim's family and the respondent's family were upset with the victim in relation to her conduct. At that time (25 years ago), members of the Port Keats Community considered that the respondent's behaviour was a valid response to the victim's behaviour. The respondent was convicted of aggravated assault and was sentenced to six months imprisonment, fully suspended with a two year good behaviour bond.

[45] Some five days after the imposition of the sentence referred to, the respondent committed another aggravated assault. On 16 November 1990, he was convicted of a number of offences in addition to the further assault, including criminal damage, escape custody, assault police, breach of bond and breach of parole. He was sentenced to eight months imprisonment for the fresh offending, and his parole order was revoked.

[46] The respondent did not commit offences of a sexual nature in the period between 1988 and 2005. However, he committed a number of offences of violence (including violence against females), and spent substantial periods of time in prison. The Table below sets out the periods of imprisonment, with reference to the respondent's offending:

	Offending details	Date received into prison	Date released	Days served
1	Sentence for aggravated sexual assault and aggravated assault	19/01/1988	16/07/1990	910
2	In custody on remand for aggravated assault	29/08/1990	12/10/1990	45
3	Sentence for breach of parole and fresh offences: assault police, criminal damage, and aggravated assault male on female with offensive weapon	22/10/1990	05/06/1992	593
4	Sentence for two counts of common assault	03/11/1992	01/12/1992	29
5	In custody on remand on charges of assault and attempted unlawful entry	12/06/1994	16/06/1994	5
6	Sentence for 3 counts of unlawful entry and stealing, and interfering with motor vehicle	03/10/1995	02/01/1996	92
7	Sentence for breach of recognisance	21/01/1996	21/06/1996	153
8	Remand	03/12/1996	10/12/1996	8
9	Sentence for unlawful entry and stealing, aggravated assault causing bodily harm and use of weapon	06/02/1997	05/09/1997	212
10	In custody for breach of bail, non-payment of fines	13/09/1998	22/09/1998	10

11	Sentence for aggravated assault male on female with weapon, trespass, and interfere with motor vehicle	29/10/1998	06/01/1999	70
12	In custody for non-payment of fines and disorderly behaviour	18/01/1999	23/01/1999	6
13	In custody for breach of bail	01/06/1999	03/06/1999	3
14	In custody for non-payment of fine for disorderly behaviour	04/08/1999	17/08/1999	14
15	Sentence for stealing, disorderly behaviour, breach of suspended sentence, unlawful property damage	20/10/1999	28/01/2000	101
16	On remand on charge of aggravated assault male on female causing bodily harm, with weapon	19/02/2000	14/03/2000	25
17	Sentence for unlawfully damaging property, unlawful entry, armed with offensive weapon, and aggravated assault	04/06/2000	03/08/2001	426
18	Sentence(s) after breach of parole	12/10/2001	15/05/2002	216
19	Sentence for aggravated assault male on female	08/06/2002	02/09/2002	87
20	In custody on remand for two counts of aggravated assault	02/10/2002	29/11/2002	59
21	Sentence for assault causing bodily harm and	18/12/2002	22/04/2003	126

	breach of suspended sentence			
22	In custody on remand for two counts of aggravated assault	25/04/2003	06/05/2003	12
23	Restored sentence for assault causing bodily harm, and further counts of aggravated assault	15/05/2003	02/01/2004	233
24	Sentence for unlawfully damaging property and unlawful entry	04/02/2004	04/05/2004	91
25	Sentence for stealing, unlawful entry, unlawfully damaging property and breach of suspended sentence	13/05/2004	08/01/2005	241
26	Sentence for being armed with offensive weapon at night	27/01/2005	25/03/2005	58
			TOTAL	3825 days 10.48 years

[47] It can be seen that in the period of just over 17 years and two months from 19 January 1988 to 25 March 2005 the respondent spent 10.48 years in custody. That represents about 60 per cent of the overall period in custody.[29]

The Offending in March 2005

[48] The respondent engaged in further serious sexual offending on 29 March 2005. On 29 June 2005, he pleaded guilty in the Supreme Court to having sexual intercourse with a female victim without her consent. He also entered

[29] The information in the table to par 45 has been derived from the document "Custodial Episode History" (Ex A2); from the IJIS Summary contained at pp 262 – 271, Vol 2 of the Annexures to the Affidavit of Maria Pikoulos affirmed 20 July 2015; and supplemented by reference to the Information for Courts document at pp 33 – 44 of Vol 1 of the Annexures to the Affidavit of Maria Pikolous.

a plea of guilty to one count of aggravated assault on the same female victim, with an admitted circumstance of aggravation that the victim suffered harm.

[49] The facts of the respondent's offending were as follows. At 10.30 pm on 29 March 2005, the female victim was walking along an alleyway connecting two streets in the suburb of Wagaman. She had been drinking during the day with her family and was very drunk. As she was walking along, the respondent called out to her. As she turned around the respondent punched her to the left side of her face and to the eye, causing her to fall to the ground. While she was on the ground the respondent punched and kicked her to the head and body several times. She lost consciousness for a brief time. When she regained consciousness the respondent told her to get up. She complied. The respondent then pulled her over to the grounds of a nearby primary school. The respondent told the victim that she must have sex with him. The victim said that she did not want to have sex. The respondent replied, "We will have sex or I will kill you right here". He then ripped off the victim's shirt, breaking off her buttons. He demanded that she take off the rest of her clothes. She complied because she was scared of being punched and kicked again. The respondent then removed his clothes and directed the victim to lie on the ground. Again she complied. The respondent then lay on top of the victim and proceeded to have penile/vaginal sexual intercourse. The victim was too afraid to say anything.

[50] After the respondent had finished having sexual intercourse, he got up, put his trousers back on and then lay down and went to sleep. The victim then took the opportunity to get dressed and walk away to her home, which was nearby. She left her bra behind. When the victim got home, she told her boyfriend that she had been assaulted. Police later went to the school grounds in search of the respondent. He was found asleep at the location of the offending, lying on top of the victim's bra. The victim was examined at the Royal Darwin Hospital and was found to have sustained bruising to her head, shoulders and left chest wall. She also had an undisplaced fracture of the medial wall of the left orbit. Some six weeks later, at review, the victim had continuing intra-orbital nerve paraesthesia.

[51] The respondent was convicted of both offences.[30] The sentencing judge described the respondent's attack on the victim as "brutal, heinous and degrading". His Honour noted that there was no remorse, that the respondent showed no empathy for his victim and no regard for her dignity as a person. The judge considered that the respondent had virtually no prospects of rehabilitation, and sentenced him to an effective aggregate term of 10 years imprisonment. A non-parole period of seven years was fixed. The respondent was not released on parole. On 30 September 2014 the respondent, whilst still in prison, was convicted of aggravated assault on a prison officer and sentenced to imprisonment for four months. Pursuant to s 59(2) of the *Sentencing Act*, the 10 year sentence was suspended until the

[30] Date of sentence: 30 June 2005.

four month sentence was served. In the result, the respondent did not complete his 10 year sentence until 29 July 2015. He was therefore able to satisfy the criterion for a "qualifying offender" in s 22(1)(b)(i) of the Act.[31]

[52] When the respondent gave his account of the 2005 offending to psychiatrist, Dr Michael Beech, he claimed that the victim was his girlfriend with whom he had enjoyed a sexual relationship for a long time. He claimed that they would often drink together. On the day of the offending, at a gathering, he met the victim's sister and talked to her. This made his 'girlfriend' (the victim) jealous. She said she wanted to leave and eventually she became wild because the respondent was still talking to her sister. They walked to the bus stop where they engaged in a jealous argument. They then took the bus and went to the shops to buy more alcohol. They were both drunk by this time. He said that he punched the victim because she was yelling at him. She then pulled off her clothes, because she was drunk and angry with him. He told her to get dressed because he was concerned that the police would come. However, she did not get dressed so the respondent hit her again with a beer can. She ran off with her clothes, but left her bra at the scene. The respondent fell asleep and was arrested by police because the victim had falsely accused him of raping her. The police did not believe him and he was subsequently charged and convicted. When Dr Beech told the respondent that it appeared he had pleaded guilty to the charges, the respondent said that this was wrong, and that he had pleaded not guilty. However, his lawyer

[31] See [12] above.

was incompetent, and made out that the respondent had pleaded guilty when he had not.[32] The respondent's account was therefore very different to the admitted facts at his sentencing in June 2005.

[53] The respondent's history of past offending was very lengthy. In brief, between 1987 and 2014, in addition to the two serious matters mentioned, he was convicted of 80 offences mainly involving assaults, aggravated assaults, stealing, trespass and unlawful entry. The respondent had a history of failing to comply with court orders (breaches of bond, breaches of suspended sentences) and also breaches of parole orders.

Bad behaviour in prison - 2005 to the present

[54] While in custody, serving his sentence for the March 2005 offending, the respondent was involved in many incidents of misconduct, some of sexual misconduct, many involving violence and threats of violence directed to prison officers and fellow prisoners. With one exception, these matters did not result in criminal charges being brought. However, Dr Beech referred to these incidents, which he described as "multiple incidents of disruptive, aggressive, violent and non-compliant behaviours" and which, he considered, constituted "a persistent pattern of aggressiveness, volatility and behavioural discontrol".[33] Dr Beech also referred to the respondent's paranoid tendencies, which had caused him to misinterpret the interactions of prisoners and staff members and engage in threatening behaviour towards

[32] Report Dr Beech 6 July 2015 p 7 lines 325 - 360.
[33] Exhibit MP7 p 14 lines 752 and 775.

them.[34] Dr Beech relied on the many incidents in order to conclude that the respondent's long history of violence, which began in childhood and continued in adult years, continued in prison with "persistent affective volatility and aggression."[35] Commissioner Middlebrook also relied on the respondent's many incidents of misconduct in making an assessment as to his ability to manage and supervise the respondent in the community.

[55] Because the incidents involving the respondent had such significance to the evidence of Dr Beech and Commissioner Middlebrook, I consider it necessary to detail the incidents to which they have referred. The relevant evidence consisted of documentary records, many of them made on the computerized Integrated Offender Management System (IOMS), others being hard copy memoranda within Departmental files.

[56] As mentioned in [2] above, the within application is a civil proceeding. The Act provides specifically that proceedings are to be conducted in accordance with the law applicable to civil proceedings, including the law of evidence, unless the Act otherwise provides.[36] The documents described in the previous paragraph come within the 'business records' exception to the hearsay rule, referred to in s 69 *Evidence (National Uniform Legislation) Act 2011*. The documents clearly form part of the records belonging to the

[34] Exhibit MP7 p 16 lines 842 - 846.
[35] Exhibit MP7 p 17 line 864.
[36] *Serious Sex Offenders Act* s 94(4). See also s 97 of the Act, which states (or declares) the admissibility of specified categories of evidence, for example, a medical, psychiatric or psychological report about an affected person; evidence of an affected person's criminal history; evidence of compliance with supervision, parole and other orders including conditions imposed on a grant of bail; evidence of efforts to address causes of offending behaviour; transcripts of court proceedings for a serious sex offence; reasons for decision or sentencing remarks of the sentencing court.

Department of Correctional Services (however named), for the purpose of a "business" (in this context, a prison carried on or operated by the Crown[37]) and contain representations made or recorded in the course of or for the purposes of that business, by persons who had or might reasonably be supposed to have had personal knowledge of the asserted facts.

[57] I was satisfied to a high degree of probability as to the sufficiency and cogency of the evidence in relation to many, but not all, of the incidents relied on. In determining the sufficiency and cogency of the evidence, I had regard to whether the officer who entered or otherwise recorded the facts about the incident was an eye witness to, or participant in, the events described; the extent of factual detail provided about the incident; the contemporaneity of the making of the record in relation to the incident itself; and (to the extent it was relevant) whether the account given was corroborated by another officer or officers. In this context, I noted that the respondent did not give evidence in this Court to contradict or otherwise challenge the facts alleged in evidence against him.

[58] On Monday 17 December 2007, the respondent was being interviewed in relation to a prison misconduct hearing. There were three prison officers in the room. The respondent became agitated when the charge was read out to him, and his agitated behaviour continued throughout the interview. When the attending Chief Prison Officer told the respondent he had been found

[37] See the extended definition of *business* in clause 1 of Part 2 of the Dictionary to the *Evidence National Uniform Legislation Act 2011*.

guilty of the charges, the respondent became aggressive and abusive. When he was returned to his cell, he was still agitated and abusive and said:

> That Mr Cook is no good. He's always staring at me, fuck him he's no good. I'll fuckin' kill him when I get out , I'll find that Mr Cook and kill him.[38]

[59] The incident was evidenced by signed statements of a Chief Prison Officer, a Senior Prison Officer and a Prison Officer.

[60] On Saturday 22 December 2007 prison officers were distributing "hygiene tools" to prisoners in the High Security Unit. For no apparent reason, the respondent shouted at one of the prison officers:

> Why you not respect me, why you yell at me, you have no respect.

[61] Prison officers left the respondent's cell and one of them, from outside the cell, told the respondent to settle down. At that stage, speaking through the hatch, the respondent said:

> I'll fucking get you, I'll kill you, you have no respect for me, you are new, you want me in more trouble, why you like this?

[62] This incident is evidenced in the signed statements of two prison officers who were present at the time.[39]

[63] On Sunday 28 December 2008, when the respondent was required to be standing by his bed with his shirt on for the morning 'unlock', he was sitting

[38] MP4 pp 553, 555 and 557.
[39] Annexure MP4 pp 551 and 553.

on his seat without his shirt on. He was instructed to get off his seat and put his top on for the morning count. He then said to the prison officer:

> I be tryin', you be pickin' on me.

[64] He later said to the same officer:

> You be pickin' on me, I get you when I get out.

[65] He then spoke to a Senior Prison Officer, with reference to the first officer and said:

> That officer is talkin' about me, I get him when I get out, he been pickin' on me.

[66] The incident was witnessed by a Senior Prison Officer and a prison officer, who both made signed statements.[40]

[67] On 27 January 2009, the respondent was lying on his bed at the time of the morning 'unlock'. He had not retrieved his breakfast cereal from the open door hatch. When he was instructed to get up and to take his breakfast, he replied:

> Fuck you, fuck you, I'll fuck you up.

[68] The respondent was very agitated, for no apparent reason. While swearing at the officer, the respondent was kicking his cell door. This incident was evidenced by the signed statements of two prison officers.[41]

[40] Exhibit MP4 pp 499 and 501.

[69] On Tuesday 3 February 2009, the respondent was subject of a prison misconduct hearing. When he was told that he had been found guilty, he became agitated and screwed up the documents relating to the charges against him. He then stood up with his hands raised in an aggressive manner, saying:

> I'm fuckin' sick of this shit.

[70] When escorted into the corridor outside the hearing room, his aggression escalated and he had to be secured on the ground and handcuffed. He was escorted back to the High Security Unit and shortly afterwards made threats against a male prison officer, several times saying that he would "get him on the outside". He then turned his attention to a female prison officer who was present and said:

> You slut woman. I'm going to see you on the outside. You fuckin' slut woman.

[71] He was warned on several occasions not to make threats against officers. The incident was observed by a number of officers who were present, and is evidenced by the signed statements of a Senior Prison Officer and two other prison officers.[42]

[72] The applicant relied on another incident which was alleged to have occurred some six months prior to Thursday, 5 May 2011. The allegation was that the respondent made a comment that he would like to push a female prison

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[41] Annexure MP4 pp 493 and 495.
[42] Annexure MP4 pp 485, 487, 489 and 491.

officer into a cell and rape her. The applicant relied on a memorandum written by a Senior Prison Officer on 6 May 2011, which read relevantly as follows:

> Prior to this [event of 5 May 2011] around 6 months ago prisoner M made statements to officers that he was going to kill JD [the respondent] because of JD's statements of sexual assault of a female officer here in HSU. Prisoner M stated that JD made a comment that he would like to push the female officer into a cell and rape her.[43]

[73] The date on which the alleged statement was made by the respondent to prisoner M was not clear. The Senior Prison Officer's written statement or representation was third hand hearsay, being the Senior Prison Officer's record of a representation made by officers unnamed (but not necessarily even made by those officers directly to the Senior Prison Officer), as to a representation allegedly made by prisoner M as to a representation allegedly made to him by the respondent. Moreover, it was clear that there was bad blood between the respondent and prisoner M at the relevant time. Prisoner M may have sought some reason to justify his threatened violence against the respondent. Finally, from my limited knowledge of Aboriginal English, that is, the English spoken by Aboriginal speakers of English, "rape" may well mean sexual intercourse, but not necessarily sexual intercourse without consent.[44] In conclusion, on application of the test in s 7(1) of the Act, the

[43] Annexure MP4 p 467.
[44] See, for example, Dave Moore: *Unfriendly Terms in Court: Aboriginal Languages and Interpreting in the Northern Territory* (2014) 8(12) Indigenous Law Bulletin, p 8, where the author discusses "dangerous false friends" and the use by Aboriginals in Central Australia of the word "rape" having a different meaning from Standard English.

alleged threat in [72] was not proven on the balance of probabilities.

[74] On Friday 15 May 2011, the prisoner came out of the dining room towards a prison officer. He was swinging his arms in a threatening manner, saying:

> You fuckin' don't do that to me. You are fucking with me.

[75] The respondent's manner was very threatening and the prison officer backed away from him saying, "Go back," and raising his hands with his palms towards the respondent. A short while later, the respondent was restrained and, while he was struggling, he yelled at the first prison officer that he was going to get a big stick and that he was going to kill him. He repeated the threat several times. The incident arose from the respondent's perception that he had been teased by the prison officer. The events of Friday 15 May 2011 were entered by the officer concerned into IOMS on the Sunday following the Friday incident.[45]

[76] On Wednesday 3 August 2011, the respondent became very agitated with another prisoner who, he alleged, was staring him down and talking to other prisoners about him. An hour or so later, the respondent was observed standing in the doorway of his cell verbally abusing the other prisoner, calling him a poofter and saying: "I'll kill you, you fuck". The respondent was subsequently moved from the block where he had been housed. The details of the incident were entered into IOMS the same day.

[45] Annexure MP4, pp 473 – 475.

[77] Also on Wednesday 3 August 2011, the respondent knocked at his cell door indicating that he wished to speak to a prison officer. When a prison officer attended, the respondent said to him:

> Piss off, I want to talk to the Block Officer.

[78] When the attending officer told the respondent not to speak to him in that way, the respondent said to him, "Officer, you are a dog cunt, you are dead', while at the same time performing a throat cutting gesture, followed by a hand gesture indicating firing a gun. He then said again, "You are dead". The officer reported the incident the same day and entered the details into IOMS.[46]

[79] On 6 August 2011, the respondent verbally abused and threatened another prisoner, who was cleaning the hallway outside the respondent's cell. He said:

> I'm going to kill you. You white prick. I'm going to get you and kill you. You bastard.

[80] A prison officer told the respondent that his behaviour would not "help his cause". The respondent then abused the officer saying:

> I'm going to kill, I'm going to kill this old block officer. He always talks about me. I'm going to punch and kill him. I'm upset and worried about my mother. I'm going to kill him.

[46] Annexure MP4 p 462.

[81] Although some other officers managed to calm the respondent down, he continued making threats against the first officer. The details of this incident were entered into IOMS on the day it occurred.[47]

[82] On 15 August 2011, the respondent had an interview with two female nurses from Forensic Mental Health Section. A prison officer was supervising their visit to the respondent. When the respondent came out of the interview room, he said to the prison officer: “You were staring at me”, moving in the officer’s direction. The nurses attempted to calm the respondent. The prison officer replied that he had been watching the respondent because he was supervising the nurses’ visit. A short while later the respondent struck the prison officer with an open handed push to the left side of his chest. He was taken to ground, but in the process the officer was struck to the cheek bone below the left eye. The prison officer and another prison officer who witnessed the incident both entered the details into IOMS on the day the incident occurred.[48]

[83] On Wednesday 19 October 2011, five prisoner officers, one of them a female officer, were carrying out the unlock procedure in the prison wing where the respondent was housed. The female officer instructed the respondent to tuck his shirt in. The respondent became agitated. He said to the officer, “What’s your problem?” or “What’s your problem with me?” He was then instructed by a male officer to tuck his shirt in. However, he came

[47] Annexure MP4 p 460.
[48] Annexure MP4 pp 471 and 472.

to his cell door and said to the female prison officer, “You are sexy lady”. He made pelvic thrust gestures towards the door of his cell. About five minutes later, the respondent’s cell door was unlocked. The respondent pushed the door open, lowered his shorts and fully exposed his genitals in front of the officers, including the female officer. He stood in the door with his arms outstretched, performing pelvic thrusts in the direction of all the officers. He then turned to face the female officer and pointed to his penis. He stated, three times, “This is what you want, you want some of this?” The incident was reported and details entered into IOMS by two prison officers, both eyewitnesses.[49]

[84] On Monday 7 November 2011, the respondent attracted the attention of three prison officers who had been speaking to a prisoner in a nearby cell. The respondent was behaving very aggressively and said, “All you officers are lying to me. I want my stuff back. I want all my things”. One of the officers tried to talk to the respondent, but he maintained his aggressive behaviour. He said:

> I don’t like you, you lying, you come in here I kill you. I’ve got big noises in my head. My head hurts. It hurts all the time. You officers keep lying to me. That female officer, that black piece of shit, I’m going to kill her, she keeps telling lies about me.

[49] Annexure MP4 pp 457 and 458.

[85] Two of the prison officers who were present during the incident each entered a description of the incident into IOMS on the day of the incident. Their accounts were consistent and very similar.[50]

[86] On 12 June 2012, the respondent became agitated and motioned for prison officers to come into his cell to speak with him. One of the prison officers declined, and instead suggested that the respondent speak through the door hatch. The respondent then charged at the door, attempting to prevent officers closing it. After the door had been secured, the respondent began to threaten officers and invite them to fight him. The information in relation to this incident was independently entered into IOMS by three of the prison officers who were in attendance and witnessed what occurred.[51]

[87] On Friday 31 August 2012, a female prison officer received an intercom call from the respondent. He was upset that another prison officer had taken his 'phone numbers'.[52] It was explained that the numbers would be returned. The respondent then began to bang on his cell door. Three prison officers went to speak to him to tell him that his demanding behaviour should stop. The respondent was agitated: pacing up and down in his cell. When he appeared to have calmed down, the female prison officer explained that she would open the hatch to speak to him. When she opened the hatch, the respondent threatened her and said that he would look for her on the outside. He called her a slut. He made repeated accusations that the female prison

[50] Annexure MP4 pp 454 and 455.
[51] Annexure MP4 pp 440, 441 and 442.
[52] A document containing a list of the phone numbers the respondent was authorized to call from prison.

officer and other officers were teasing him. The female prison officer prepared a file note in relation to the incident on the same day.[53]

[88] On Saturday 23 February 2013, the respondent was placed in handcuffs by a prison officer while his cell was searched. While the search was being carried out, the respondent made a number of threats towards the prison officer including that he would get him "on the outside". During the cell search, a makeshift shiv (stabbing weapon) was removed from the respondent's glasses case. The shiv was manufactured from a wire handle removed from the rear of a prison-issue desk fan. It was 11 cm in length, sharpened at one end to a sharp point and bent at the other end to make a handle. A report of the incident was entered by the prison officer into IOMS on the same day.[54]

[89] On 8 March 2013, an incident was logged by a South Australian Correctional Officer who was carrying out his duties as an escort for the respondent while he was an inpatient at the Royal Adelaide Hospital. The incident report recites that the respondent threatened to kill officers and wanted to fight; further, that he threw filing cabinet drawers at those officers and was abusive and aggressive.[55] A formal charge was subsequently laid by South Australian Prison Authorities, but was then withdrawn.[56] The evidence of the logged entry was admissible, as a business record, but none of the facts was verified by a formal statement made or

[53] Annexure MP4 p 436.
[54] Annexure MP4 pp 429 – 430.
[55] Annexure MP4 p 424.
[56] Annexure MP4 p 423.

signed by one or both the officers involved. The evidence was not entitled to the same weight as that to be given to events which are more fully detailed and verified. My conclusion was that, on application of the test in s 7(1) of the Act, the alleged incident was not proven on the balance of probabilities.

[90] On 28 March 2013, David Brown, for the Chief Executive, South Australian Department for Correctional Services, sent a Minute to the Minister for Correctional Services in relation to an incident in which the respondent was said to have set alight his belongings on the floor of his cell at the Yatala Labour Prison. Correctional Officers responded immediately, restrained the respondent and extinguished the fire. The wing in which the respondent's cell was situated had to be evacuated to enable smoke to subside. A Correctional Officer had to be taken to hospital because of severe asthma caused by smoke inhalation. Mr Brown did not witness the fire and his report is based on the account of an unnamed Correctional Officer or officers. In the circumstances, although the incident was not disputed by the respondent (who did not give evidence), I gave this evidence less weight than evidence of incidents which were verified by eye witnesses.[57]

[91] On 24 September 2013, a Prison Officer was accompanying a nurse on her medication rounds in the block where the respondent was housed. When the officer arrived at the respondent's cell, he requested that the respondent put on his shirt, fill his mug with water (to take his tablets) and turn on his cell light. The respondent complied in part, but yelled out to the officer:

[57] Annexure MP4 p 421.

> You're a racist, no good officer, I'll kill you, I get out shortly and I'll hang around town and find you.

[92] After some other officers spoke with the respondent, he quietened down and accepted his medication.[58] The officer who had been threatened prepared a memorandum which was submitted to the Superintendent on the same day.

[93] On Monday 30 September 2013, a prison officer opened the hatch to the respondent's cell to deliver his lunch. The respondent asked to be moved to another section of the prison. The officer told the respondent that he would have to remain where he was (maximum security) to complete his 14 days of loss of privileges, as instructed by a Senior Prison Officer previously. The respondent became verbally abusive and threw his cup at the door, causing it to smash. The respondent then took his lunch plate from the open hatch and threw it at the officer outside his cell. The respondent then made numerous intercom calls to the officer, abusing him and using the terms "horse fucker", "pig fucker", "fucking cunt" and "wanker". He also threatened that he would "get the officer on the outside". The officer concerned entered the details of the events into IOMS in the mid afternoon of the same day. A second prison officer entered a corroborative description of the events.[59] When a Senior Prison Officer attended the respondent's cell, the respondent began to wail, and dropped onto the cell floor, crying. He accused the prison officer of having called him a "pig fucker". Another prison officer reported that the respondent's mood swung from extreme agitation, to grief in

[58] Annexure MP4 p 393.
[59] Annexure MP4 pp 387 – 388 and 386.

relation to his mother's death, and then back to anger directed at prison officers.

[94] On Thursday 13 February 2014, two prison officers unlocked the respondent's cell, intending to escort him to a medical appointment. When an officer informed the respondent that he would be going to a medical appointment, the respondent gave a "thumbs up". However, he then raised his voice and said to the other prison officer "You stop teasing me. You are teasing me," or words to that effect. The respondent then moved forward towards that prison officer and punched him on the jaw with a clenched right fist. Officers then ground stabilised the respondent on his bed, after which they placed him in the recovery position because of concern for his heart condition.[60]

[95] As a result of his actions described in the previous paragraph, the respondent was charged with an offence contrary to s 188A of the Criminal Code, unlawfully assaulting a worker who was working in the performance of his duties. The respondent was convicted by the Alice Springs Court of Summary Jurisdiction on 30 September 2014, and sentenced to four months imprisonment.

[96] On Friday 21 February 2014, the respondent was interviewed by police in relation to the assault described in [94]. When the respondent was being

[60] Annexure MP4 pp 375 and 376.

escorted back to his cell, he became abusive to another prison officer, saying:

> Come here I'm going to smash you, you poofter cunt. I'll get you.

[97] A report of the incident referred to in the previous paragraph was entered into IOMS by the abused prison officer on the same day, shortly after the incident described.[61]

[98] On Thursday 6 March 2014, the respondent was aggressive and made a threat to a prison officer. As he was walking past the officer he said: "I'm sick of you all the time. I'll smash you for touching my stuff. You just keep going". There was no apparent reason for the respondent's outburst. He was spoken to by a Senior Prison Officer for his conduct and was then returned to his cell.[62]

[99] On Monday 7 July 2014, during the unlock process, a prison officer asked the respondent a number of questions in relation to his health and welfare. The respondent asked why he was being questioned. The officer explained the reason. The respondent then used obscene language and said, "I want to punch you in the head officer, right now", or words to that effect. A record of this incident was entered into IOMS by an officer on 10 July 2014, and a corroborating report by another officer on 11 July 2014.[63]

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[61] Annexure MP4 p 369.
[62] Annexure MP4 p 367.
[63] Annexure MP4 pp 363 and 362.

[100] On Monday 14 July 2014, the respondent was being returned to his block and was at the reception area. He pointed to one of the prison officers in attendance, and said to other officers:

> That's him. That one is the poofter. He a cocksucker that one, you know.

[101] He then added, speaking to the officer directly:

> You are a gay officer. I will get you on the outside.

[102] The respondent was spoken in relation to his comments and calmed down. A record of this incident was made by each of two officers on Monday 14 July, in largely consistent reports.[64]

[103] On Monday 11 August 2014, the respondent became involved in a physical altercation with another prisoner, for reasons which are not presently relevant. After the respondent had been restrained by prison officers, he became agitated and said, without justification, "That fat officer was calling me an animal fucker. I'm going to get that fat cunt". The respondent continued to be abusive for some time and resisted officers. After he had calmed down, he was secured in his cell. A report in relation to this incident was entered into IOMS by two officers who witnessed the event, on the same day as the event.[65]

[64] Annexure MP4 pp 357 and 358.
[65] Annexure MP4 pp 349 – 350 and 351.

[104] On Friday 15 August 2014, the respondent spoke with a prison officer during the morning unlock procedure and complained about his treatment by female prison officers. His particular complaint was that a female prison officer was rude, and had walked away from the respondent while he was speaking with her. The respondent then said:

> Prisoners here have all been staring and talking about me and they are no good. They humbug me all the time and giving me hard time.

[105] The conversation was entered into IOMS by the prison officer some days after the incident.[66]

[106] The respondent's apparent concern with people talking about, laughing about him or teasing him manifested again on Friday 22 August 2014. While a prison officer and a nurse were handing out the respondent's medication, he became verbally aggressive and abusive for no apparent reason, saying, "Get fucked you cunt. You are laughing at me. Fuck you and that slut" (a reference to the nurse). The prison officer reassured the respondent that he and the nurse were not talking about him and that nobody was laughing at him. The respondent settled down. A record of the incident was entered into IOMS on the same day.[67]

[107] On 6 October 2014, a prison officer and a female nurse were conducting the daily medical round in the unit where the respondent was housed. After he had been issued with his medication, the respondent said to the nurse, "I

[66] Annexure MP4 pp 341 – 342.
[67] Annexure MP4 p 340.

want to fuck you. You got a nice arse". The respondent kept repeating that statement, or variations of it. He was noted to be in a good mood, quite cheerful, and not aggressive or angry. The nurse reported that the respondent's language was offensive, but that his manner was not. The prison officer directly involved entered a record of the incident into IOMS on the same day, and a second officer made an IOMS entry in substantially the same terms on the following day.[68]

[108] On 8 October 2014, a prison officer was escorting a nurse through the unit where the respondent was housed, to give the respondent his medication. Before closing the door hatch, the prison officer checked if the respondent had finished taking his medication. The officer could not understand the respondent's reply. He bent down to the hatch in order to hear what was said and the respondent said, "Are you teasing me? Fuck you, you cunt". The respondent then threw water through the hatch hitting the officer in the face and shoulder area. After the hatch was closed, the respondent said, "I'll get you, you cunt. I'll get you with my knife on the outside. I'll get you on the outside". A record of the incident was entered into IOMS by the prison officer a short while after the event happened.[69]

[109] On Sunday 12 October 2014, the respondent became impatient or irritated with a nurse who was delivering his medication. He started yelling at the nurse, stating that she had got him into trouble and charged. He threatened

[68] Annexure MP4 pp 336 and 337.
[69] Annexure MP4 pp 334 and 335.

that he was going to get her "on the outside". He made that threat numerous times. A report of this incident was entered into IOMS, within a few hours of the events having occurred, by a prison officer who witnessed the events.[70]

[110] On 9 January 2015, Barbara Sampson, who was then the Director of Offender Services and Programs within the Department of Correctional Services, interviewed the respondent in the presence of the acting principal psychologist of the Darwin Correctional Centre, Ms Baltasara De Luca. The purpose of the interview was to ascertain the respondent's willingness to participate in sex offender treatment proposed to be delivered on an individual basis. Ms Sampson explained to the respondent that such individual treatment would help him to learn ways to make sure that, once he was released, he did not find himself in high risk situations in which he might re-offend.[71]

[111] The respondent refused to participate in any sex offender treatment programs. He said that he had been in prison for a long time, and "all that was in the past". He said that he now showed respect to female officers. The respondent maintained his refusal even after he was told that he might not be released from custody because of the operation of the *Serious Sex Offenders Act*. The respondent signed a document, formally declining to participate in

[70] Annexure MP4 pp 324 – 325.
[71] Annexure MP4 pp 147 – 148.

the Sexual Offenders Treatment Program (SOTP), in which he wrote: "Been in prison too long and getting out in July".[72]

[112] On Thursday 29 January 2015, a male Prisoner Support Officer and a female Throughcare Co-ordinator attended an interview with the respondent in order to discuss a re-integration plan in anticipation of the respondent's discharge from Darwin Correctional Centre on 29 July 2015. Shortly into the interview, the respondent became agitated with the Throughcare Co-ordinator and said:

> I'm not going to listen to you, you slut. I'm get a flat and fuckin' stay in Darwin okay. ....
>
> I'm going to fuckin' kill you. I'll get that chair and fuckin' hit you with it, you slut. Don't come in here and talk to me like I'm an animal.

[113] The respondent then raised his hand with a clenched fist and it appeared that he was about to hit the Throughcare Co-ordinator. The Prisoner Support Officer intervened, stood between the respondent and his colleague, and activated the wall duress alarm. The Throughcare Co-ordinator pressed her own personal duress alarm. The visitors were ushered to safety by three prison officers. The respondent was taken from the interview room. Incident reports were prepared by both the Prisoner Support Officer and the Throughcare Co-ordinator on 29 January 2015, the day of the incident.[73]

[72] Annexure MP4 p 149.
[73] Annexure MP4 pp 316 – 317, 318 – 319, 312.

[114] On Saturday 2 May 2015, a trainee correctional officer was informed that the respondent was not happy with him. He then enquired of the respondent why he was unhappy, to which the respondent replied, "I'm going to get you on the outside, I have a lot of family we going to get you and yours", or words to that effect. When he was cautioned to be careful about what he was saying, the respondent again threatened the officer, saying:

> I'm going to get you, you dog cunt.

[115] A report of the incident was entered into IOMS on the same day almost immediately after the incident.[74]

[116] While serving the sentence imposed for his offending in March 2005, including the additional four months referred to in [95] above, the respondent remained classified as High Security for the whole time, save for two periods during which he was classified Medium Security: November 2005 to May 2006, and May 2007 to September 2007.

[117] Commissioner Middlebrook said in evidence that respondent had not shown or demonstrated any capacity to "turn corners" in all the time that he had been in custody.[75] Not only had Mr Middlebrook not seen any sign of rehabilitation demonstrated by the respondent during the period he had been in custody, he had in fact seen the opposite. The respondent's behaviour had not 'settled' so as to allow a lower security rating. Mr Middlebrook observed:

[74] Annexure MP4 pp 309 – 311.
[75] Transcript 2 September 2015 p 35.3.

> It's quite rare to see somebody in custody for as long as JD has been in custody and still maintain a high security rating. It's quite unusual. You don't see that happen too often. … I can guarantee you, after 30 years in the New South Wales Prison System, I know Goulburn [Prison] extremely well, and I can say to you that prisoners like JD spending that amount of time in custody, it's very unusual that they would stay high security for that period of time.[76]

[118] Mr Middlebrook said that Corrections staff had tried their best to encourage the respondent to obtain a lower classification to take advantage of rehabilitation programs and work programs, but the respondent did not respond to, or take advantage of, those efforts.[77]

Evidence of specialist psychiatrists

[119] As mentioned earlier, Mildren J made a medical assessment order in relation to the respondent, naming Dr Michael Beech and Dr Lester Walton, both specialist psychiatrists.[78] Reports were duly provided pursuant to s 79(3) of the Act. Those reports were expressly made admissible as evidence pursuant to s 82(a) of the Act, and the Attorney-General was obliged to tender the reports in evidence, pursuant to s 82(b) of the Act.

[120] Dr Beech interviewed the respondent on 19 June 2015 for a total of approximately 4 hours. He provided a report dated 6 July 2015, in which he expressed his opinion as to the likelihood of the respondent committing a serious sex offence in the future.[79]

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[76] Transcript 2 September 2015 p 36.2.
[77] Transcript 2 September 2015 p 36.4. See also [110] above.
[78] The Court must make a 'medical assessment order' in relation to a respondent pursuant to s 25(2)(b) *Serious Sex Offenders Act.*
[79] Exhibit "MP7" to affidavit of Maria Pikoulos affirmed 20 July 2015.

[121] Dr Beech referred in his report to the respondent's long history of violence and antisocial behaviour that began in childhood, continued into adult years and which had persisted in prison. Past assessments indicated significant cognitive deficits, and there had been persistent affective volatility and aggression. Repeated psychiatric assessments from the time of the respondent's youth had failed to find evidence of a primary mental illness.

[122] Dr Beech was of the opinion that the respondent has a severe Anti-social Personality Disorder, which did not appear to have settled much since the offending in 2005.[80] The respondent had Borderline Intellectual Functioning, that is, his intellectual level at interview was somewhere between low average intelligence and mild intellectual disability. He demonstrated significant deficits in executive functioning and memory, arising from residual Attention Deficit disorder, brain injury or some other impairment (or a combination). Dr Beech wrote that the deficits were long-standing and affected judgment, planning and insight. Dr Beech was also of the view that the respondent (when in the community) had an Alcohol Abuse Disorder, which was in "enforced remission" while he remained in prison.[81]

[123] In the opinion of Dr Beech, the respondent's prior sexual offending and his inappropriate sexual behaviour in custody indicated that he had an air of sexual entitlement and impulsivity, associated with poor insight, misogynistic views, and either hostility towards women or at least a belief

[80] MP7 p 17 line 902. 00
[81] MP7 p 17 lines 905 - 912.

system that condoned sexual violence towards women. Dr Beech finally referred to the fact that the respondent had not undertaken any rehabilitation while in custody and that, because of his enduring antisocial attitude, readily resorted to aggression, threats and poor behaviour.

[124] In addition to clinical assessment, Dr Beech assessed the respondent using a number of 'instruments' which have validity in the estimation of the risk of recidivism in violent sexual offenders. In giving evidence, Dr Beech explained that risk assessment could be carried out by using a structured clinical judgment and by actuarial assessment. He explained that the best practice in Australia, which he used, was to make both a structured clinical judgment and an actuarial risk assessment, and then see whether the results 'cohere', which he said they did in the case of the respondent.[82]

[125] On one of the actuarial risk assessment instruments,[83] the respondent obtained a score which indicated a high risk for further offending and sexual offending, as well as a poor prognosis for supervision in the community.

[126] On another such instrument,[84] the respondent obtained a score which placed him in the group regarded as being at high risk of sexual re-offending.

[127] On yet another instrument,[85] this one designed to assess dynamic risk, the respondent had many factors which placed him at a high risk of violent re-

[82] Transcript 26 August 2015 p 30.8.
[83] The 'Hare Psychopathy Checklist Revised'. The respondent's score of 27 indicates high psychopathic personality traits, if not actual psychopathy.
[84] The 'Static 99-R'. The respondent's score of 6 placed him in the 90 to 95 percentile. In other words, 90% of sex offenders have a score lower than the respondent. His 'relative risk' score of 2.9 suggested that he was three times more likely than a typical sexual offender to reoffend within five years of release.

offending and violent sexual re-offending if he were to be released into the community. Those factors included: escalation in violence between the offending in 1988 and the offending in 2005; the use of extreme physical coercion; denial of the sexual violence; maintaining a continuing attitude which condoned violence; deficits in self-awareness in relation to his past offending; significant problems of substance abuse; psychopathy; his history of mental symptoms and personality disorder; his history of violent behaviour; problems in relationships, both intimate and non-intimate; problems with employment; problems with planning; difficulties with treatment, and past problems with supervision.

[128] Dr Beech provided the following opinions in relation to the respondent's risk of violent re-offending:[86]

> It is my opinion that JD is at high risk of violent re-offending and violent sexual re-offending if he is to be released into the community at this stage. He is a violent man who continues to display aggression, violence and an antisocial attitude. His behaviour indicates ongoing problems managing his emotions and affect, and he has continued to make sexual advances towards females while in custody. He has little if any insight into his problems, rejects blame and responsibility, and harbours misogynist views. He has not made much progress since his conviction in terms of his behaviour or attitude, and if anything he has gone from admitting guilt to espousing views that women have deliberately set him up, and continue to do so. He has not undertaken any rehabilitation. While he has some aspirations for his release he has not that I can see developed any clear strategies.
>
> In my opinion the risk of sexual violence is high. The victim is likely to be an adult female. She may be a partner such as this promised

[85] The 'Risk for Sexual Violence Protocol'. Dr Beech listed 18 factors which he described as "the most pertinent factors at present" at MP7 page 18 lines 975 to 995 of his report dated 6 July 2015.
[86] Report Dr Beech p19 lines 994 - 1012.

> bride and the violence will occur in the setting of domestic violence. She may be an unrelated stranger that he accosts in the street. The assault could involve indecent touching but there is a significant risk that it would involve severe physical violence. That risk would be heightened by intoxication. The victims are likely to suffer physical harm. There is a less likely risk to children, but it is not insignificant.

[129] Dr Beech confirmed in his evidence-in-chief that his reference to sexual violence ("violent sexual re-offending") was another way of expressing the notion of "serious sexual offence" in Schedule 1 of the Act.[87] In relation to his categorisation of "high risk" Dr Beech gave evidence as follows:

> I do not tend to use the phrase 'very high'. I think once you get into the category or risk of JD there are not many people that you can start separating them out further into high, very high, extremely high. I see people as being low, moderate and then high risk, and that is where I would place JD, in the high risk category. …
>
> You know, about 90 to 95 percent of offenders would have a lower risk that he does. So you are getting into a small group of high risk offenders and it is hard to separate them to any further risk. The risk can be further separated out though whether it is an acute risk like an imminent risk or something which is likely to occur over a number of years. …
>
> I think his risk would be seen as acute, that is that something is likely to happen within a fairly short time of his release. I say that because you can see there is evidence of behavioural discontrol, some sexual preoccupation or entitlement and … impulsivity and poor planning. So I think the risk generally on release would start from the get go.[88]

[130] Dr Beech said he believed that a supervision order would have only limited effect, given a lengthy history of breach while on supervised release and the

[87] Transcript 26 August 2015 pp 6.9 to7.2.
[88] Transcript 26 August 2015 pp 7.5 to 7.9.

fact that, even in prison, the respondent remained disorderly and non-compliant.

[131] In the opinion of Dr Beech, the risk inherent in supervised release could be lessened if the respondent were to first undergo a rehabilitation program to assist him to developing insight, appropriate cognitions and attitudes towards females and sexual entitlement, as well as behavioural control (for his impulsivity). This would require a cognitive skills program and then an intensive sexual offenders program, initially one-on-one and then followed by a group program involving other indigenous men. If he were then able to develop some insight and demonstrate improved compliance behaviour, he might be suitable for release on a supervision order but the conditions would need to be stringent in terms of compliance and monitoring, ongoing counselling and abstinence (presumably from drugs and alcohol). There would need to be a properly thought out plan for accommodation and support in the community, and probably a transition-to-community program as well.

[132] I was impressed with the comprehensive report provided by Dr Beech, and I was satisfied that his assessment of the respondent had been extremely thorough. Dr Beech clearly identified the facts on which he based his opinions, and explained the thought processes leading to his conclusions and opinions. I was satisfied to a high degree of probability that the evidence given by Dr Beech was cogent, and of sufficient weight for me to rely on in

concluding that there was an unacceptable risk that the respondent would commit a serious sex offence unless he were in custody.

[133] Dr Lester Walton interviewed the respondent on 12 June 2015 and provided a report dated 1 July 2015.[89]

[134] In his report, Dr Walton referred to a number of previous psychiatric assessments, including a psychiatric assessment carried out by Dr Craig Raeside on 21 June 2014.[90] Dr Raeside had diagnosed a mixed personality disorder with antisocial, paranoid and narcissistic traits. He had considered the respondent to be at very high risk of further offending, including violent, non-violent and sexual offending. As recommended by Dr Raeside, neuropsychological assessment of the respondent was undertaken on 9 and 18 September 2014. That testing confirmed borderline intellectual capacity, executive functioning deficit and poor interpersonal emotional recognition. There were also difficulties in sustaining attention and compromised comprehension. Dr Raeside reviewed his report after the results of neuropsychological testing were available and reached the conclusion that the respondent was not affected by any diagnosable mental illness; rather, that there were permanent cognitive deficits, which were not amenable to intervention, and parallel behavioural disturbance. Dr Raeside highlighted

[89] Annexure "MP6" to affidavit of Maria Pikoulos affirmed 20 July 2015 pp 1365 -1370.
[90] Dr Raeside's report was dated 23 July 2014: annexure MP4 pp 122 – 142.

the behavioural disturbance as having prevented any meaningful rehabilitation.[91]

[135] Dr Walton regarded the history of two serious sex offences as placing the respondent in an elevated risk category of further similar offending. In Dr Walton's opinion, other indicators of elevated risk included the history of head injury, with the dual implication of the respondent's compromised ability to apply himself to rehabilitation and an elevated risk of impulsive behaviour. The respondent's borderline intellectual disability was also an indicator of elevated risk. Dr Walton wrote that it is well recognised that "a pattern of more general irresponsibility and offending carries elevated risk of specific sexual re-offending." Other matters of concern in term of elevated risk included the lack of community support for the respondent and the respondent's continuing denial of involvement in the serious sexual offence committed in March 2005. Dr Walton wrote that the respondent exhibited no remorse and seemed to lack insight into how seriously his offending was regarded by others.

[136] Dr Walton concluded as follows:

> … by any sensible standard JD is … in a high-very high category of risk of re-offending generally and re-offending specifically in relation to a serious sex offence.[92]

[137] Dr Walton also expressed doubt as to the respondent's likely compliance with court orders, if he were released under supervision. Dr Walton referred

[91] Report dated 16 October 2013: annexure MP4 pp 163 – 164.
[92] MP6 p 1370.

in his report to the respondent having an established history of breaches, consistent with the general pattern of irresponsibility. In his evidence in court on 2 September 2015, Dr Walton also referred to the respondent's patterns of ongoing misconduct in prison as being relevant contra indicators of compliance with supervision in the community on release.

Unacceptable risk

[138] The Act requires that, in deciding whether the respondent is a serious danger to the community, the court have regard to the likelihood of the respondent committing another serious sex offence. In my assessment, it was very likely that the respondent would commit another serious sex offence unless he were in custody. In making that assessment, I took into account the serious sex offence committed in 1988 and the serious sex offence committed in 2005. I took into account the respondent's long history of violence and anti-social behaviour, from childhood to the present. I took into account the respondent's low level intellect and significant deficits in executive functioning and memory, very possibly as a result of organic brain damage. I took into account the opinion of Dr Beech that the respondent's deficits were such as to affect his judgment and insight. I also took into account the respondent's severe anti-social personality disorder, which appeared to strongly persist. I took into account the respondent's somewhat paranoid and antagonistic behaviour while a serving prisoner. I took into account the opinion of Dr Beech, significant parts of which are extracted in [128] and

[129] above. The opinion of Dr Beech is supported in most respects by the opinion of Dr Walton, to which I have referred in [135] to [137] above.

[139] Mr Thomas on behalf of the respondent submitted that the specialist psychiatrists did not give sufficient weight to the circumstantial and other differences between the two serious sexual offences committed by the respondent, or to the gap of some 17 years between serious sexual offending. In relation to the differences between the two serious sexual offences, Mr Thomas noted that the principal victim of the first offending was a six year old boy whereas the victim of the later offending was a mature aged woman. However, Dr Beech considered that the diversity in the nature of the victims in their age and gender was a dynamic factor associated with the risk of further sexual violence.[93] While I am not positively persuaded that the difference in victims is necessarily a matter adverse to the respondent's position, I am certainly not satisfied that the difference is a matter which is somehow favourable to him. In relation to the gap in offending, I agree with the submission of Mr Anderson, counsel for the applicant, that if the position were assessed shortly prior to the March 2005 offending, the gap of 16 years might have been a matter of some significance in assessing the likelihood of the respondent committing another serious sex offence. However, it is a matter of fact that the respondent *did* commit the serious sex offence in March 2005. Therefore,

[93] Annexure MP7 p 18 line 976.

the significance of the 17 year gap is greatly diminished, to the point of irrelevance.

[140] Mr Thomas also argued that Dr Beech drew an impermissible inference from the respondent's violent offending between 1998 and 2005 to conclude that he was at risk of committing a further sexual offence. However, I consider that Dr Beech was justified in his reliance on the history of non-sexual violence, given the brutality of the sexual offending in March 2005.
Mr Thomas also contended that Dr Beech did not take into account the respondent's ill health, principally his heart condition. In this respect, however, I accept the evidence of Dr Beech, that, although the respondent may have an underlying heart condition, it has not resulted in his becoming frail or weak to the extent that he is not capable of committing a serious sex offence. Indeed, there was a significant amount of evidence that the respondent's sexual urges had not diminished over the previous four to five years, notwithstanding his heart condition.

[141] As to whether there was "an unacceptable risk", as found by me, I accepted the analysis of Steytler P and Buss JA in *Director of Public Prosecutions (WA) v GTR*:[94]

> The word "unacceptable" necessarily connotes a balancing exercise, requiring the court to have regard, amongst other things, for the nature of the risk (the commission of a serious sexual offence, with serious consequences to the victim) and the likelihood of the risk coming to fruition, on the one hand, and the serious consequences for the offender, on the other, if an order is made (either detention,

[94] (2008) 38 WAR 307 at [27].

> without having committed an unpunished offence, or being required to undergo what might be an onerous supervision order). As John Fogarty points out, albeit in a rather different context (*Unacceptable risk – A return to basics* (2006) 20 AJFL 249 at 252), the advantage of the phrase "unacceptable risk" is that "it is calibrated to the nature and degree of the risk, so that it can be adapted to the particular case".

[142] In my opinion, the risk in this case was an unacceptable risk. I was satisfied, to a high degree of probability, that there is acceptable and cogent evidence of sufficient weight to justify my assessment. Even if, contrary to my interpretation in [6] above, the standard of proof of unacceptable risk of commission of a serious sexual offence were "to a high degree of probability", I would still have been so satisfied on all the evidence.

[143] I now explain my conclusion that adequate protection could not reasonably be provided to victims or potential victims and the general community by making a supervision order in relation to the respondent, rather than a continuing detention order.

Report of Commissioner of Correctional Services

[144] The Commissioner of Correctional Services was required under s 27 of the Act to prepare a supervision report about the respondent. The Act requires the Commissioner to express an opinion as to whether it would be reasonably practicable for the Commissioner to ensure appropriate management and supervision of the respondent if a supervision order were made, rather than an order for continuing detention.[95]

[95] See s 88(3)(a)(i).

[145] If a supervision order were made, the Commissioner must ensure that a supervisee is managed and supervised by probation and parole officers in a way that is appropriate, the paramount consideration being the need to protect victims of serious sex offences committed, or likely to be committed by the supervisee, with rehabilitation a secondary consideration.[96]

[146] Commissioner Middlebrook was of the opinion that the level of management and supervision required for the respondent, given his assessed risk, would not be compatible with accommodation options such as the Salvation Army Sunrise Centre or the St Vincent de Paul Bakhita Centre, neither of which in any event was prepared to accept the referral of the respondent, because of his offending history. Accommodation options in the Wadeye Community had been investigated, but discounted because of the number of young children living in close proximity to the respondent's proposed residence and also because of the inability of family members to control the respondent's behaviours. Another possible accommodation option was in one of three clusters of cottages situated at the Darwin Correctional Centre, situated on designated Correctional Centre property, but outside the high security area of the prison. One such cluster of cottages is presently managed by the Department of Health for clients subject to Part IIA of the Criminal Code, that is, persons found not guilty of criminal offences because of mental impairment and who are subject to supervision orders imposed by the Supreme Court. A second cluster of cottages houses

[96] See s 63(2)(a) and (b) of the Act.

prisoners who are classified “Open Rated”, all of whom are in paid employment within the community. Those prisoners go to work each day. The lower level of custodial supervision reflects the low risk which these prisoners pose.

[147] There is a third cluster of cottages which had been set aside for visiting Aboriginal elders and their families. This accommodation is not permanently utilised, but Commissioner Middlebrook considered it was inappropriate for the respondent because of low security (eg, no security fences), and therefore unsuitable for a detained person who had had a significant number of recorded incidents while a serving prisoner and who had potential for further conflict, including physical conflict, if he were housed near other prisoners. Commissioner Middlebook expressed the opinion that there would be significant risks to staff and prisoners if the respondent were housed at the cottages presently designated for visiting elders and their families.

[148] If it were possible for the respondent to be accommodated outside of the prison, Commissioner Middlebrook was of the opinion that he would need to be managed and supervised at the highest level, akin to detention in his own private prison. The level of necessary intensive supervision would require two full time corrections officers supervising the respondent at all times on a 24/7 basis. The requirement would be eight hour shifts seven days a week, requiring 11.64 hypothetical positions. A roster for that level of staffing would require 12 staff in total and annual salaries would be $1,118,740.

There was no challenge to those cost estimates, and they appeared quite reasonable on their face.

[149] Commissioner Middlebrook concluded as follows:

> I do not consider that it is reasonably practicable for me … to fund this level of supervision in circumstances that must closely resemble, if not surpass, actual imprisonment.

[150] In relation to the secondary object of the Act, to provide for the continuing rehabilitation care and treatment of the respondent, Commissioner Middlebrook expressed concern about the respondent's unwillingness to participate in any rehabilitation interventions during his time in custody. As mentioned above, the respondent had refused to participate in programs for the targeted treatment of his offending behaviour.

[151] As Dr Walton explained in his report, the respondent has permanent cognitive deficits, identified by a neuropsychologist in September 2014, and those cognitive deficits are not amenable to intervention.

[152] In December 2014, the respondent was transferred from Alice Springs to Darwin in a further attempt to have him engage in treatment on a one to one basis with a Departmental psychologist. An indigenous treatment team member was assigned to support the respondent in order to remove language and cultural barriers and facilitate the respondent's engagement with the program. The respondent still declined to participate.

[153] Of additional relevance was the fact that the respondent had not had employment while in prison. Commissioner Middlebrook was of the opinion that, if the respondent were subject to a supervision order, it would be impracticable for those supervising him to arrange for employment or employment training.

[154] Another indicator of the respondent's likely compliance with supervision was the number of prison incidents in which he had been involved as well as compliance with previous court and parole board orders. Commissioner Middlebrook was of the view that past behaviour is a very good indicator of future behaviour, particularly where there had not been any relevant treatment or intervention. I accepted Commissioner Middlebrook's opinion in this respect, consistent with my findings and reasons summarized in [138].

[155] Since December 2007 the respondent had had a security classification rating of 'high', which limited the opportunities for him to engage in any activities that might have contributed to his re-integration into the community. He did not have a bank account because his risk level had been such as to preclude him from being escorted from the Correctional Centre to a bank in order to open a bank account.

[156] Mr Middlebrook usefully summarized the position in his oral evidence:

> JD has not undertaken or been willing to undertake any treatment during the term of his imprisonment. He has maintained a very high classification during the whole time he has been in prison. He has not

> been involved in any work related activity. In fact, he has been non-compliant for the period of that incarceration and I would think it would be very difficult for me to accept that I could put him out in a community without some form of very strict supervision.[97]

Conclusion

[157] I was ultimately satisfied that it was appropriate that I make an order under s 31(1) of the Act. As I explained in [1] and [138] to [142] above, I was satisfied that the respondent is a serious danger to the community, in that there is an unacceptable risk that he will commit a serious sex offence unless he is in custody. I did not consider that supervision of the respondent in the community would be effective or reasonably practicable.

[158] The orders made by me were as follows:

(1) Pursuant to s 31(1) *Serious Sex Offenders Act 2013*, a final continuing detention order in relation to the respondent.

(2) The review period specified as 12 months (from 3 December 2015).

[159] The review period was set to take into account the period of just over four months from 27 July 2015, the date on which the respondent completed his sentence, to 3 December 2015.

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[97] Transcript 2 September 2015 p 45.5.