RNT;dgr

14 November 2013

The Hon Jarrod Bleijie MP
Attorney-General and Minister for Justice
Level 18 State Law Building
50 Ann Street
Brisbane Qld 4000

Dear Attorney

Re: *Dangerous Prisoners (Sexual Offenders) Act* 2003

I refer to our recent meeting with you when, amongst other matters, there was discussion concerning the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("DPSOA") and the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 ("the Declarations Act").

The Declarations Act is a legislative response to what are seen to be shortcomings in the DPSOA which have resulted in the release of prisoners who the Government perceives should remain in custody. The Declarations Act introduces a scheme allowing Executive imprisonment of an offender. From any point of view, the Declarations Act constitutes fairly drastic action. The Declarations Act, in the respectful view of the Bar Association, places too much power in the hands of the Executive. It is undesirable for that reason. The Association favours its repeal. In the view of the Bar Association, if the policy of the government be to tighten the law relating to the release of dangerous prisoners, that can be achieved by amendment of the existing legislation in ways which permit the Court to retain the power to decide whether or not a prisoner should be released.

With a view to achieving that objective, I herein set out a number of aspects of the current legislation which might usefully be addressed.

LEGISLATION DEALING WITH PREVENTATIVE DETENTION IN QUEENSLAND

We respectfully suggest that it may be time to review the DPSOA and ascertain whether the legislation, and indeed the entire dangerous prisoner's scheme, can be improved. We suggest, in effect, a review of all of the relevant legislation.

The DPSOA has been held to be constitutionally valid[1]. It operates by virtue of conferral of judicial power to make various discretionary orders consequent upon factual findings and judgments. Although the legislation itself was novel in that it provided for a scheme of preventative detention unlike any scheme previously introduced, the Act is conventional to the extent that detention of the subject is dependent upon an exercise of judicial power adverse to the subject.

[1] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

DPSOA became law on 6 June 2003. It has been the subject of amendment on numerous occasions since its enactment[2]. All of those amendments have been made in reaction to particular issues which have arisen. As we understand it, there has been no full review of the Act since its enactment in 2003. As the title to the Act suggests, the target prisoners are not those who are generally dangerous, but are those who are likely to commit sexual offences: see ss 13 and definition of "serious sexual offence" in the dictionary.

There are two other regimes which provide for the preventative detention of prisoners. The first is the *Criminal Law Amendment Act* 1945 ("the 1945 Act"), which was amended by the Declarations Act. The 1945 Act provides that where a person has been found guilty of an offence of a sexual nature, the person may be found by the court to be incapable of exercising proper control over his sexual instincts and may then be detained at Her Majesty's pleasure.

Part 10 of the *Penalties and Sentences Act* 1992 ("the Penalties and Sentences Act") provides for another scheme. The offenders who may be the subject of orders under that Part, must firstly be convicted of a *"qualifying offence"* as defined in Schedule 2 to the Penalties and Sentences Act. Schedule 2 lists various offences, some of which are of a sexual nature, and some of which are not. Like DPSOA, Part 10 of the Penalties and Sentence Act requires the court to make a finding that the offender *"is a serious danger to the community"*. However, unlike DPSOA, that finding falls to be made at the time of sentencing for the original offence, rather than at a time when release from custody is imminent. Section 163(4) provides:

> *"163 Indefinite sentence - imposition*
>
> *(1) .....*
>
> *(4) In determining whether the offender is a serious danger to the community, the court must have regard to -*
> *(a) whether the nature of the offence is exceptional; and*
> *(b) the offender's antecedents, age and character; and*
> *(c) any medical, psychiatric, prison or other relevant report in relation to the offender; and*
> *(d) the risk of serious harm to members of the community if an indefinite sentence were not imposed; and*
> *(e) the need to protect members of the community from the risk mentioned in paragraph (d)."*

The policy behind Part 10 is that some prisoners pose such a risk that they ought not to be the subject of the usual parole considerations under the *Corrective Services Act* 2006, but should receive *"indefinite sentences"*. The effect of that is that the prisoners can only be released if a court determines that they are no longer a risk.

Like the DPSOA, there are then annual reviews.

A central weakness with the *Penalties and Sentences Act* scheme is that the psychiatrists are put in the position of having to make a prediction at the time of sentence as to dangerousness at the time of release.

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[2] Act No 35 of 2007, Act No 37 of 2007, Act No 14 of 2010, Act No 34 of 2010, Act No 38 of 2011 and Act No 3 of 2013.

The *Mental Health Act* 2000 ("the Mental Health Act") also provides a system which can result in indefinite detention. However, that is a different regime for a different purpose, and although in some respects that scheme is related to justice and law and order, it ought to be regarded separately.

Consequently, there are three separate regimes[3] all providing for preventative detention of prisoners who are regarded as so dangerous that their detention is warranted beyond what would be expected to be their release date.

It may very well be appropriate for there to be one scheme, not three, which deals with these prisoners. It is difficult to justify why a person who is dangerous because he is homicidal is dealt with under one regime, and yet a person who is dangerous because he grooms and pursues children, is dealt with under another.

HOW SHOULD A REVIEW PROCEED?

In our view, there are issues beyond just how the legislation ought to be drawn. There are practical considerations as to how Queensland Corrective Services ("QCS") handle the prisoners. The prisoners under DPSOA seem to breach supervision orders with some regularity. From our observations, this is not the fault of QCS. Rather, it is a product of various features including:

1. The nature of the prisoners who are on supervision;
2. Restrictions as to where they can live (the vigilante problem);
3. The fact that most of them have been in jail for very lengthy periods of time and reintegration into the broader community is difficult;
4. The fact that supervision orders seem always to be very complicated. That is a product, no doubt, of the type of offender which the orders seek to control. It is probably also a product of the legislation.

Any full review of DPSOA[4] ought to include representatives of QCS who can provide practical information as to the working of these schemes.

Within Crown Law is a unit headed by Ms Maloney, which deals with dangerous prisoners matters. These are the lawyers who deal with applications, appeals etc on a day to day basis. Any review should of course have to include a reference back to those lawyers. It would be worthwhile to include psychiatrists in the process of review. When DPSOA was introduced, there was a constitutional challenge to it by the prisoner Fardon[5]. DPSOA was found to be constitutionally valid. However, since *Fardon* was decided, there have been various successful constitutional challenges upon legislation, based on the *Kable* principle[6]. Therefore, it will be necessary with any amendment to DPSOA to carefully consider constitutional ramifications.

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[3] Disregarding the mental health regime.

[4] And for that matter the other regimes of preventative detention.

[5] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

[6] *Kable v Director of Public Prosecutions (DPP)(NSW)* (1996) 189 CLR 51; *Wainohu v New South Wales* (2011) 243 CLR 181 at 228-229 [105]; *South Australia v Totani* (2010) 242 CLR 1 and *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

WHO MAY BE A RESPONDENT UNDER DPSOA?

Proceedings under DPSOA are commenced under s 5. An application filed pursuant to s 5 leads to a preliminary hearing under s 8 which leads the court to ordering the respondent to be examined by two psychiatrists. Once that has occurred, the matter comes back before the court and final orders are made under Division 3[7].

A s 5 application is made *"in relation to a prisoner"*[8]. The term *"prisoner"* is defined for the purposes of s 5, by s 5(6) which provides:

> *"5* ***Attorney-General may apply for orders***
>
> *(1)* . . .
> *(6) In this section -*
> *prisoner means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section."*

It can be seen that a *"prisoner"* is someone *"who is serving a period of imprisonment for a serious sexual offence"*.

The term *"serious sexual offence"* is defined in the dictionary as follows:

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

It can be seen then that the Act catches any offence *"of a sexual nature . . . against children"*. However, in relation to victims who are not children, the Act catches offences *"of a sexual nature . . . involving violence"*.

This has caused a problem. The Court of Appeal in two cases, *Attorney-General for the State of Queensland v Phineasa*[9] and *Attorney-General (Qld) v Tilbrook*[10] held that the term *"violence"* used to define the term *"serious sexual offence"* meant more than mere physical contact. It refers to *"sexual offences . . . of a very serious kind"* and that the Act was *"addressing conduct of such a nature that the risk that a prisoner, assumed to be a member of a particular class, might engage in it and harm a member or members of the public if released from custody or released without a supervision order, is regarded as unacceptable." "Consequently, the 'violence' contemplated by the Act (excluding for present purposes, threats and intimidation) would normally involve the use of force against a person to facilitate the "rape" of that person within the meaning of s 349 of the Criminal Code or which caused (or in the case of predicted conduct would be likely to cause) that person significant physical injury or significant psychological harm"*[11].

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[7] Commencing s 13.
[8] Section 5(1).
[9] [2012] QCA 184.
[10] [2012] QCA 279.
[11] *Attorney-General for the State of Queensland v Phineasa* [2012] QCA 184 at [38] and see [39] and *Attorney-General (Qld) v Tilbrook* [2012] QCA 279 at [16].

The reference to *"intimidation and threats"* is a reference to the definition of *"violence"* in DPSOA, which is:

> *"'violence' includes the following -*
> *(a) intimidation;*
> *(b) threats."*

In both *Phineasa*[12] and *Tilbrook*[13] the offences which have led those offenders to be in prison were, on the scale of sexual offences, relatively minor. The offences involved lifting of skirts, groping of strangers etc. However, once those offenders were within the corrective services system, they were the subject of psychological assessment and both were suspected of being particularly dangerous in the sense that if unsupervised, their conduct was likely to escalate.

The objects of DPSOA are, of course, protection of the community from future sexually violent acts. Unfortunately though, in light of the decisions in *Phineasa* and *Tilbrook*, that protection can only be afforded by orders under DPSOA, if the offender has already committed a significantly violent offence. Otherwise, he will not qualify as a respondent for an application under s 5.

Victoria has enacted similar legislation[14]. In that legislation, the respondent is not identified as a person who has committed *"a serious sexual offence"*, but is identified as a person who has committed an offence under one of various sections listed in the schedule to that Act. That schedule includes virtually every type of sexual offence, including the types of offences which were committed by Phineasa and Tilbrook. The Victorian approach though has its limitations. Some offences have a sexual legal element. The offence may, for instance, be sexually motivated. Some of course do not, eg doing grievous bodily harm. However, some offences which do not have a sexual legal element may very well have a sexual factual element eg motivation. The Victorian approach assumes that every possible offence which can be committed with a sexual connotation is caught in the schedule.

An alternative to both the Victorian and Queensland approaches is to identify a respondent under s 5 as any person who is in custody serving a sentence (for anything) where there is a suspicion[15] the prisoner may be a danger of committing an offence of a sexual nature in the future. That would then trigger s 5, it would catch prisoners such as Phineasa and Tilbrook, and the court would then receive the psychiatric evidence and determines whether orders should be made against such offenders.

LIMITATIONS TO THE TERM *"AGAINST CHILDREN"*

As already observed, a respondent may not be the subject of an application under s 5, unless he or she is in custody as a result of committing a *"serious sexual offence"*. A *"serious sexual offence"* includes any offence of a sexual nature *"against children"*.

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[12] [2012] QCA 184.

[13] [2012] QCA 279.

[14] *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic).

[15] A very low threshold, see *George v Rockett* (1990) 170 CLR 104.

That term, *"against children"* was considered by the Court of Appeal in *Dodge v Attorney-General for the State of Queensland* [16].

Dodge had been convicted of offences against s 218A(1)(b) of the *Criminal Code*. Section 218A is as follows:

> *"**218A Using internet etc. to procure children under 16***
>
> *(1) Any adult who uses electronic communication with intent to procure a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to engage in a sexual act, either in Queensland or elsewhere, commits a crime.*
> *Maximum penalty - 10 years imprisonment.*
>
> *(2) The adult is liable to 14 years imprisonment if -*
> *(a) the person is -*
> *(i) a person under 12 years; or*
> *(ii) a person the adult believes is under 12 years; or*
> *(b) the offence involves the adult -*
> *(i) intentionally meeting the person; or*
> *(ii) going to a place with the intention of meeting the person.*
>
> *(3) For subsection (1), a person engages in a sexual act if the Person -*
> *(a) allows a sexual act to be done to the person's body; or*
> *(b) does a sexual act to the person's own body or the body of another person; or*
> *(c) otherwise engages in an act of an indecent nature.*
>
> *(4) Subsection (3) is not limited to sexual intercourse or acts involving physical contact.*
>
> *(5) For subsection (1), it is not necessary to prove that the adult intended to procure the person to engage in any particular sexual act.*
>
> *(6) Also, for subsection (1), it does not matter that, by reason of circumstances not known to the adult, it is impossible in fact for the person to engage in the sexual act.*
>
> *(7) For subsection (1), it does not matter that the person is a fictitious person represented to the adult as a real person.*
>
> *(8) Evidence that the person was represented to the adult as being under the age of 16 years, or 12 years, as the case may be, is, in the absence of evidence to the contrary, proof that the adult believed the person was under that age.*
>
> *(9) It is a defence to a charge under this section to prove the adult believed on reasonable grounds that the person was at least 16 years.*
>
> *(9A) For an offence defined in subsection (1) alleged to have been committed with the circumstance of aggravation mentioned in subsection (2)(a)(i), it is a defence to the circumstance of aggravation to prove that the adult believed on reasonable grounds that the person was at least 12 years.*
>
> *(10) In this section -*
> *electronic communication means email, internet chat rooms, SMS messages, real time audio/video or other similar communication.*
> *meeting means meeting in person.*
> *procure means knowingly entice or recruit for the purposes of sexual exploitation."*
>
> (my underlining)

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[16] [2012] QCA 280.

Section 218A criminalises the use of the internet to procure children under the age of 16 to engage in a sexual act or to expose those persons to any indecent matter[17]. Section 218A(1) makes it clear that the offence is committed even if the person is not under the age of 16, but the offender *"believes [the person] is under the age of 16 years"*. See also s 218A(7).

There is very good reason why this section is drawn in that way. The internet is very difficult to police. A tactic that has been adopted by the Queensland Police Service ("QPS") is for police officers to operate on the internet pretending to be children. They then enter chat rooms and identify offenders who are trawling the internet, trying to identify children to then groom for their deviant purposes.

Section 9 of the *Penalties and Sentences Act* provides that *"a sentence of imprisonment should only be imposed as a last resort"*[18], but that principle does not apply in relation to *"any offence of a sexual nature committed <u>in relation to a child under 16 years</u>"*[19]. In *R v McGrath*[20] the Court of Appeal considered an application for leave to appeal against a sentence imposed on a young man who had committed an offence under s 218A of the *Code*. The offender had believed that he was communicating through the internet with a young girl, but in fact was communicating with a police officer. The question arose as to whether he had been convicted of an offence *"of a sexual nature committed <u>in relation to a child under 16 years</u>"*. Mackenzie J, with whom de Jersey CJ and Williams JA both agreed, had no difficulty in concluding that for the purposes of s 9 of the *Penalties and Sentences Act*, and on a proper construction of s 218A, McGrath had committed an offence *"in relation to a child under 16 years"* notwithstanding that there was in fact no child involved in the commission of the offence.

However, in *Dodge v Attorney-General for the State of Queensland* [21], the Court of Appeal held that an offence under s 218A committed where the offender believed he was communicating with a child, but where he was in fact communicating with a member of the QPS, was not an offence *"against children"*. Therefore, Dodge was not a prisoner for the purposes of s 5(6) and therefore could not be the subject of an application under DPSOA. This was despite the fact that there was evidence that Dodge may be a danger to children if released.

You may consider an amendment to the definition of *"serious sexual offence"* to pick up offences under s 218A of the *Code*.

DIVISIONS 3, 3A AND 3B; AND PART 4 OF DPSOA

Divisions 3, 3A and 3B and Part 4 of DPSOA contain what can be regarded as the central provisions. Divisions 3, 3A and 3B concern the making of detention or supervision orders under DPSOA. Part 4 deals with periodic reviews.

Sections 13-16C provide as follows:

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17 Section 218A(1).
18 Section 9(2)(a)(i).
19 Section 9(5) (my underlining).
20 [2006] 2 Qd R 58.
21 [2012] QCA 280.

*"**13 Division 3 orders***

(1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied <u>the prisoner is a serious danger to the community in the absence of a division 3 order</u> (a serious danger to the community).

(2) <u>A prisoner is a serious danger to the community</u> as mentioned in subsection (1) <u>if there is an unacceptable risk that the prisoner will commit a serious sexual offence</u> -

- *(a) if the prisoner is released from custody; or*
- *(b) if the prisoner is released from custody without a supervision order being made.*

(3) On hearing the application, <u>the court may decide that it is satisfied as required under subsection (1) only if it is satisfied</u> -

- *(a) <u>by acceptable, cogent evidence</u>; and*
- *(b) <u>to a high degree of probability</u>;*

that the evidence is of sufficient weight to justify the decision.

(4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following -

- *(aa) any report produced under section 8A;*
- *(a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;*
- *(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;*
- *(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;*
- *(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;*
- *(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;*
- *(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;*
- *(g) the prisoner's antecedents and criminal history;*
- *(h) the risk that the prisoner will commit another serious sexual offence if released into the community;*
- *(i) the need to protect members of the community from that risk;*
- *(j) any other relevant matter.*

(5) If the court is satisfied as required under subsection (1), <u>the court may order</u> -

- *(a) <u>that the prisoner be detained in custody</u> for an indefinite term for control, care or treatment (continuing detention order); or*
- *(b) <u>that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order</u> (supervision order).*

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

- *(a) <u>the paramount consideration is to be the need to ensure adequate protection of the community</u>; and*
- *(b) <u>the court must consider</u> whether -*
  - *(i) <u>adequate protection of the community can be reasonably and practicably managed by a supervision order</u>; and*
  - *(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.*

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

13A Fixing of period of supervision order

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

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

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

(b) a further supervision order.

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

Division 3A Effect of particular orders

14 Effect of continuing detention order or interim detention order

(1) A continuing detention order has effect in accordance with its terms -

(a) on the order being made or at the end of the prisoner's period of imprisonment, whichever is the later; and

(b) until rescinded.

(2) An interim detention order has effect in accordance with its terms -

(a) on the order being made or at the end of the prisoner's period of imprisonment, whichever is the later; and

(b) for the period stated in the order, unless earlier rescinded.

15 Effect of supervision order or interim supervision order A supervision order or interim supervision order has effect in accordance with its terms -

(a) on the order being made or on the prisoner's release day, whichever is the later; and

(b) for the period stated in the order.

Division 3B Supervised release to be subject to particular requirements

Subdivision 1 Requirements for supervised release

16 Requirements for orders

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

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

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

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

(d) be under the supervision of a corrective services officer; and

(da) <u>comply with a curfew direction or monitoring direction</u>; and

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

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

Examples of direct inconsistency -

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

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

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

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

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

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

(2) <u>The order may contain any other requirement the court or a relevant appeal court considers appropriate</u> -

(a) <u>to ensure adequate protection of the community</u>; or

Examples for paragraph (a) -

• a requirement that the prisoner must not knowingly reside with a convicted sexual offender

• a requirement that the prisoner must not, without reasonable excuse, be within 200m of a school

• a requirement that the prisoner must wear a device for monitoring the prisoner's location

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

Subdivision 2 Directions to released prisoners

16A Curfew and monitoring directions

(1) The purpose of this section is to enable the movements of a released prisoner to be restricted and to enable the location of the released prisoner to be monitored.

(2) A corrective services officer may give 1 or both of the following directions to the released prisoner -

(a) a direction to remain at a stated place for stated periods (curfew direction);

Example -

a direction to remain at the released prisoner's place of residence from 2.30p.m. to 7.00p.m. on school days, if the prisoner is not required to be at a place of employment during these hours

(b) a direction to do 1 or both of the following (monitoring direction) -

(i) wear a stated device;

(ii) permit the installation of any device or equipment at the place where the released prisoner resides.

(3) A corrective services officer may give any reasonable directions to a released prisoner that are necessary for the proper administration of a curfew direction or monitoring direction.

(4) A direction under this section must not be directly inconsistent with a requirement of the relevant order for the released prisoner.

16B Other directions

(1) A corrective services officer may give a released prisoner a reasonable direction about -

(a) the prisoner's accommodation; or

Example -

a direction that the released prisoner may only reside at a place of residence approved by a corrective services officer

(b) the released prisoner's rehabilitation or care or treatment; or

Example -
a direction that the released prisoner participate in stated treatment programs

(c) drug or alcohol use by the released prisoner.

(2) A direction under subsection (1) may relate to a matter even though the relevant order imposes a requirement about the matter, either generally or specifically.

(3) However, the direction must not be directly inconsistent with a requirement of the order.

16C Criteria for giving directions

(1) A corrective services officer may give a direction under this subdivision or a direction mentioned in section 16(1)(db) only if the officer reasonably believes the direction is necessary -

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

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

(2) In this section -
reasonably believes means believes on grounds that are reasonable in all the circumstances of the case.

Part 4 of the DPSOA relevantly provides as follows:

*"**27 Review - periodic***

(1) <u>If the court makes a continuing detention order, it must review the order at the intervals provided for under this section</u>.

(1A) The hearing for the first review and all submissions for the hearing must be completed within 2 years after the day the order first had effect.

(1B) There must be subsequent annual reviews while the order continues to have effect.

(1C) Each annual review must start within 12 months after the completion of the hearing for the last review under this section.

(2) The Attorney-General must make any application that is required to be made to cause the reviews to be carried out.

28 Review - application by prisoner

(1) The prisoner may apply to the court for the prisoner's continuing detention order to be reviewed at any time after the court makes its first review under section 27(1) if the court gives leave to apply on the ground that there are exceptional circumstances that relate to the prisoner.

(2) The registrar must immediately forward a copy of the application to the Attorney-General.

(3) As soon as practicable after the making of the application, the court must give directions to enable the application to be heard.

(4) Subject to any directions given by the court, the application must be heard as soon as practicable after the application is made.

28A Attorney-General may produce report

Section 8A applies for any application under section 27 or 28 as if the application were an application for a division 3 order.

29 Psychiatric reports to be prepared for review

(1) Unless the court otherwise orders at the hearing of any application under this Act, for the purposes of a review under section 27 or 28, the chief executive must arrange for the prisoner to be examined by 2 psychiatrists.

(2) For subsection (1) and the purposes of a review, sections 11 and 12 apply with necessary changes.

(3) Subsection (1) authorises examinations of the prisoner by the 2 psychiatrists.

30 Review hearing

(1) This section applies if, on the hearing of a review under section 27 or 28 and having regard to the required matters, the court affirms a decision that the prisoner is a serious danger to the community in the absence of a division 3 order.[22]

(2) On the hearing of the review, the court may affirm the decision only if it is satisfied -

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to affirm the decision.[23]

(3) If the court affirms the decision, the court may order that the Prisoner -

(a) continue to be subject to the continuing detention order; or

(b) be released from custody subject to a supervision order.[24]

(4) In deciding whether to make an order under subsection (3)(a) or (b) -

(a) the paramount consideration is to be the need to ensure adequate protection of the community[25]*; and*

(b) the court must consider whether -

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order;[26] *and*

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

(5) If the court does not make the order under subsection (3)(a), the court must rescind the continuing detention order.

(6) In this section -

required matters means all of the following -

(a) the matters mentioned in section 13(4);

(b) any report produced under section 28A."

(my underlining)

For present purposes, we can describe these sections as operating as follows. An application is made under s 13 to have the prisoner brought within DPSOA. That occurs where the prisoner is *"a serious danger to the community"* [27]. A prisoner is a *"serious danger to the community"* if there is *"an unacceptable risk that the prisoner will commit a serious sexual offence"* unless he is either detained or, if he is not detained but released, he is not released under a supervision order[28].

The Attorney-General will not succeed on a s 13 application unless the application is supported by *"acceptable cogent evidence"* which satisfies the court *"to a high degree of probability"*[29].

It is now settled that even if the court was satisfied that the prisoner is *"a serious danger to the community"* there is a residual discretion to make no order[30].

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22 This mirrors s 13(1) and (2).
23 This mirrors s 13(3).
24 This mirrors s 13(5).
25 This mirrors s 13(6)(a).
26 This mirrors s 13(6)(b).
27 Section 13(1).
28 Section 13(2).
29 Section 13(3).

However, assuming that the case is not one of the exceptional cases where no order is justified even though a finding of dangerousness had been made, the choice of the court is to make either a continuing detention order or a supervision order[31]. In determining whether to make a detention order or a supervision order *"the paramount consideration is to be the need to ensure adequate protection of the community"* and the court must consider whether *"adequate protection of the community can be reasonably and practicably managed by a supervision order"*[32].

So, in most cases, the court reasons whether *"there is an unacceptable risk that the prisoner will commit a serious sexual offence"* if not brought within the DPSOA[33] and then determines whether *"adequate protection of the community can be reasonably and practicably managed by a supervision order"*[34]. Otherwise, a continuing detention order is made.

Section 16(1) provides for a series of conditions which must be in a supervision order and then s 16(2) enables the court to add any other requirements that might be considered appropriate *"to ensure adequate protection of the community, or for the prisoner's rehabilitation or care or treatment"*.

Section 16A enables directions to be given by QCS services in relation to curfew and monitoring and s 16B authorises other directions.

Part 4 deals with annual reviews where an offender has been the subject of a detention order under s 13.

In many ways, Part 4 mirrors Divisions 3, 3A and 3B. By s 30, the court must consider whether the prisoner is still *"a serious danger to the community in the absence of a Division 3 order"*. The various definitions which apply to s 13 also apply here. The s 13 decision may only be affirmed under s 30(2) if it is supported by *"acceptable cogent evidence"* and the court is satisfied *"to a high degree of probability"*. This mirrors s 13(3).

Once the court affirms the decision made under s 13, it may then, on the review, preserve the continuing detention or make a supervision order. Section 30(4) mirrors s 13(6) in that, in determining whether to make a supervision order, the paramount consideration is the need *"to ensure adequate protection of the community"* and the court must consider whether *"adequate protection of the community can be reasonably and practicably managed by a supervision order"*.

The types of offenders who find themselves as respondents under DPSOA usually:

1. Have committed quite horrific offences;
2. Have been in jail for a very long time;
3. Have personality disorders or psychoses.

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[30] *Attorney-General for the State of Queensland v Kanaveilomani* [2013] QSC 086 at [67] which is under appeal on other issues; but see also *Attorney-General (Qld) v Lawrence* [2009] QCA 136 at [28]-[30] citing judgments of individual members of the court in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

[31] Section 13(5).

[32] Section 13(6).

[33] Section 13(2).

[34] Section 13(6).

If the court considers, on an application under s 13 or a review under s 30, that the offender, if released, is likely to comply with the supervision order then, generally speaking, the community will be protected. It is only necessary to look at s 16 and the requirements of a supervision order to be satisfied, that if compliance occurred, there would be little difficulty. A problem which arises though time and time again in the cases is a doubt as to whether the offender can or will comply with the orders. Doubts about compliance no doubt arise because the persons who are the subject of proceedings under DPSOA are very much damaged personalities. They often are manipulative, suspicious of authority etc. In three of the most notorious offenders, Yeo, Fardon and Eades, these issues surrounding compliance have arisen.

In *Attorney-General v Fardon*[35], the Chief Justice described supervision orders as follows:

> *"These orders (supervision orders) have the character of a compact between the prisoner and the community; the prisoner is according a measure of personal freedom, but only provided he is willing to, and does, submit to a regime of tight control."*[36]

However, other cases[37] have taken a different approach. In those cases, there has been consideration of the nature of the breaches that might be committed and whether minor breaches are likely to be detected before serious offending occurs. In *Eades* for instance, it seemed highly unlikely that Eades would comply with his supervision order. However, the evidence was that Eades would probably breach his order by initially befriending families with children (which would be a breach of his supervision order) but that breach would be detected before any sexual offending against children occurred.

As a matter of policy, it has to be doubted that the purposes of DPSOA are being properly served where offenders are being released on supervision orders in circumstances where breaches are likely and QCS resources are being utilised to detect and intercept breaches before serious offending occurs.

There are a number of ways in which the relevant provisions may be amended. One option would be to consider a section which casts an onus upon the offender to prove on the balance of probabilities, that compliance by him of the mandatory requirements under s 16 (which would pick up ss 16A and 16B) is likely during the term of any supervision order made. It seems to us that each of Yeo, Fardon and Eades would have failed that test.

We have mentioned the cases of Yeo, Fardon and Eades specifically. However, this issue about likelihood of compliance has certainly arisen in other cases. It is a central difficulty with DPSOA.

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35 [2011] QCA 155.

36 At paragraph [29].

37 *Attorney-General of Queensland v Yeo* [2008] QCA 115 and *Attorney-General for the State of Queensland v Eades* [2013] QSC 266, *Attorney-General for the State of Queensland v Fardon* [2013] QSC 264.

CONCLUSIONS

We have attempted to identify the central aspects of DPSOA that may require some attention. However, you ought to consider, in our view, a full review of DPSOA as we are sure that such a review will identify other areas of the Act which could be improved by amendment.

The Bar Association does not here purport to express a view about the policy issues behind the legislation. We have made these suggestions in light of the evident policy of the government, in order to permit the law to operate in a way which, in the view of the Bar Association, is preferable to effect being given to exercise of the power vested in the Executive under the Declarations Act. The Association would be pleased to meet with you or with officers of the Department to discuss these matters, and any other matters about which we might be of assistance.

Yours faithfully

Roger N Traves QC
President