[2008] WASCA 188

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	WOODS -v- THE DIRECTOR OF PUBLIC PROSECUTIONS (WA) [2008] WASCA 188
CORAM	**:**	STEYTLER P BUSS JA MURRAY AJA
HEARD	**:**	6 JUNE 2008
DELIVERED	**:**	8 SEPTEMBER 2008
FILE NO/S	**:**	CACR 9 of 2008
BETWEEN	**:**	IAN DUDLEY WOODS Appellant AND THE DIRECTOR OF PUBLIC PROSECUTIONS (WA) Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	JENKINS J
Citation	**:**	THE STATE OF WESTERN AUSTRALIA -v- WOODS [2007] WASC 320
File No	**:**	MCS 19 of 2007

Catchwords:

Criminal law and procedure - Dangerous sexual offender application - Appellant found to be a serious danger to the community - Supervision order made - Whether court had discretion to make no order - Admissibility of psychiatric evidence - Whether court erred in attributing weight to psychiatric evidence - Admissibility of evidence of statements made to psychiatrists by appellant - Admissibility of evidence of convictions and offending as a child

Legislation:

Dangerous Sexual Offenders Act 2006 (WA)

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Appellant	:	Mr M J Croucher & Ms M R Barone
Respondent	:	Mr D Dempster

Solicitors:

Appellant	:	Aboriginal Legal Service (WA)
Respondent	:	Director of Public Prosecutions (WA)

Case(s) referred to in judgment(s):

Attorney-General (Qld) v Francis [2006] QCA 324
Australian Securities and Investments Commission v Rich [2005] NSWCA 152; (2005) 218 ALR 764
Batoka Pty Ltd v Conocophillips WA-248 Pty Ltd [2006] WASCA 44; (2006) 198 FLR 93
Channel 7 Perth Pty Ltd v S (A Company) [2007] WASCA 122
Cleland v The Queen (1982) 151 CLR 1
Coleman v Shell Co of Australia (1943) 45 SR (NSW) 27

Collins v The Queen (1980) 31 ALR 257
Craig v Troy (1997) 16 WAR 96
Director of Public Prosecutions (WA) v GTR [2007] WASC 318
Director of Public Prosecutions (WA) v GTR [2008] WASCA 187
Director of Public Prosecutions (WA) v Williams [2007] WASCA 206; (2007) 35 WAR 297
Director of Public Prosecutions for Western Australia v Mangolamara [2007] WASC 71; (2007) 169 A Crim R 379
Duke v The Queen (1989) 180 CLR 508
Fardon v Attorney-General (Qld) [2004] HCA 46; (2004) 223 CLR 575
Finance Facilities Pty Ltd v Commissioner of Taxation (Cth) (1971) 127 CLR 106
Fisher v Hebburn Ltd (1960) 106 CLR 188
Geraldton Building Co Pty Ltd v May (1977) 136 CLR 379
Goodwin v Phillips (1908) 7 CLR 1
Gordon v The Queen (1982) 41 ALR 64
HG v The Queen (1999) 197 CLR 414
MacPherson v The Queen (1981) 147 CLR 512
Makita (Aust) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705
Mathieson v Burton (1971) 124 CLR 1
Maxwell v Murphy (1957) 96 CLR 261
McDermott v The King (1948) 76 CLR 501
Moody v French [2008] WASCA 67
Napier v The State of Western Australia [2008] WASCA 106
Neowarra v Western Australia [2003] FCA 1399; (2003) 134 FCR 208
Pollock v Wellington (1996) 15 WAR 1
Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370
PQ v Australian Red Cross Society [1992] 1 VR 19
R v Barrett [2007] VSCA 95; (2007) 16 VR 240
R v Barry [1984] 1 Qd R 74
R v Bonython (1984) 38 SASR 45
R v Karger [2001] SASC 64; (2001) 83 SASR 1
R v Lee (1950) 82 CLR 133
R v Mesiti [1984] WAR 21
R v Noll [1999] VSCA 164; [1999] 3 VR 704
R v Rowe (1992) 5 WAR 491
R v Swaffield; Pavic v The Queen [1998] HCA 1; (1998) 192 CLR 159
R v Tonkin & Montgomery [1975] Qd R 1
Ramsay v Watson (1961) 108 CLR 642
Re Calder; Ex parte Cable Sands (WA) Pty Ltd (1998) 20 WAR 343
Robertson v City of Nunawading [1973] VR 818

Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157; (2002) 55 IPR 354
The State of Western Australia v Latimer [2006] WASC 235
The State of Western Australia v Woods [2007] WASC 320
Traegar v Pires de Albuquerque (1997) 18 WAR 432

1 **STEYTLER P & BUSS JA**: The appellant was found by the primary judge, Jenkins J, to be a serious danger to the community for the purposes of s 7 of the *Dangerous Sexual Offenders Act 2006* (WA) (the Act). She ordered that he be subject to a supervision order under s 17(1)(b) of the Act. He appeals against the making of that order. The material facts are set out in the reasons of Murray AJA. We agree with his Honour that the appeal should be dismissed. Our reasons are as follows.

The relevant provisions of the *Dangerous Sexual Offenders Act 2006* (WA)

2 The objects of the Act are apparent from s 4 read with s 7. They are:

(a) to provide for the detention in custody or the supervision of sexual offenders who would otherwise present an unacceptable risk of committing a 'serious sexual offence', as defined in s 106A of the *Evidence Act 1906* (WA); and

(b) to provide for continuing control, care or treatment of offenders of the kind referred to in (a).

3 Under s 8(1) of the Act, the Director of Public Prosecutions (WA) (DPP) may file with the Supreme Court an application for orders under s 14 and s 17(1) in relation to a person (the 'offender') who is under sentence of imprisonment wholly or in part for a serious sexual offence. Section 17 reads:

> (1) If the court hearing an application for a Division 2 order [that is, an order under s 17(1)(a) or s 17(1)(b)] finds that the offender is a serious danger to the community, the court may -
>
> (a) order that the offender be detained in custody for an indefinite term for control, care, or treatment; or
>
> (b) order that at all times during the period stated in the order when the offender is not in custody the offender be subject to conditions that the court considers appropriate and states in the order.
>
> (2) In deciding whether to make an order under subsection (1)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

4 Section 18 of the Act provides for the conditions of a supervision order (that is, an order under s 17(1)(b) or s 33(2)(b)) that might be imposed. It reads as follows:

> (1) If the court makes a supervision order against a person, the order must require that the person -

> (a) report to a community corrections officer at the place, and within the time, stated in the order and advise the officer of the person's current name and address;
>
> (b) report to, and receive visits from, a community corrections officer as directed by the court;
>
> (c) notify a community corrections officer of every change of the person's name, place of residence, or place of employment at least 2 days before the change happens;
>
> (d) be under the supervision of a community corrections officer;
>
> (e) not leave, or stay out of, the State of Western Australia without the permission of a community corrections officer; and
>
> (f) not commit a sexual offence as defined in the *Evidence Act 1906* section 36A during the period of the order.
>
> (2) The supervision order may contain any other terms that the court thinks appropriate -
>
> (a) to ensure adequate protection of the community; or
>
> (b) for the rehabilitation or care or treatment of the person subject to the order.

5 Section 7 of the Act deals with the notion of 'a serious danger to the community' that triggers the operation of s 17(1). Section 7(1) reads:

> Before the court dealing with an application under this Act may find that a person is a serious danger to the community, the court has to be satisfied that there is an unacceptable risk that, if the person were not subject to a continuing detention order [that is, an order under s 17(1)(a) or s 23(b)] or a supervision order [that is, an order under s 17(1)(b) or s 33(2)(b)], the person would commit a serious sexual offence.

6 Section 7(2) of the Act places upon the DPP the onus of satisfying the court of the matters specified in s 7(1). This must be done by acceptable and cogent evidence: s 7(2)(a). The level of satisfaction must be 'to a high degree of probability': s 7(2)(b). In deciding whether to find that a person is a serious danger to the community, the court is required by s 7(3) to have regard to:

> (a) any report that a psychiatrist prepares as required by section 37 for the hearing of the application and the extent to which the person cooperated when the psychiatrist examined the person;

(b) any other medical, psychiatric, psychological, or other assessment relating to the person;

(c) information indicating whether or not the person has a propensity to commit serious sexual offences in the future;

(d) whether or not there is any pattern of offending behaviour on the part of the person;

(e) any efforts by the person to address the cause or causes of the person's offending behaviour, including whether the person has participated in any rehabilitation program;

(f) whether or not the person's participation in any rehabilitation program has had a positive effect on the person;

(g) the person's antecedents and criminal record;

(h) the risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence;

(i) the need to protect members of the community from that risk; and

(j) any other relevant matter.

7 Section 14(1) of the Act provides that if, at a preliminary hearing, the court is satisfied that there are 'reasonable grounds for believing that the court might, under s 7(1), find that the offender is a serious danger to the community, the proper officer of the court must fix a day for the hearing of the application' for a continuing detention order under s 17(1)(a) or a supervision order under s 17(1)(b). Section 14(2)(a) provides that, if the court is satisfied as described in s 14(1), it must order that the offender undergo examinations by two psychiatrists named by it for the purposes of preparing reports, as required by s 37, to be used on the hearing of the application. Extraordinarily, s 14(2)(b) provides that, if the offender is in custody and might otherwise be released before the application is finally decided, or if the offender is not in custody, the court may order that the offender be detained in custody for a stated period. There is consequently a power to imprison a person, who has completed any sentence of imprisonment imposed upon him, only because there are 'reasonable grounds' for believing that he 'might' be found to present an 'unacceptable risk' of committing a serious sexual offence if not subject to a continuing detention order or a supervision order. That is a remarkably low threshold for imprisoning a person solely as a preventative measure.

8 Each psychiatric report ordered pursuant to s 14(2)(a) must indicate the psychiatrist's assessment of the level of risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence and the reasons for that assessment: s 37(2).

9 The Act provides, by Pt 3, for annual reviews of a person's detention under a continuing detention order. The first review must be carried out as soon as practicable after the end of a period of one year, commencing when the person was first in custody on a day on which that person would not have been in custody had the order not been made: s 29(2)(a). Subsequent reviews must be carried out as soon as practicable after the end of the period of one year commencing when the detention was most recently reviewed: s 29(2)(b). Applications for review must be brought by the DPP (s 29(1)), although a person subject to a continuing detention order may, with the leave of the court, apply for a review under s 30(1) if he or she is able to satisfy the court that there are exceptional circumstances (s 30(2)). An application cannot be made under s 30(1) until after the detention has been reviewed under s 29(2)(a) (that is, after the initial annual review has been carried out) (s 30(3)). Further provisions in respect of the reviews may be found in s 31, s 32 and s 33.

10 Appeals are provided for by Pt 4 of the Act. An appeal is by way of rehearing: s 36(1). Section 36(2) provides that the Court of Appeal:

> (a) has all the powers and duties of the court making the decision against which the appeal is made;
>
> (b) may draw inferences of fact, not inconsistent with the findings of the court making the decision against which the appeal is made; and
>
> (c) may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit, or in another way.

11 Section 40 of the Act provides that proceedings under the Act or on an appeal under the Act are to be taken to be criminal proceedings for all purposes. Section 42 deals with applicable rules of evidence.

The proper construction of relevant provisions of the Act

12 In ***Director of Public Prosecutions (WA) v GTR*** [2008] WASCA 187, we considered various issues relating to the proper construction and application of the Act. The issues we considered were these:

(1) Is there any distinction, for the purposes of the Act, between a finding that a person is 'a serious danger to the community' and a finding that there is 'an unacceptable risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence', within s 7(1)?

(2) What constitutes an 'unacceptable risk' in this context?

(3) What is conveyed by the requirement in s 7(2)(b) that the court must be satisfied 'to a high degree of probability'?

(4) Does the word 'may' in s 17(1) mean 'must'; or is there a discretion to do nothing, notwithstanding a finding that an offender is a serious danger to the community?

(5) When considering an application under the Act, is the court entitled, in any case, to have regard to relevant sexual offences committed when the offender was a juvenile; or is this prohibited by s 190 of the *Young Offenders Act 1994* (WA) when the period of 2 years referred to in s 189(2) of that Act has expired?

(6) To what extent must a court be guided by psychiatric reports prepared pursuant to s 37 of the Act?

(7) What is imported by the requirement, in s 36(1), that the appeal is to be 'by way of rehearing'?

13 It is unnecessary, in these reasons, to reproduce our decision and reasoning in relation to each of these issues. They are set out in detail in ***GTR*** [14] - [65].

The grounds of appeal in the present case

14 We turn now to address each of the grounds of appeal in the present case.

Grounds 1 and 1B of the appeal

15 Ground 1 reads:

> The learned trial judge erred in law in speculating that Dr Brett's and Dr Wynn Owen's reports applied the statutory definition of 'serious sexual offence', absent an express declaration to that effect in their reports or in their oral evidence and absent any reference to a consideration of the *Evidence Act*.

16 Ground 1B reads:

> The learned trial judge erred in law in making an order for supervision under the *Dangerous Sexual Offenders Act 2006*, in circumstances where

there were no psychiatric reports in accordance with the requirements of s 37 of the Act.

17 It is convenient to consider these grounds together.

18 The term 'serious sexual offence' is defined in s 3 of the Act to have the meaning given to it in s 106A of the *Evidence Act 1906* (WA).

19 In s 106A of the *Evidence Act*, 'serious sexual offence' is defined to mean:

> (a) an offence under a section or Chapter of *The Criminal Code* mentioned in Part B of Schedule 7 for which the maximum penalty that may be imposed is 7 years, or more than 7 years;
>
> (b) an offence under a repealed section of *The Criminal Code* if -
>
> (i) the acts or omissions that constituted an offence under that section are substantially the same as the acts or omissions that constitute an offence (the '**new offence**') under a section or Chapter of *The Criminal Code* mentioned in Part B of Schedule 7; and
>
> (ii) the maximum penalty that may be imposed for the new offence is 7 years, or more than 7 years;
>
> or
>
> (c) an offence of attempting to commit an offence described in paragraph (a) or (b);

20 By s 37(2) of the Act, the report of each psychiatrist named in an order under s 14(2)(a), or with whom the chief executive officer makes an arrangement under s 32(1), must indicate:

> (a) the psychiatrist's assessment of the level of risk that, if the offender were not subject to a continuing detention order or a supervision order, he or she would commit a serious sexual offence; and
>
> (b) the reasons for the psychiatrist's assessment.

21 Dr Brett's report dated 5 September 2007 states, relevantly to grounds 1 and 1B:

> (a) Mr Woods has been referred for an examination as required by s 37 of the *Dangerous Sexual Offenders Act 2006* (AB 44).
>
> (b) [Mr Woods] is currently in prison on the offence of sexual penetration without consent aggravated x 2 (AB 44).

(c) **STATIC 99**

The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders. This risk assessment instrument was developed by Hanson and Thornton (1999) based on follow-up studies from Canada and the United Kingdom with a total sample size of 1,301 sexual offenders. The STATIC-99 consists of 10 items and produces estimates of future risk based upon the number of risk factors present in any one individual. The risk factors included in the risk assessment instrument are the presence of prior sexual offences, having committed a current non-sexual violent offence, having a history of non-sexual violence, the number of previous sentencing dates, age less than 25 years old, having male victims, having never lived with a lover for two continuous years, having a history of non-contact sex offences, having unrelated victims, and having stranger victims.

The recidivism estimates provided by the STATIC-99 are group estimates based upon reconvictions and were derived from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism risk of an individual offender. The offender's risk may be higher or lower than the probabilities estimated in the STATIC-99 depending on other risk factors not measured by this instrument.

It should be noted that this risk assessment tool has not been formally validated in Indigenous Australians. However, it still has important factors that could be of relevance (AB 48).

(d) **THREE PREDICTOR MODEL**

This model was developed in the course of a Western Australian retrospective study examining the factors that predict whether indigenous male sexual offenders would re-offend violently and sexually respectfully [*sic*]. They found that the three factors, which best predicted sexual re-offending were all dynamic namely unrealistic long-term goals, unfeasible release plans and poor coping skills prior to release. Poor coping skills are shown if there has been the use of alcohol or other maladaptive behaviours as a coping strategy. Mr Woods has a history of alcohol use and difficulty in coping with stress in the past. He has also been documented to saying he has been previously 'terrified' of community life. He also more recently alluded to self-harm if the outcome of the court is unsatisfactory (AB 49).

(e) **RISK FOR SEXUAL VIOLENCE PROTOCOL**

The Risk for Sexual Violence Protocol is a set of structured professional guidelines. They can also be considered a

psychological test. The administration of the RSVP comprises six steps including the evaluation of information, the evaluation of twenty two individual risk factors, the relevance of the risk factors in the development of risk management plans, the development of risk scenarios, the development of strategies to manage sexual violence risk and judgments regarding overall risks in the case (AB 49).

(f) **RISK SCENARIOS**

If Mr Woods were to re-offend it would be likely that his offence pattern will be similar to that in the past, which has involved rape. It is difficult to predict who the likely victims will be given the variety in the past. The likely motivation will be to have his sexual needs met. Given his previous offending pattern it is likely that the severity of re-offending will be serious. Mr Woods uses threats of violence more than actual violence so the offending is not likely to be life threatening. The imminence of Mr Woods risk is difficult to assess. His previous stint in the community was the longest he had spent in the community during his life. It is hoped that the imminence would not be acute and with supervision this should be reduced. There does not appear to be warning signs to predict risk. Two of his offences have occurred following car trips with other offenders.

Mr Woods has chronic risk factors. He has not addressed a lot of his risk factors so it is unlikely to be reduced in the short or long term. Given Mr Woods' history and his age it is difficult to predict the likelihood of his offending though this will depend on his supervision and his life circumstances. His background factors place him in a high-risk category for re-offending (AB 52).

(g) **OPINION AND RECOMMENDATIONS**

From the clinical examination, the review of the collateral information, the STATIC 99, the Three Predictor Model and the Risk for Sexual Violence Protocol I believe that Mr Woods falls within the high-risk category for re-offending. The reasons for this are outlined in the bulk of this report. I believe that Mr Woods' risk to others would reduce significantly with strict monitoring, substance abuse counselling and abstinence from illicit substances, individual psychological counselling with respect to general issues and individual counselling to attempt to address his violence and sexual offending. The prognosis for this appears to be poor. I believe that an individual approach is the best way forward given his difficulties in groups and his personality style (AB 53).

22 Dr Wynn Owen's report dated 14 September 2007 reads, relevantly to grounds 1 and 1B:

(a) This report has been prepared at the request of the Supreme Court of Western Australia as required under s 37 of the *Dangerous Sexual Offenders Act 2006* (DSOA 2006) (AB 130).

(b) **STATIC-99** (Harris, Phenix, Hansen and Thornton, revised 2003)
The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders. This risk assessment was developed by Hansen and Thornton (1999) based on follow-up studies from Canada and the United Kingdom with a total sample size of 1301 sexual offenders. The STATIC-99 consists of 10 items and produces estimates of future risk based on the number of risk factors present in any one individual. The risk factors included in the risk assessment instrument are the presence of prior sexual offences, having committed a current non-sexual violent offence, having a history of non-sexual violence, the number of previous sentencing dates, age less than 25 years old, having male victims, having never lived with a lover for 2 continuous years, having a history of non-contact sexual offences, having unrelated victims and having stranger victims.

The recidivism estimates provided by STATIC-99 are group estimates based on reconvictions and were derived from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism risk of an individual offender. The offender's risk may be higher or lower than the probabilities estimated in the STATIC-99 depending on other risk factors not measured by this instrument (AB 140).

(c) **Psychopathy Checklist, revised** (PCL-R 2nd Edition, Robert D Hare, 2003)
Mr Woods scores 29 on the PCL-R; although a score of 30 has been accepted as being the point at which an individual is identified as 'a psychopath' this is not a sharp dividing line, scores of 25 (Scotland, Michie and Cooke; 1999) and 26 (Cooke, D; 2000) have been used in the British and Swedish Criminal Justice Systems for prediction and other purposes.

Evidence suggests that the presence of psychopathy in a sexual offender increases the likelihood of sexual re-offending. It has been found (Rice and Harris, 1997) in a sample of 288 sexual offenders that about 70% of individuals with deviant sexual arousal and a PCL-R score of 25 or more committed a new sexual offence compared with 40% in other groups. This finding was replicated in 2001 (Serin, Mailloux and Malcolm), 70% of sex offenders with a PCL-R score above the median re-offending compared with 15% with a score below median (AB 140 - 141).

(d) **RISK OF REOFFENDING**

> Mr Woods' STATIC-99 score, presence of psychopathy (PCL-R score 29), age at last offence, denial and extreme minimisation, personality style, recent prison charges and stereotyped superficial plans for the future indicate that Mr Woods currently presents a High risk of sexual reoffending (AB 141).
>
> (e) **RECOMMENDATIONS**
>
> Mr Woods has not participated in any program addressing his violent sexual offending due mainly to his denial of offences, participation in a program/programs targeting this behaviour are essential to any modification of that behaviour to reduce re-offending risk.
>
> If ongoing custody is decided I respectfully recommend:
>
> - Personally tailored 1:1 Sex Offender Treatment Programme with 24/7 behavioural monitoring to assess response.
> - Completion of an Anger Management programme.
>
> If an order is made requiring supervision in the community I respectfully recommend:
>
> - Personally tailored 1:1 Sex Offender Treatment Programme with behavioural monitoring to assess response.
> - Completion of an Anger Management programme.
> - Daily reporting/monitoring through Community Justice Services.
>
> In both instances the Sex Offender Treatment Programme is to have the goals of: acknowledging and accepting responsibility for his offences; recognising the inappropriateness of his behaviours and learning to recognise triggers for these behaviours; and of acknowledging and recognising the inappropriateness of sexual arousal to coerced sex or sexual violence (AB 142).

23 The appellant made submissions to the learned judge which are similar to the contentions in grounds 1 and 1B of the appeal.

24 The learned judge referred to passages from Dr Brett's report, including some of those set out at [21] above, and said:

> I see no reason to assume from Dr Brett's report that he was unaware of the definition of 'serious sexual offence' when he gave his opinion and made his recommendations. The [appellant's] counsel did not cross-examine Dr Brett as to his understanding of that term. In the absence of evidence to the contrary, my view is that when Dr Brett says that his report is for the purposes of the Act s 37 and when in the last sentence of his report he

> gives his assessment of the [appellant's] level of risk of committing a 'serious sexual offence' that he uses that phrase as it is defined in the Act [68].

25 The learned judge then referred to passages from Dr Wynn Owen's report, including some of those set out at [22] above, and said:

> Under the heading 'History of Sexual Offending' on page 4 of his report, Dr Wynn Owen includes the conviction for deprivation of liberty and the prison charge of masturbating in front of a female prison officer. Neither of these offences are classified as serious sexual offences as defined by the Act. Whilst that may indicate that Dr Wynn Owen has a broader definition of sexual offending than the Act, I am of the opinion that Dr Wynn Owen, when writing about the [appellant's] risk of sexual re-offending, was primarily writing about his risk of committing the most serious sexual offences contained in his criminal record. Each of those offences are a 'serious sexual offence' for the purpose of the Act s 37. I also take into account that Dr Wynn Owen was aware that his report was for the purposes of the Act s 37 [71].

26 The appellant's counsel submitted to this court that, on the evidence, there were two possibilities; namely, the psychiatrists had applied the statutory definition or they had not. The trial judge's conclusion that they had applied the statutory definition was mere speculation and not a properly drawn inference. Even if the inference was capable of being drawn on the civil standard of proof, the proceedings in question are, by s 40 of the Act, to be taken to be criminal proceedings for all purposes, and her Honour could not have been satisfied beyond reasonable doubt that the psychiatrists had applied the statutory definition.

27 It was further submitted on behalf of the appellant that the reports of Dr Brett and Dr Wynn Owen were not reports in accordance with s 37 of the Act in that they did not relate to the risk of the appellant committing a serious sexual offence, as defined by the Act. According to the appellant's counsel, in the circumstances, her Honour erred in having regard to the reports.

28 Dr Brett said in cross-examination that he told the appellant that his role was to interview him and to provide the court with a report for the purposes of the Act (ts 30). Dr Brett also gave evidence that he understood the decision which the court was required to make on the respondent's application was whether or not the appellant is a serious danger to the community (ts 32). Also, in his report, Dr Brett noted, significantly, that the appellant had been referred to an examination as required by s 37 of the Act; the appellant was currently in prison on two counts of aggravated sexual penetration without consent (which are

'serious sexual offences' as defined in s 3 of the Act); he had used STATIC-99, which is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders; also, he had used the Risk for Sexual Violence Protocol (RSVP), which includes, relevantly, the development of strategies to manage sexual violence risk; he was of the opinion that if the appellant were to re-offend, it would be likely that his offence pattern will be similar to that in the past, which has involved rape (a 'serious sexual offence'); also, he was of the opinion that given the appellant's previous offending pattern, it is likely that the severity of any re-offending will be serious.

29 Dr Wynn Owen said in cross-examination that he had read the Act before he interviewed the appellant (ts 89). Also, Dr Wynn Owen noted in his report that the report had been prepared at the request of the court as required under s 37 of the Act. Dr Wynn Owen used STATIC-99, which he described as an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders; and, in his recommendations, he emphasised the importance of the appellant acknowledging and recognising the inappropriateness of sexual arousal to coerced sex or sexual violence.

30 In our opinion, it is apparent from the passages in Dr Brett's and Dr Wynn Owen's reports and cross-examination, to which we have referred, that each of them applied the statutory definition of 'serious sexual offence' in forming their opinions and recommendations in relation to the appellant. Also, their reports complied with s 37 of the Act in that they indicated, relevantly, their assessment of the level of risk that, if the appellant were not subject to a continuing detention order or a supervision order, he would commit a 'serious sexual offence', as defined. We are satisfied beyond reasonable doubt that Dr Brett and Dr Wynn Owen did apply the statutory definition and that the learned judge's decision on this point was, with respect, correct.

31 Grounds 1 and 1B fail.

Ground 2 of the appeal

32 Ground 2 reads:

> The learned trial judge erred in law in interpreting the *Dangerous Sexual Offenders Act* as deeming psychiatrists, and thereby deeming the two court-appointed psychiatrists as having expertise in predicting recidivism.

33 The appellant made a submission to the learned judge which is similar to the contention in ground 2 of the appeal.

34 The learned judge referred to s 37 of the Act and then noted that s 7(3) states that the court must have regard to any report prepared under s 37 [74]. Her Honour held:

> From these provisions, I infer that the court is required to place some weight on the opinions of the psychiatrists even if they have not been qualified as experts in recidivism. It appears to me that Parliament has deemed that psychiatrists ordered to prepare reports under s 37 are qualified to give the opinions required of them [75].

She then added:

> This is not to say that in an appropriate case the court could decide to put little weight on an opinion because it came from a psychiatrist with little experience or who lacked credibility. In my opinion, neither Dr Brett nor Dr Wynn Owen fall into that category. Both are experienced psychiatrists. Each of them gave their evidence in a cogent and credible manner. The cross-examination of Dr Wynn Owen challenged his approach and attitude towards the [appellant] and some of his comments in his report. That cross-examination did not cause me to place less weight on his opinions.
>
> There are clear limitations on the psychiatrists' abilities to predict future behaviour. The psychiatrists acknowledged those limitations. There was no evidence which causes me to decide that their opinions were of little weight. To the contrary, I was assisted by their opinions and their reasons for them. At the same time, I am cognisant of the fact that Parliament has given to me the responsibility for determining this application. The opinions of the psychiatrists are one of the matters which I must take into account but they do not determine the outcome of the application [76] - [77].

35 The appellant's counsel submitted to this court that although, by s 7(3)(a) of the Act, the court 'must have regard to' any report that a psychiatrist prepares as required by s 37, the court is not obliged to 'accept' any such report. The court is entitled to reject the report and not accord any weight to the opinions expressed in it if, for example, the report or the opinions are not acceptable or cogent, or are not admissible under s 42 of the Act read with s 40.

36 The provisions of the Act which bear upon ground 2 of the appeal are these:

(a) Section 3 provides that 'psychiatrist' has the meaning given to that term in s 3 of the *Mental Health Act 1996* (WA).

(b) By s 14(2)(a), if the court is satisfied, at a preliminary hearing, that there are reasonable grounds for believing that the court might, under s 7(1), find that an offender is a serious danger to the

community, the court must order that the offender undergo examinations by two psychiatrists named by the court for the purposes of preparing the reports required by s 37 that are to be used on the hearing of the application.

(c) By s 15, an order under s 14(2)(a) authorises each of the two psychiatrists named in the order to examine the offender and report in accordance with Pt 5.

(d) Section 32(1) provides for annual reviews of a person's detention under a continuing detention order and requires, unless the court otherwise orders, the chief executive officer of the department of the Public Service principally assisting the Minister with the administration of the Act to arrange for the person to be examined by two psychiatrists for the purposes of preparing the reports required by s 37 that are to be used on a review under Pt 3 of the Act. Section 32(2) authorises each of the two psychiatrists to examine the person and report in accordance with Pt 5.

(e) By s 37(1), each psychiatrist named in an order under s 14(2)(a) or with whom the chief executive officer makes an arrangement under s 32(1) must examine the person to whom the order or arrangement relates and prepare an independent report.

(f) As we have mentioned, by s 37(2), the report must indicate the psychiatrist's assessment of the level of risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence, and the reasons for the psychiatrist's assessment.

(g) By s 7(3)(a), the court, in deciding whether to find that a person is a serious danger to the community, must have regard to any report that a psychiatrist prepares, as required by s 37, for the hearing of the application.

37 Section 3 of the *Mental Health Act* defines 'psychiatrist' to mean a medical practitioner whose name is contained in a register of psychiatrists prepared and maintained under s 17 of that Act by the Medical Board. By s 17(1), the Medical Board must prepare and maintain, for the purposes of the *Mental Health Act*, a register of psychiatrists. Section 17(2) provides that the register of psychiatrists is to contain the names of every medical practitioner practising in Western Australia who:

(a) has made a special study of, or who has gained and maintained special skill in the practice of, psychiatry; and

(b) is recognised by the Medical Board as a specialist in psychiatry.

Section 17(3) provides that where the Medical Board is of the opinion that a medical practitioner whose name is contained in the register of psychiatrists has ceased to be a specialist in psychiatry, the Board is to remove his or her name from that register.

38 In our opinion, it is plain from the scheme of the Act that the Parliament has accepted and legislated on the basis that a 'psychiatrist', as defined in s 3 of the *Mental Health Act*, has, by virtue of his or her having made a special study of, or having gained and maintained special skill in the practice of, psychiatry, the expertise to examine an offender who is the subject of an application under the Act, and make an assessment of the level of risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence. The statutory scheme in this respect is apparent from ss 7, 14, 15, 32 and 37 of the Act, read with the definition of 'psychiatrist' in s 3 of the *Mental Health Act* and s 17 of that Act.

39 The court hearing an application under the Act is, however, entitled and obliged to consider the skill and experience of the particular psychiatrists (including in relation to predicting recidivism) who have examined the person in question and prepared reports under s 37(2) of the Act. By s 7(3)(a), the court must have regard to the reports in deciding whether to find that the person is a serious danger to the community, but the court's consideration of the skill and expertise of the particular psychiatrists, and the cogency and credibility of their reports and evidence, may affect the weight to be accorded to their views.

40 In the present case, each of Dr Brett and Dr Wynn Owen was a 'psychiatrist' as defined in s 3 of the *Mental Health Act*. The learned judge considered their skill and experience (including in relation to predicting recidivism). Her Honour found them to be experienced psychiatrists and that their evidence was cogent and credible. Her Honour acknowledged, as Dr Brett and Dr Wynn Owen had done, the limitations on their abilities to predict future behaviour. She was, however, assisted by their views and the reasons for those views.

41 In our opinion, ground 2 is without merit.

Ground 3 of the appeal

42 Ground 3 reads:

> The learned trial judge erred in law in giving any weight to the opinions of Dr Brett and Dr Wynn Owen, in their reports or oral evidence, when the facts upon which they based their opinions were not proven by admissible

> evidence and were based on unproven speculative assumptions and where no evidence was adduced as to their ability to predict recidivism generally or in relation to serious sexual offences as defined by the *Dangerous Sexual Offenders Act*.

43 Ground 3 of the appeal repeats, in substance, ground 2 to the extent that it contends that no evidence was adduced as to the ability of Dr Brett and Dr Wynn Owen to predict recidivism generally or in relation to serious sexual offences, as defined by the Act. For the reasons we have expressed in relation to ground 2, this aspect of ground 3 fails.

44 The appellant made a submission to the learned judge which is similar to the contention in the balance of ground 3. Her Honour recorded the submission and her conclusions in relation to it:

> The next matter raised by the [appellant] was the alleged failure by the applicant to prove the facts upon which the psychiatrists' opinions were based. In particular, it was submitted that the applicant was required to prove the contents of the doctors' interviews with the [appellant]. Further, it is submitted that the applicant was required to prove the substance of the risk assessment tools that each psychiatrist used and the assessments and calculations, for want of a better word, that they did in order to draw their conclusions in respect to those tools.
>
> In respect to the content of the interviews, whilst the psychiatrists did not produce any record of those interviews, they did refer to the comments that had been made in the interviews that led them to form their opinions. Further, all the documentary material that they relied upon to form their opinions is in evidence. On the other hand, the psychiatrists did have some conversations with third parties, the contents of which were not proven. In my opinion, the applicant proved the relevant positions of the interviews with the [appellant]. Even though it would have been preferable for the psychiatrists not to have had any conversations with third parties or to have included in their reports the substance of any information they used from them, I am satisfied that there was no information which the psychiatrists received in such conversations which materially affected their views.
>
> In respect to the use of the assessment tools, the same submission was made in ***Director of Public Prosecutions for Western Australia v Mangolamara*** [2007] WASC 71 [130] - [167]. Hasluck J, in that case, stated the relevant legal principles [145] - [152], and I would simply adopt his recitation and interpretation of them. The result is that hearsay information that is non-specific hearsay evidence drawn from text books and similar sources may be relied upon without proof of those sources. However, specific hearsay information such as research data and methods underlying assessment tools must be proven in evidence in order for weight to be given to the opinions derived from those assessment tools [78] - [80].

45 Section 42(2) of the Act provides:

> Before the court makes a decision or order on the hearing of an application it must, if the evidence is admissible -
>
> (a) hear evidence called by the DPP; and
>
> (b) hear evidence given or called by the offender or person subject to the order, if that person elects to give or call evidence.

Section 42(3) provides that, except as modified by s 42(4), ordinary rules of evidence apply to evidence given or called under s 42(2). By s 42(4):

> In making its decision, the court may receive in evidence -
>
> (a) any document relevant to a person's antecedents or criminal record;
>
> (b) anything relevant contained in the official transcript of any proceeding against a person for a serious sexual offence, or contained in any medical, psychiatric, psychological or other report tendered in a proceeding of that kind.

46 Psychiatric evidence that is sought to be adduced in any proceedings may, in a particular case, be based on out of court statements, conduct or behaviour of the person who is the subject of, or a party to, the proceedings.

47 ***Ramsay v Watson*** (1961) 108 CLR 642 is the leading Australian authority on the admissibility of hearsay evidence in the context of expert evidence given by medical practitioners as to a person's physical (as distinct from psychiatric) disabilities. In ***Ramsay***, Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ examined the origin and scope of the rule that certain statements made by a person out of court as to his or her bodily symptoms and sensations are evidence of the facts they recount. Their Honours cited with approval the following statement of the rule in *Wills on Evidence* (3rd ed, 1938) 209:

> Whenever there is an issue as to some person's state of health at a particular time, the statements of such person at that time or soon afterwards with regard to his bodily feelings and symptoms are admissible in evidence. This medium of proof does not appear, like most of those which are known as Declarations, to possess any special sanction of credibility; like declarations accompanying acts it would seem to have been admitted on the ground of necessity and convenience (647).

A little later, their Honours discussed the basis on which, and the extent to which, out of court statements made by a person to a medical practitioner generally (as distinct from out of court statements made by a person to a

medical practitioner as to his or her present bodily symptoms or sensations) are admissible in evidence:

> When a physician's diagnosis or opinion concerning his patient's health or illness is receivable, he is ordinarily allowed to state the 'history' he got from the patient. This practice accords with what seems to be the better opinion in the United States: see *Wigmore on Evidence* s. 688. It matters not whether the person whose health is in question was a regular patient of the doctor, or whether the doctor saw him for the purpose of qualifying as a witness. This, of course, is quite a different matter from the rule last discussed. That, in cases where it applies, makes statements made to anyone concerning present symptoms and sensations admissible as evidence that those symptoms and sensations, in fact, existed. This makes all statements made to an expert witness admissible if they are the foundation, or part of the foundation, of the expert opinion to which he testifies; but, except [where] they be admissible under the first rule, such statements are not evidence of the existence in fact of past sensations, experiences and symptoms of the patient. Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician. And, if the man whom the physician examined refuses to confirm in the witness box what he said in the consulting room, then the physician's opinion may have little or no value, for part of the basis of it has gone. Each case depends on its own facts (648 - 649).

48 In ***R v Tonkin & Montgomery*** [1975] Qd R 1, Kneipp J made observations as to the proof of the basis for the opinion of an expert witness who is giving psychiatric evidence. His Honour said:

> In general, the facts on which an expert's opinion is based not only may be proved, but must be proved by admissible evidence: see *Cross on Evidence* (Australian Edition) at p. 461, and the cases there cited. In the case of a medical witness, the facts on which he relies may include, among others, his own observations, the results of tests or experiments, and what the patient has told him of the patient's history and symptoms. Of course, if what the patient has told him is not confirmed by evidence from the plaintiff or other sources, this may weaken or destroy the effect of his evidence: ***Ramsay v. Watson*** (1961) 108 CLR 642. It seems to me that the same principles are applicable to the evidence of a psychiatrist as to the evidence of any other medical witness, subject to the observation that what the patient of a psychiatrist says or has said, whether to him or in his presence or not, may be relevant to him, and admissible in evidence, quite irrespective of proof of any facts stated in the statement. *The words used by a person, irrespective of the truth or any facts stated, might to a psychiatrist be just as significant and objective a symptom as might be the presence of a rash to a physician* (17). (emphasis added)

49 In ***Gordon v The Queen*** (1982) 41 ALR 64, Gibbs CJ, Mason, Murphy, Aickin and Brennan JJ, in a short judgment refusing special leave to appeal, referred to ***Ramsay*** and then said, in the context of the

admissibility of statements made to an expert witness who is giving psychiatric evidence:

> [***Ramsay*** decided that] statements [as to physical disabilities] made to an expert witness are admissible if they are the foundation, or part of the foundation, of the expert opinion to which he testifies but that if such statements, being hearsay, are not confirmed in evidence, the expert testimony based on them is of little or no value.
>
> In the case of psychiatric evidence, statements made to the psychiatrist may be themselves original evidence, in which case they need no confirmation in the witness box. In the present case, however, the statements made to the psychiatrist and upon which he relied, but which were not proved in evidence, were not of that character (64).

50 In ***R v Barry*** [1984] 1 Qd R 74, McPherson and Thomas JJ held that proposed evidence from a psychologist at a criminal trial concerning his examination and assessment of the accused's intellectual impairment was not rendered inadmissible (as the trial judge had ruled) merely because the accused himself did not give evidence. McPherson J said:

> It is, in my opinion, clear that the absence of the accused from the witness box did not make the evidence of Mr Walkley either hearsay or irrelevant. It is true that the tests conducted almost certainly included the putting of numbers of questions to the accused. Evidence of the nature of those tests, and at least some illustrative samples of the answers given, would have been a necessary foundation for introducing the results and opinions of Mr Walkley. As was said in ***R v Turner*** [1975] QB 834, 840:
>
> > 'counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.'
>
> The answers of the accused to questions put to him in the course and for the purpose of administering the tests are akin to statements of bodily sensations or symptoms given by patients under examination by medical witnesses. Such statements, if made contemporaneously with the symptom or sensation, have always been regarded as admissible: see *Cross on Evidence* (2nd Australian edition), paras 18.27 to 19.29. It is otherwise if the statements refer to past sensations or symptoms, in which case the content of the statements is generally not admissible unless affirmed in evidence by the patient himself: ***Ramsay v Watson*** (1961) 108 CLR 642; ***R v Schafferius*** [1977] Qd R 213.
>
> In a case such as the present, answers of the kind referred to clearly do not constitute hearsay if they are given in evidence as the foundation for the opinion to be given by the examining psychologist. Those answers are not tendered to establish the truth of the content of the answers, if any, but in

> order to prove that they were given by the accused or, as the case may be, that no answer was given: see ***R v Tonkin & Montgomery*** [1975] Qd R 1, 17, per Kneipp J; p 41, per Dunn J. The psychiatrist's testimony is admissible evidence because it consists of his observations of the condition and conduct, verbal and otherwise, of the patient in question: cf. ***Reg v Turner*** [1975] QB 834, 840B. It is on the basis of those observations that he arrives at his expert opinion as to the mental state of the accused on the occasion of the examination. That opinion is relevant because it invites the conclusion that the same mental state or condition existed on an earlier and relevant occasion (85 - 86).

Also see the discussion in ***R v Barrett*** [2007] VSCA 95; (2007) 16 VR 240 [106] - [119] (Eames JA, Maxwell P and Habersberger AJA agreeing).

51 In the present case, Dr Brett's and Dr Wynn Owen's reports were tendered, and they gave oral evidence, without objection by the appellant's counsel.

52 In any event, whether or not objection had been made, the findings and opinions of Dr Brett and Dr Wynn Owen in relation to the clinical interviews, as expressed in their reports and their oral evidence, were admissible. By s 37(2) of the Act, Dr Brett and Dr Wynn Owen were required to examine the appellant for the purpose of assessing the level of risk that, if the appellant were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence. It was necessary for Dr Brett and Dr Wynn Owen to make a determination as to the appellant's mental state at the time of the clinical interviews, and determine the level of risk at that time which the appellant posed in terms of s 37(2). The psychiatric tests administered in the course of the clinical interviews included putting questions to the appellant, considering his answers or refusal to answer, assessing his affect and cognition, and evaluating generally his behaviour and conduct throughout the interviews. The appellant's statements, behaviour and conduct were a foundation for the findings and opinions which Dr Brett and Dr Wynn Owen formed and expressed in their reports and oral evidence. His statements, and any implied assertions attributable to his behaviour or conduct, were not relied on by the respondent to establish the truth of their contents. The contemporaneous observations of Dr Brett and Dr Wynn Owen were a basis for their expert findings and opinions as to the appellant's mental state at the time of the interviews, and a basis for determining whether and to what extent there was risk at that time that, if the appellant were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence.

53 Psychiatric evidence that is sought to be adduced in any proceedings may, in a particular case, be based on scientific tests or scientific publications and data.

54 In Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev 1979), § 665a(2), the following views are expressed in relation to expert evidence based on scientific instruments, formulas, etc:

> The use of *scientific instruments, apparatus, formulas, and calculating tables* involves to some extent a dependence on the statements of other persons, even of anonymous observers. Yet it is not feasible for the professional man to test every instrument himself; furthermore he finds that practically the standard methods are sufficiently to be trusted. Thus, the use of an X-ray machine may give correct knowledge, though the user may neither have seen the object with his own eyes nor have made the calculations and adjustments on which the machine's trustworthiness depends. The adequacy of knowledge thus gained is recognised for a variety of standard instruments. In some instances the calculating tables or statistical results are admitted directly, under an exception to the hearsay rule (§1706 infra).

55 Wigmore then considers, at § 665b(3), expert evidence founded on books and other data:

> The data of every science are enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the *reported data of fellow scientists*, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men. On the one hand, a mere layman, who comes to court and alleges a fact which he has learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards.
>
> Yet it is not easy to express in usable form that element of professional competency which distinguishes the latter case from the former. In general, the considerations which define the latter are (a) a professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information, (b) an extent of personal observation in the general subject, enabling him to estimate the general plausibility, or probability of soundness, of the views expressed, (c) the impossibility of obtaining information on the particular technical detail except through reported data in part or entirely. The true solution must be to trust the discretion of the trial judge, exercised in the light of the nature of the subject and of the witness' equipments. The decisions show in general a

> liberal attitude in receiving technical testimony based on professional reading.

56 In ***PQ v Australian Red Cross Society*** [1992] 1 VR 19, McGarvie J made rulings from time to time during a trial as to the admissibility and evidentiary use of information in authoritative scientific publications. His Honour explained his rulings as follows:

> By 'information in authoritative scientific publications' I mean information of the type which scientific experts of the relevant categories ordinarily treat as data on which they may rely in forming opinions and making decisions within the area of their expertise. Included in such data are facts and opinions stated in articles or reports in scientific publications or in statements by organisations, public authorities or persons regarded by such experts as having knowledge and expertise in the relevant area. Such data includes facts in tables or statistical material on which such experts ordinarily rely.
>
> It is made clear in ***Borowski v Quayle*** [1966] VR 382 that expert witnesses may not only base opinions they give in evidence on such data but may give evidence of fact which is based on such data. Expert witnesses may do this although the data on which they base their opinion or evidence of fact will usually be hearsay information in the sense that they rely for such data not on their own knowledge but on the knowledge of someone else: see ***R v Abadom*** [1983] 1 WLR 126 at pp. 129 - 32. The considerations which justify that principle are stated in the passages from *Wigmore on Evidence* on which Gowans J relied in ***Borowski***, at pp. 386-8. See also RW Baker, *The Hearsay Rule*, p 165.
>
> An expert witness, in relying on data in authoritative publications, is not confined to confirming or correcting a recollection of what is stated in the data. The witness may rely on the data without a previous knowledge of it. An example is the reliance that may be placed on tables and the like: see ***Borowski***, at pp. 387-8. The data relied on may be a statement of fact or opinion.
>
> When an expert witness bases evidence on data in an authoritative scientific publication it is the evidence of the witness which is thus put before the court. The publication itself is not evidence of the truth of statements it makes as to data. If the witness refers to or quotes from an authoritative publication as correctly stating a fact, what is referred to or quoted is part of the testimony of the witness: ***Sussex Peerage Case*** (1844) 11 Cl and Fin 85, at pp 114-17; 8 ER 1034, at pp. 1046-7; ***Collier v Simpson*** (1831) 5 C and P 73; 172 ER 883; ***Cocks v Purday*** (1846) 2 Car and Kir 269; 175 ER 111; ***Concha v Murrieta*** (1889) 40 ChD 543, at p 554; ***Federal Commissioner of Taxation v Hamersley Iron Pty Ltd*** (1980) 33 ALR 251, at pp. 273-4; Baker, *The Hearsay Rule*, p 164 and Gillies, *The Law of Evidence in Australia*, pp 354-5.

> As a statement in an article in a learned scientific journal is only before the jury as part of the testimony of an expert witness, it is for the jury to decide whether an expert witness in evidence adopted or acknowledged the correctness of the statement. If it is before them in that way, they assess it in the same way as any other part of the evidence of the expert witness: ***Concha v Murrieta*** (1889) 40 ChD 543, at p. 554 (34 - 35).

57 In ***R v Noll*** [1999] VSCA 164; [1999] 3 VR 704, a biochemist with no qualifications in statistics gave evidence, at a criminal trial, of an analysis of a bloodstain which included DNA profiling. The expert said that the blood in question matched the accused's blood on four separate tests. He predicted that the statistical likelihood of a random match of this nature was approximately one in 180,000. The expert said that this prediction was based on professionally accepted statistical theory, but he could not explain the basis for this theory. The accused was convicted and applied to the Court of Appeal of Victoria for leave to appeal. Leave was refused. Ormiston JA said:

> As a matter of principle, as exemplified by the authorities, experts can speak of many matters with authority if their training and experience entitle them to do so, notwithstanding that they cannot describe in detail the basis of knowledge in related areas. Professional people in the guise of experts can no longer be polymaths; they must, in this modern era, rely on others to provide much of their acquired expertise. Their particular talent is that they know where to go to acquire that knowledge in a reliable form [3].

58 In ***R v Runjanjic*** (1991) 56 SASR 114, King CJ referred to relevant scientific literature in deciding whether 'battered woman syndrome' had gained acceptance by experts competent in the field of psychology or psychiatry as a scientifically established facet of psychology (118). Also see ***R v Bonython*** (1984) 38 SASR 45, 46 - 48 (King CJ, Matheson and Bollen JJ agreeing); ***R v Karger*** [2001] SASC 64; (2001) 83 SASR 1 [67] - [72] (Mullighan J).

59 In our opinion, Dr Brett and Dr Wynn Owen were entitled to base their opinions and evidence on their clinical interviews with the appellant. Their opinions and evidence did not become inadmissible merely because they did not document, or give evidence, exhaustively or in detail, as to the appellant's statement, conduct or behaviour.

60 Further, Dr Brett and Dr Wynn Owen were entitled to base their opinions and evidence on the so-called 'assessment tools' referred to by them. Their opinions and evidence did not become inadmissible because the operational manuals relating to those tools were not tendered, or

because the methodology, assumptions and rationale underlying the assessment tools was not proved. These issues were not explored at trial; no doubt, because the appellant's counsel did not object to the tendering of the reports of Dr Brett and Dr Wynn Owen or their evidence. In any event, it is apparent from the psychiatrists' reports and evidence that the assessment tools on which they relied were generally accepted by psychiatrists engaged in the assessment of sexual offenders and the prediction of recidivism, subject to the limitations (including the application of the tools to the indigenous Australian population) which were acknowledged by them.

61 In our opinion, the opinions and evidence of Dr Brett and Dr Wynn Owen did not become inadmissible as a result of their having relied, to some extent, on information provided by third parties. Again, this issue was not explored at the trial; no doubt, because the appellant's counsel did not object to the tender of the reports of Dr Brett and Dr Wynn Owen or their evidence. We have read the whole of the psychiatrists' reports and evidence and we are satisfied that any information provided by third parties was not critical or indispensible to the formation of the opinions (including the risk assessment) in question. In Dr Brett's case he was careful to list all of the information that had been provided to him, including that provided by third parties. His reasoning process is fully explained. It is apparent from it that his assessment is based primarily, if not exclusively, on risk factors that he identified and the outcome of the tests to which he referred. These do not depend, in any way that is significant, on information provided by others, save in respects that are not, or could not be, objected to (for example, sentencing remarks concerning the appellant in respect of his prior convictions). The same is largely true of Dr Wynn Owen's report. The conclusion at which he arrives is based upon factors referred to under the headings 'Risk of Reoffending' and 'Opinion'. These are objective facts, none of which was challenged in the primary proceedings, being the results of testing, the presence of psychopathy and Dr Wynn Owen's own assessment of the appellant, made as a result of interviewing him.

62 The learned judge, for the reasons given by Hasluck J in ***Director of Public Prosecutions for Western Australia v Mangolamara*** [2007] WASC 71; (2007) 169 A Crim R 379, gave little weight to the results of the STATIC-99 testing instrument [81], [83]. Similarly, her Honour decided she should be cautious in placing any weight on Dr Wynn Owen's risk assessment based on the PCL-R 'in the absence of either the document from which the instrument derives or Dr Wynn Owen's workings in order to arrive at [the appellant's score on the PCL-R]' [84].

63 The learned judge accepted the findings and opinions of Dr Brett insofar as they were derived from the three predictor model and the RSVP. Her Honour said that the three factors on which the three predictor model is based (namely, unrealistic long-term goals, unfeasible release plans and poor coping skills before release) were 'commonsense' [81]. In our opinion, Dr Brett's explanation as to the methodology of the three predictor model was adequate to make admissible his findings based on that model in circumstances where the appellant's counsel did not object to the tender of his report or his oral evidence on that or any other ground. We are of the same opinion in relation to the RSVP.

64 Ground 3 fails.

Ground 4 of the appeal

65 Ground 4 reads:

> The learned trial judge erred in law in concluding that the court-appointed psychiatrists would have come to the same opinions concerning the appellant's risk of committing serious sexual offences without relying on the STATIC-99 or PCL-R when there was no evidence to that effect and such a conclusion was a matter of pure speculation.

66 We have set out, at [21] - [22] above, passages from Dr Brett's report concerning STATIC-99 and passages from Dr Wynn Owen's report in relation to STATIC-99 and the appellant's PCL-R score.

67 The learned judge was of the view that there was a much broader basis for the ultimate opinions of each of Dr Brett and Dr Wynn Owen than the results derived from the STATIC-99 test and the appellant's PCL-R score. Her Honour said:

> The next question is whether, given Dr Brett and Dr Wynn Owen used the Static 99 test and Dr Wynn Owen placed some weight on the [appellant's] PCL-R score in arriving at his opinion, I should place weight on their final opinions. I am of the view that there was a much broader basis for each of the psychiatrist's opinion than the results from those tests. I am satisfied that regardless of them Dr Brett and Dr Wynn Owen would have come to the same opinions concerning the [appellant's] risk of committing a serious sexual offence if unsupervised in the community. Thus, I have decided to give weight to their opinions [85].

68 Neither Dr Brett nor Dr Wynn Owen said in evidence that his opinions would be invalid if reliance on the STATIC-99 instrument (in the case of Dr Brett and Dr Wynn Owen) or the PCL-R score (in the case of Dr Wynn Owen) were discounted.

69 In forming his opinions and preparing his report, Dr Brett relied on, relevantly, clinical interviews on 20 August 2007 and 28 August 2007 with the appellant, the STATIC-99 instrument, the RSVP and the Hare Psychopathy Checklist.

70 Dr Brett said in evidence that risk assessment by a professional clinician involved a clinical judgment. In particular:

> Risk tools have got a number of features which you examine and then you use your clinical judgment to put different weights on those. So different people may put different weight on different things and that's where clinical judgment comes into play (ts 38).

71 Dr Brett accepted, in cross-examination, that clinical judgment alone is a poor tool for risk assessment (ts 37 - 38). He said that although STATIC-99 had limitations (including that it had not been validated on the Australian indigenous population) it was nevertheless 'a useful tool' (ts 40). According to Dr Brett, the RSVP was the 'state of the art risk assessment tool' (ts 41). It had 'much fewer limitations' (ts 42).

72 The appellant's counsel suggested to Dr Brett that 'very experienced clinicians have proven to be … not that flash at predicting' recidivism (ts 42). Dr Brett accepted this suggestion, but explained:

> [That] is why we use a range of tools (ts 42).

73 Dr Brett noted, in cross-examination, that psychiatric literature has demonstrated that people who deny they have committed offences of which they have been convicted are at an increased risk of re-offending (ts 57). He also said:

> Because the evidence shows that people who have been convicted of sexual offences and deny that they did those sexual offences, that is a risk factor which increases their risk of recidivism (ts 58).

74 Dr Brett rejected a suggestion by the appellant's counsel that risk prediction is necessarily imprecise (ts 63). He accepted, however, that he was not 'an accurate predictor of people's conduct into the future' (ts 63). He also accepted that, as a general proposition, 'there are real difficulties in being able to predict with any confidence whether a particular individual will or might re-offend' (ts 63). According to Dr Brett, most forms of risk assessment have some problems or deficiencies, but not all of them (ts 64). He mentioned that the RSVP and the three predictor model have positive features.

75 Dr Brett reiterated in cross-examination that, without any supervision, the appellant 'has a high risk of re-offending' (ts 68).

76 Dr Wynn Owen's opinions and report were based on, relevantly, two clinical interviews with the appellant on 25 August 2007 and 1 September 2007, the STATIC-99 and the Hare Psychopathy Checklist.

77 Dr Wynn Owen explained, in cross-examination, his ultimate conclusion concerning risk:

> My ultimate conclusion is there is a high risk of re-offending in the understanding that risk is about likelihood; it's not an absolute. The basis of that is the clinical and structured assessments that I performed and the record. The single most significant factor in considering risk of re-offending of this nature is the initial offences (ts 86).

He added that if someone has committed a sexual offence of the kind committed by the appellant, he or she immediately has an increased likelihood of re-offending over others (ts 87).

78 Dr Wynn Owen said in relation to risk assessment:

> The risk assessment is based on tools that have been internationally standardised, but other than small studies have not necessarily been standardised specifically on a Western Australian or Western Australian Aboriginal population … (ts 98).

He noted that the absence of standardisation potentially changed the level of risk, but it was unclear whether the risk is greater or lesser (ts 98).

79 Dr Wynn Owen's assessment of the appellant's risk was based on a combination of STATIC-99, the Hare Psychopathy Checklist, the clinical interviews, and all of the information he had received about the appellant (ts 100).

80 Dr Wynn Owen accepted the suggestion of the appellant's counsel that he could not exclude, as a reasonable possibility, that if the appellant was released from custody, returned to his home, and lived with his wife, he would not commit any further sexual offences. Dr Wynn Owen said:

> All I can conclude is that the likelihood of a further offence is high in that it is around 40% or 4 in 10 over the next five years based on a number of studies on other cohorts of offenders. I am also aware internationally that somebody who has committed a sexual offence has a 10 to 15% chance of re-offending in the next ten years (ts 108).

81 Dr Wynn Owen added that STATIC-99 is 'just a baseline of offending', and that the STATIC-99 test put the appellant in the category

of 40%. He also mentioned that there is some data to support the accuracy of STATIC-99 in Aboriginal people, but the data was obtained from a relatively small cohort (ts 109).

82 In our opinion, it was open to the learned judge, on the whole of the evidence, to conclude that Dr Brett and Dr Wynn Owen would have come to the same opinions as to the appellant's risk of committing serious sexual offences without reliance on STATIC-99 (in the case of Dr Brett and Dr Wynn Owen) or the appellant's PCL-R score (in the case of Dr Wynn Owen), even if, which was not made out, they should not have placed any weight on these tests.

83 Ground 4 fails.

Ground 5 of the appeal

84 Ground 5 reads:

> The learned trial judge erred in law in failing to give adequate reasons as to why the 'risk' was unacceptable.

85 In ***Director of Public Prosecutions (WA) v Williams*** [2007] WASCA 206; (2007) 35 WAR 297, Wheeler JA said, on the topic of 'unacceptable risk':

> In my view, an 'unacceptable risk' in the context of s 7(1) is a risk which is unacceptable having regard to a variety of considerations which may include the likelihood of the person offending, the type of sexual offence which the person is likely to commit (if that can be predicted) and the consequences of making a finding that an unacceptable risk exists. That is, the judge is required to consider whether, having regard to the likelihood of the person offending and the offence likely to be committed, the risk of that offending is so unacceptable that, notwithstanding that the person has already been punished for whatever offence they may have actually committed, it is necessary in the interests of the community to ensure that the person is subject to further control or detention.
>
> There are four reasons for considering that the meaning outlined above is what Parliament intended by the expression 'unacceptable risk'. The first is that s 7(1) expressly refers to the risk as a risk which exists 'if the person were not subject to [either] a continuing detention order or a supervision order'. That is, Parliament has expressly adverted to the consequences of making a finding, in referring to the type of risk to be guarded against. Second, s 7(2) places upon the DPP the onus of satisfying the court of the matters described in s 7(1) by acceptable and cogent evidence and 'to a high degree of probability'. An onus expressed in that way suggests a task of substantially greater difficulty than that of simply ascertaining whether there is a risk which is real and not remote. Third, s 7(3) sets out a variety

> of matters to which the court must have regard in determining the related question of whether a person is a serious danger to the community. The list includes factors which suggest that there is some need to balance the interests of the offender against those of the public, or at least that it is permissible for a court to have regard to such matters. Section 7(3)(i), for example, refers to the need to protect members of the community from 'that risk' (suggesting that the public may not need protection from every risk) while s 7(3)(j) refers broadly to 'any other relevant matter'.
>
> Finally, it is to be noted that many of the provisions of the Act are similar to, although not identical with, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). Section 13(2) of that Act referred to 'an unacceptable risk that the prisoner will commit a serious sexual offence'. It was argued in ***Fardon v Attorney-General (Qld)*** (2004) 223 CLR 575 that such a test was devoid of practical content. In rejecting that contention, Gleeson CJ at [22] and Callinan and Heydon JJ at [225] referred to the decision of the High Court in ***M v M*** (1988) 166 CLR 69, a case which dealt, as Gleeson CJ summarised it in ***Fardon***, with 'the magnitude of a risk that will justify a court in denying a parent access to a child'. That is, those members of the High Court who referred directly to the question considered that the legislature had adopted a criterion and a standard appropriate to the balancing of competing considerations. ***Fardon*** was decided prior to the enactment of the Act, and it would be expected that Parliament in Western Australia would be aware of the meaning given to that expression in the reasons in ***Fardon***. An examination of Hansard confirms that Parliament was aware of that case: eg *Parliamentary Debates*, Legislative Assembly, 15 November 2005, 7272 - 7273 [63] - [65].

We agree, with respect, with Wheeler JA's observations.

86 The word 'unacceptable' necessarily connotes a balancing exercise, requiring the court to have regard to, amongst other things, the nature of the risk (the commission of a serious sexual offence, with serious consequences for 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, 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, 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 … '.

87 In the present case, the learned judge said:

> I have taken into account all the evidence and all the comments that I have made in respect to it. The evidence includes the opinions and evidence of

> Dr Brett and Dr Wynn Owen. I have also considered and taken into account the inferences that can be drawn from the [appellant's] past offending. I have considered those matters in light of the standard of proof, the statutory provisions and the Court of Appeal's dicta in ***Williams***' case. I conclude that the DPP has proven that there is an unacceptable risk that if the [appellant] is not subject to a continuing detention order or a supervision order, he will commit a serious sexual offence. Thus, I find that the [appellant] is a serious danger to the community [130].

88 In our opinion, it is apparent from the learned judge's reasons that she had regard to the factors enumerated in s 7(3) of the Act. Her Honour considered carefully the opinions and evidence of Dr Brett and Dr Wynn Owen and, as she was entitled to, accepted them. We consider that, on a fair reading of her Honour's reasons as a whole, it was open to her to find that there was an unacceptable risk that if the appellant were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence, and that she gave adequate reasons for that conclusion.

89 Ground 5 fails.

Ground 6 of the appeal

90 Ground 6 reads:

> The learned trial judge erred by concluding that the psychiatric opinion evidence that the appellant was 'a high risk' of committing serious sexual offences was a relevant consideration in determining whether the risk was unacceptable, when the psychiatrists gave no evidence as to what 'high risk' meant and there was no other relevant evidence as to what 'high risk' meant.

91 The word 'high' is a relative term. It connotes 'of relatively great degree'. Dr Brett and Dr Wynn Owen, in concluding that the appellant was at 'a high risk' of committing serious sexual offences, were conveying their opinions that if the appellant were not subject to a continuing detention order or a supervision order, then the risk that he would commit a serious sexual offence was elevated or significant.

92 It is apparent, from s 37(2) of the Act, that the Parliament contemplated that the psychiatrists would analyse and evaluate the relevant risks and express their opinions as to the degree of risk.

93 In our opinion, the words 'high risk' in the reports of Dr Brett and Dr Wynn Owen bear their ordinary meaning in the context of the Act (in particular, in the context of s 37(2)) and convey adequately their opinions

that there was an elevated or significant risk, to the point where the risk was of a relatively great degree, that the appellant would commit a serious sexual offence if he were not subject to a continuing detention order or a supervision order.

94 Ground 6 fails.

Ground 7 of the appeal

95 Ground 7 reads:

> The learned trial judge erred in law in reversing the burden of proof in relation to the issue of whether the 'risk' was unacceptable and failed to have regard to all the appellant's arguments'.

96 The appellant's counsel submitted to this court that the learned judge failed to deal with the appellant's arguments based on the following:

(a) age and medical condition as 'a commonsense factor';

(b) the gaps between the offences;

(c) the offences did not exhibit predatory behaviour;

(d) no past or existing problems with alcohol or substance abuse;

(e) predicting future conduct by past conduct is fraught with difficulty and danger for the reasons expressed by Kirby J in ***Fardon v Attorney-General (Queensland)*** (2004) 223 CLR 575, 623; [2004] HCA 46;

(f) 'deniers' were prominent in 'false positives'; and

(g) risk decision-makers were particularly prone to over-estimate the risk posed by sex offenders who had victimised children in their own family unit and those who had denied their sexual offending.

97 As to the appellant's age and medical condition 'as a commonsense factor' and the gaps between the offences, the learned judge noted the appellant's submission that, given his age, health problems and determination not to return to prison, the risk in question was not unacceptable [121]. Her Honour concluded, however, that the appellant's physical health did not significantly reduce the risk of his committing serious sexual offences in the future [122]. She also said that age is a factor that does correlate with reducing the recidivism risk in sexual offenders over time [123]. Her Honour said she took account of the views of Dr Wynn Owen and, to a lesser extent, Dr Poli, to the effect that the appellant's commission of his last serious sexual offences at the age of 53,

indicated that, in his case, age was not a significant factor in reducing his risk of committing further serious sexual offences [123]. Her Honour also took into account the fact that, until recently, the appellant had committed offences while in prison [123]. She recorded, in her reasons, details of the appellant's criminal record, including the approximate date or time when he committed or was convicted of each offence [21] - [47].

98 As to the argument that the offences did not exhibit predatory behaviour, the learned judge referred in detail to the circumstances of the principal offences. Her Honour noted that the commission of the appellant's sexual offences involved a co-offender (who also committed a serious sexual offence against the victim), the taking of victims to isolated areas to facilitate the offending, and the female gender of the victims [114]. In our opinion, the circumstances of the offending, as recounted by her Honour, demonstrated that the offences did involve predatory behaviour.

99 As to the argument that the appellant had no past or existing problems with alcohol or substance abuse, the learned judge recounted that Dr Brett had noted the appellant had a history of alcohol use and difficulty in coping with stress in the past [88]. Her Honour also recorded Dr Brett's comment that the appellant's past alcohol and cannabis use was of concern, and his ongoing need for substances should be monitored in the future [90].

100 As to the argument that predicting future conduct by past conduct is fraught with difficulty and danger for the reasons expressed by Kirby J in ***Fardon v Attorney-General (Queensland)*** [2004] HCA 46; (2004) 223 CLR 575 [123] - [124], the learned judge said she took into account all of the evidence, including the opinions and evidence of Dr Brett and Dr Wynn Owen [130]. As we have mentioned, Dr Brett accepted that there are real difficulties in being able to predict with any confidence whether a particular individual will or might re-offend (ts 63). He also accepted that no-one can accurately predict any person's conduct into the future (ts 63). Similarly, as we have mentioned, Dr Wynn Owen emphasised that he was dealing with the risk of re-offending and he could not say, with any degree of certainty, whether the appellant would re-offend or not (ts 86 - 87). In any event, the task of predicting future conduct was required, by the Act, to be undertaken by the learned judge, whether fraught with difficulty or not.

101 As to the argument that 'deniers' were prominent in 'false positives', the learned judge, by accepting the evidence and opinions of Dr Brett and

Dr Wynn Owen, necessarily rejected this argument. As we have mentioned, Dr Brett said in cross-examination that the psychiatric literature demonstrates that people who deny the commission of offences of which they have been convicted are at an increased risk of re-offending (ts 57). A little later, Dr Brett said, specifically, that people who have been convicted of sexual offences, and deny having committed them, are at an increased risk of recidivism (ts 58).

102 As to the argument that risk decision-makers were particularly prone to over-estimate the risk posed by sex offenders who had victimised children in their own family unit and those who had denied their sexual offending, the learned judge, by accepting the evidence and opinions of Dr Brett and Dr Wynn Owen, necessarily rejected this argument. The argument was not put to Dr Brett or Dr Wynn Owen in cross-examination.

103 In our opinion, the learned judge dealt adequately with each of the appellant's arguments including those which the appellant alleged her Honour failed to deal with.

104 Further, in our opinion, the learned judge did not reverse the burden of proof in relation to the issue of whether the 'risk' was unacceptable. It is apparent, on a fair reading of her Honour's reasons, that she gave careful consideration to the evidence. She concluded:

> the DPP has proven that there is an unacceptable risk that if the [appellant] is not subject to a continuing detention order or a supervision order, he will commit a serious sexual offence. Thus, I find that the [appellant] is a serious danger to the community [130].

105 Ground 7 fails.

Ground 8 of the appeal

106 The appellant abandoned ground 8 of the appeal.

Grounds 9 and 10 of the appeal

107 Ground 9 reads:

> There has been a miscarriage of justice, alternatively the learned trial judge erred in law, in admitting in evidence or having any regard to the information provided to Dr Brett and Dr Wynn Owen by the appellant in that it was involuntary and therefore inadmissible; alternatively should not have been received or accorded any weight in the proper exercise of the court's discretion.

108 Ground 10 reads:

> The court erred in failing to inform the appellant, alternatively, of [sic] giving a direction that the appellant be informed, prior to the court ordered psychiatric examinations that:
>
> a. He was not legally obliged to answer any questions put to him by the psychiatrists;
>
> b. If he did so his answers may be used in evidence in the proceedings against him; and
>
> c. If he failed to co-operate, this could have an adverse effect on the court's assessments of the matter.

109 It is convenient to deal with these grounds together.

110 Section 40 of the Act provides that proceedings under the Act or on an appeal under the Act are to be taken to be criminal proceedings for all purposes.

111 The appellant's counsel submitted to this court that the information obtained by Dr Brett and Dr Wynn Owen from the appellant was used in evidence against him in that it formed the basis for their conclusions that the appellant was at a high risk of re-offending. There was no evidence that either of the psychiatrists had given the appellant a 'caution' or warned him about the potential adverse consequences of his participation in the clinical interviews (although Dr Brett mentioned that the appellant was advised in writing that a report would be provided to the judge who requested it and Dr Wynn Owen mentioned that the appellant was told of the purpose of the interviews and that a report would be made available to the court; Dr Wynn Owen also said that the appellant understood the implications of the inapplicability of normal doctor/patient confidentiality).

112 It was submitted that admissions by an accused in criminal proceedings are only admissible if made voluntarily. See ***R v Lee*** (1950) 82 CLR 133, 149. Also, it was submitted that although the appellant's counsel at the hearing before the learned judge did not object to the evidence of Dr Brett or Dr Wynn Owen, her Honour had a duty to raise and deal with this issue. See ***MacPherson v The Queen*** (1981) 147 CLR 512, 523 (Gibbs CJ and Wilson J), 542 - 543 (Brennan J). Alternatively, the appellant's counsel submitted that the failure to administer a 'caution' or give a warning enlivened her Honour's discretion to exclude the expert evidence on the ground of unfairness or public policy. See ***R v Swaffield; Pavic v The Queen*** [1998] HCA 1; (1998) 192 CLR 159 [71] - [79] (Toohey, Gaudron and Gummow JJ). Further, it was submitted that the

admission of the expert evidence based on the information obtained from the appellant was unfair in that no accurate record was made of the clinical interviews and none was tendered.

113 In ***Lee***, Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ approved the two imperative rules of the common law regarding confessional statements enunciated by Dixon J in ***McDermott v The King*** (1948) 76 CLR 501. Their Honours said:

> These rules, stated in abbreviated form, are - (1) that such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, and (2) that such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed. These two 'rules' are, of course, well established, but it is important, we think, in this case to observe that they seem to be not really two independent and co-ordinate rules. There seems to be really one rule, the rule that a statement must be voluntary in order to be admissible. Any one of a variety of elements, including a threat or promise by a person in authority, will suffice to deprive it of a voluntary character. It is implicit in the statement of the rule, and it is now well settled, that the Crown has the burden of satisfying the trial judge in every case as to the voluntary character of a statement before it becomes admissible (144).

114 The justifications of the rule excluding confessions that are not voluntary are unreliability and the overbearing of the will of the person making the confession. See ***Cleland v The Queen*** (1982) 151 CLR 1, where Deane J said:

> The rational basis of the principle that evidence can only be received of a confessional statement if it be shown to be voluntary should be seen as a combination of the potential unreliability of a confessional statement that does not satisfy the requirement of voluntariness and the common law privilege against self-incrimination (18).

115 It is necessary to examine the effect of the conduct by those in authority upon the will of a person making a confession to determine whether his or her will was overborne. As Brennan J observed in ***Collins v The Queen*** (1980) 31 ALR 257:

> So the admissibility of the confessions as a matter of law (as distinct from discretion, later to be considered) is not determined by reference to the propriety or otherwise of the conduct of the police officers in the case, but

> by reference to the effect of their conduct in all the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focussing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused (307).

116 In ***Swaffield; Pavic,*** Brennan J summarised the approach of the court in determining objections to the admissibility of a confession which is alleged to have been made involuntarily:

> In determining objections to the admissibility of a confession that is said to have been made involuntarily, the court does not attempt to determine the actual reliability of the confession. Rather, it assesses the nature and effect of any inducement to make the confession in order to determine whether the confession was made because the will of the confessionalist was overborne by the conduct of a person or persons in authority. That conduct may consist of a threat, promise or inducement made or held out by the person or persons in authority … [13].

117 In ***Duke v The Queen*** (1989) 180 CLR 508, Brennan J examined the nature, scope and rationale of the unfairness discretion. His Honour said:

> The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded (513).

His Honour then said:

> Trickery, misrepresentation, omission to inquire into material facts lest they be exculpatory, cross-examination going beyond the clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification -- to name but some improprieties -- may justify rejection of evidence of a confession if the impropriety had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or to be silent (513).

Brennan J concluded, in this context, that the fact that an impropriety occurred does not, of itself, require that evidence of a voluntary confession procured in the course of the investigation must be excluded. It is necessary to evaluate the effect of the impropriety, in procuring the confession, in all the circumstances of the case.

118 In ***Swaffield; Pavic***, Toohey, Gaudron and Gummow JJ explained the distinction between the purpose of the unfairness discretion and the purpose of the policy discretion. Their Honours said:

> The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of the accused person. The [policy discretion] focuses, not on unfairness to the accused, but on considerations of public policy which make it unacceptable to admit the statement into evidence, notwithstanding that the statement was made voluntarily and that its admission would work no particular unfairness to the accused. The purpose of the discretion which is brought to bear with that emphasis is the protection of the public interest [52].

Toohey, Gaudron and Gummow JJ noted, 'that it is not always possible to treat voluntariness, reliability, unfairness to the accused and public policy considerations as discrete issues' [74]. Their Honours then added:

> The overlapping nature of the unfairness discretion and the policy discretion can be discerned in ***Cleland v The Queen*** ((1982) 151 CLR 1. See also ***Foster v The Queen*** (1993) 67 ALJR 550; 113 ALR 1). It was held in that case that where a voluntary confession was procured by improper conduct on the part of law enforcement officers, the trial judge should consider whether the statement should be excluded either on the ground that it would be unfair to the accused to allow it to be admitted or because, on balance, relevant considerations of public policy require that it be excluded. That overlapping is also to be discerned in the rationale for the rejection of involuntary statements. It is said that they are inadmissible not because the law presumes them to be untrue, but because of the danger that they might be unreliable. That rationale trenches on considerations of fairness to the accused. And if admissibility did not depend on voluntariness, policy considerations would justify the exclusion of confessional statements procured by violence and other abuses of power [74].

119 In the present case, a determination of the merits of grounds 9 and 10 must be made in the context of the scheme of the Act in relation to the psychiatric examination of an offender.

120 By s 14(2)(a), if the court is satisfied that there are reasonable grounds for believing that the court might, under s 7(1), find that the offender is a serious danger to the community:

> the court must order that the offender undergo examinations by 2 psychiatrists named by the court for the purposes of preparing the reports required by section 37 that are to be used on the hearing of the application;

Section 15 provides that an order under s 14(2)(a) authorises each of the two psychiatrists named in the order to examine the offender and report in accordance with Pt 5.

121 Section 32(1) provides, in relation to annual reviews of a person's detention under a continuing detention order, that, unless the court otherwise orders:

> the chief executive officer must arrange for a person to be examined by 2 psychiatrists for the purposes of preparing the reports required by section 37 that are to be used on a review under this Part.

By s 32(2), s 32 authorises each of the two psychiatrists to examine the person and report in accordance with Pt 5.

122 Section 37(1) provides, relevantly, that each of the psychiatrists 'must examine the person to whom the order [under s 14(2)(a)] or arrangement [under s 32(1)] relates and prepare an independent report'. By s 37(4), the obligation under s 37(1) to prepare a report applies even if the person to be examined does not co-operate, or does not co-operate fully, in the examination.

123 Section 7(3)(a) provides, relevantly, that in deciding whether to find that a person is a serious danger to the community, the court must have regard to the extent to which the person co-operated when the psychiatrists examined the person.

124 It is apparent from the Act that an offender is under a statutory obligation to undergo a clinical examination by the psychiatrists, but the obligation is not specifically enforceable. Further, an offender who is under a statutory obligation to undergo a psychiatric examination does not commit an offence if he or she refuses to undergo the examination or fails to co-operate wholly or partly with the psychiatrists in the examination process.

125 In our opinion, in circumstances where the Parliament has imposed a statutory obligation on an offender to undergo psychiatric examinations, the court was not bound to inform the appellant, alternatively to give a direction that the appellant be informed, before the court ordered psychiatric examinations, of the matters set out in ground 10. Also, Dr Brett and Dr Wynn Owen were not bound to administer a 'caution' to

the appellant or otherwise warn him about the consequences of participating in the clinical interviews.

126 Further, in our opinion, the statutory scheme is inconsistent with a requirement that the unfairness discretion or the policy discretion may be invoked, by analogy, as alleged by the appellant, unless, perhaps, a clinical interview was conducted in a manner which was unreasonable or oppressive having regard to standards of clinical conduct and behaviour accepted by psychiatrists of good repute. It was not suggested, on behalf of the appellant, that either Dr Brett or Dr Wynn Owen failed to observe proper standards in the conduct of their clinical assessments of the appellant.

127 Grounds 9 and 10 fail.

Ground 11 of the appeal

128 Ground 11 reads:

> The learned trial judge, having found that there was 'information which indicates that the appellant's propensity to commit serious sexual offences in the future may have diminished over time', erred in law by reversing the burden of proof by concluding, adverse to the appellant, that, 'there is no evidence that his physical health problems will prevent him from committing serious sexual offences or that they significantly diminish the risk of him committing further serious sexual offences'.

129 There was limited evidence before the learned judge as to the appellant's health. In the 1990s, the appellant's health deteriorated. He developed high cholesterol and high blood pressure. In 2002, he suffered a myocardial infarct, which resulted in the insertion of a stent. In 2005, he had a transient ischaemic attack which caused temporary left hemiparesis and permanent left hearing loss.

130 The learned judge noted that Dr Brett considered that because the appellant was now over 60 years of age and had some health problems, his risk of re-offending was reduced [92]. However, that consideration has to be evaluated in the context of Dr Brett's view that the appellant had chronic risk factors. Her Honour referred to this view, as follows:

> [Dr Brett] said that the [appellant] had not addressed a lot of those risk factors so that it was unlikely that his risk of re-offending would be reduced in the short or long term. He said that given the [appellant's] history and age, it was difficult to predict the likelihood of his offending, though this would depend on his supervision and his life circumstances. He said that the [appellant's] background factors placed him in a high-risk

> category for re-offending. In summary, Dr Brett said that he believed that the [appellant] is a high priority given his numerous risk factors and that he would be placed in the high-risk category for risk of re-offending [94].

131 Dr Wynn Owen was of the opinion that as the appellant was aged 53 at the time of his most recent sexual offence, age modification of risk was not indicated [104].

132 The learned judge summarised her findings and conclusions in relation to the impact of the appellant's age and health difficulties on his propensity to commit serious sexual offences:

> There is some information which indicates that the [appellant's] propensity to commit serious sexual offences in the future may have diminished over time. It is that the [appellant] is now 61 years of age, his general offending reduced on his release from prison in 1995 and the [appellant] has some serious health problems. However, in respect to his age, it is of grave concern that his most recent serious sexual offence was committed when he was a very mature man; that is at 53 years of age and that in the last 4 1/2 years that he has spent in custody, he has committed a considerable number of prison offences. There is no evidence that his physical health problems will prevent him from committing further serious sexual offences or that they significantly diminish the risk of him committing further serious sexual offences [113].

Her Honour's reference to 'some information' is to the evidence of Dr Brett which we have mentioned at [130] above.

133 In our opinion, the learned judge's statement that 'there is no evidence that [the appellant's] physical health problems will prevent him from committing serious sexual offences or that they significantly diminish the risk of him committing further serious sexual offences' was a reference to the state of the evidence in the context of the formation of a judgment as to whether or not the evidence established, to her Honour's satisfaction, that there was an unacceptable risk that, if the appellant were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence, within s 7(1) of the Act. She did not reverse the onus of proof cast on the respondent by s 7(2).

134 Ground 11 fails.

Ground 12 of the appeal

135 Ground 12 reads:

> The finding of the court was unreasonable and cannot be supported by the admissible evidence.

136 The appellant's written submissions to this court included these assertions:

> (a) … the psychiatric opinion evidence of risk can be given no weight. There was no evidence before the court that the appellant suffered from a psychiatric illness that demonstrated a propensity to commit serious sexual offences. There was no evidence of a diagnosis of paedophilia, schizophrenia or any other recognisable mental disease or defect.
>
> (b) Age and medical condition was something that the learned trial judge erroneously considered to be the appellant's onus. As a matter of law, it was for the respondent to prove that these factors were of no relevance. Commonsense dictates that they must be of relevance and cannot be discounted to zero simply because the appellant was 53 years of age when his last offence was committed. This approach also gives no recognition of his serious health problems.
>
> (c) The evidence discloses no real pattern to the offending, other than serious sexual offending. The relevant offending has occurred with considerable gaps going back to 1985, then 1987 and then 1999.
>
> (d) While the term 'high risk' was used, no attempt was made to define what that meant either by the psychiatrist or the learned trial judge.
>
> (e) It is difficult to comprehend a more compelling, rational reason than that projected by the appellant of his wish to go home to grow old with his wife and children (as opposed to dying in gaol) as being a persuasive consideration (discounted to zero by the learned trial judge).
>
> (f) The appellant's credit in that regard was not attacked by the respondent in cross-examination. In fact, he was not attacked at all.
>
> (g) The predictive assessments must, in the appellant's case, be considered highly speculative.
>
> (h) It is also significant in terms of assessment of the unacceptability of the risk, that the offences committed exhibited no actual physical violence or physical harm to the victims.
>
> (i) Is the appellant a false positive? Not even Dr Brett can answer that question because, as he says, he is not a statistician. That is not his field but both psychiatrists purport to rely on statistical unproven instruments.
>
> (j) What must be at the forefront of the court's collective mind is the infringement of the liberty of a subject based, not on what he has done, but what he might do in the future.

(k) The content of the Reports demonstrates an attempt by the authors to couch their opinions in the guise of scientific credibility which, it is submitted, is unsuccessful.

(l) Putting aside the psychiatric opinions, one is left with the proposition that the best predictor of the future is past conduct - a proposition shunned as a general rule by the common law, save in exceptional circumstances, and then only in the clearest cases. This of course, in this case, must be tempered with the accepted evidence that recidivism rates at 60 and after, for sexual offending, is virtually zero.

(m) The medical evidence does not demonstrate any dangerous propensity arising out of any psychiatric diagnosis.

(n) Further, even if there was evidence of a disordered or unstable mind, compelling evidence of likelihood would be required: see ***Veen v R*** 143 CLR 458, Mason CJ [10].

(o) The legislation, it is submitted, recognises that mental illness may have a direct bearing on propensity - hence, the compulsory psychiatric reports.

(p) Absent mental illness, the capacity to prove the necessary propensity for unacceptable risk becomes extremely problematic and would require compelling evidence of pattern to demonstrate the necessary likelihood to reach and attain unacceptable risk. See ***Veen [No 2] v R*** (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ [16].

137 The fact that there was no evidence before the court that the appellant suffered from a psychiatric illness or that there was no evidence of a diagnosis of paedophilia, schizophrenia or any other recognisable mental disease or defect, did not preclude the learned judge from according weight to the expert evidence. The task of Dr Brett and Dr Wynn Owen was to assess the level of risk that, if the appellant were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence. They carried out their statutory task as experts in the practice of psychiatry and concluded that the appellant was at a high risk of re-offending.

138 For the reasons we have given in the context of considering grounds 7 and 11, the learned judge did not reverse the onus of proof in relation to the appellant's age or medical condition. Also, her Honour recognised and took into account, to the extent she thought appropriate, the appellant's health problems.

139 The evidence does disclose a pattern to the appellant's offending to the extent that, as the learned judge noted, some of the offences involved a co-offender (who also committed a serious sexual offence against the victim), the taking of victims to isolated areas in a motor vehicle to facilitate the offending, and the female gender of the victims [114].

140 For the reasons we have given in the context of considering ground 6, there is no merit in the appellant's complaint about the use of the term 'high risk'.

141 The learned judge was entitled to conclude that the appellant's wish to 'go home to grow old with his wife and children (as opposed to dying in gaol)' was not a matter which diminished materially or at all the numerous risk factors that placed him in the high-risk category for risk of re-offending.

142 The appellant gave evidence before the learned judge. His evidence was remarkable for its brevity. The appellant's counsel asked him one question, as follows:

> If the judge decided to let you go home, and you were asked by the Department of Corrections to undergo counselling with a psychologist from time to time, would you agree to do that or not agree to do it?---I would agree to do it (ts 147).

There was no cross-examination. The respondent's decision not to cross-examine the appellant in relation to his credit or otherwise did not preclude her Honour from making the findings she did or the order she ultimately made.

143 Dr Brett and Dr Wynn Owen frankly acknowledged that there were limitations on their abilities to predict future behaviour. The learned judge was aware of those limitations [77]. The fact that the psychiatrists' assessments necessarily involved some speculation did not preclude her Honour from making the findings she did or her ultimate conclusion.

144 It is apparent from Dr Brett's report and Dr Wynn Owen's report that they were aware and took into account that no actual physical violence or physical harm (beyond the acts which constituted the sexual assaults themselves) were perpetrated against the victims. Dr Brett, Dr Wynn Owen and the learned judge were cognisant of that fact.

145 None of the other assertions in the appellant's written submissions to this court on ground 12 of the appeal renders any of the findings of the

learned judge or her ultimate conclusion unreasonable or unsupportable by the admissible evidence.

146 Ground 12 fails.

Ground 13 of the appeal

147 Ground 13 reads:

> The learned trial judge erred in law [in] having regard to the appellant's Children's Court convictions and having regard to the opinions of Dr Brett and Dr Wynn Owen, given their reliance upon those convictions.

148 We dealt with this issue in ***GTR*** [52] - [56]. After referring to ss 189(2) and 190 of the *Young Offenders Act 1994* (WA) and to pars (c), (d), (g) and (j) of s 7(3) of the Act, we said:

> Plainly, evidence of prior sexual offending as a juvenile might, in an appropriate case, be evidence bearing upon the questions whether there is any propensity to commit sexual offences in the future and whether there is any pattern of offending behaviour. It would also be a relevant part of the person's antecedents and criminal record. It would, on any view, be relevant to the question whether or not the person is a serious danger to the community. Also, each psychiatrist named in an order under s 14(2)(a) of the Act, or who is reporting for the purposes of a review pursuant to s 32, must be given, by the chief executive officer, any relevant information relating to the person to be examined that is in the chief executive officer's possession or to which he or she has, or may be given, access: s 38(1). Section 38(3) provides that a person in possession of any prison, or other relevant report or information, relating to the person to be examined must give a copy of the report or the information to the chief executive officer if asked by him or her to do so. Section 38(4) requires this to be done 'despite any other law or any duty of confidentiality'. Moreover, s 42(4) provides that:
>
> > In making its decision, the court may receive in evidence -
> >
> > (a) any document relevant to a person's antecedents or criminal record;
> >
> > (b) anything relevant contained in the official transcript of any proceeding against a person for a serious sexual offence, or contained in any medical, psychiatric, psychological or other report tendered in a proceeding of that kind.
>
> In our respectful opinion, these provisions require the admission of evidence establishing the commission of prior sexual offences while a juvenile. If there is any conflict between them and the provisions of the *Young Offenders Act* to which we have referred then, in our opinion, the

> later provisions override the former to the extent of the inconsistency: ***Goodwin v Phillips*** (1908) 7 CLR 1, 7 (Griffith CJ) [55] - [56].

149 The learned judge did not err in law in having regard to the appellant's Children's Court convictions or offences, or in having regard to the opinions of Dr Brett and Dr Wynn Owen, given their reliance on those convictions and offences.

150 Ground 13 fails.

Ground 14 of the appeal

151 Ground 14 reads:

> The cumulative or aggregate of the errors of law and errors [of fact] have caused the hearing to miscarry: (***Leary v R*** [1975] WAR 133 at 137).

152 The learned judge did not make any material error of law or fact. Ground 14 therefore fails.

Ground 15 of the appeal

153 Ground 15 reads:

> The learned judge erred:
>
> (a) in proceeding on the basis that the court had no discretion not to make an order; and
>
> (b) in failing to have regard to the appellant's age, health, gaps in his prior offending, the limitations of the psychiatric evidence and the retrospective effect of the legislation in determining whether or not to impose a supervision order.

154 In ***GTR***, we referred to the decision of this court in ***Williams*** in relation to the effect of the word 'may' in s 17(1) of the Act. Wheeler JA (Le Miere AJA agreeing) concluded that, read in its context, 'may' is to be understood as 'must'. In ***Williams***, Martin CJ expressed a different view. His Honour considered that the word 'may', in s 17(1), gives to the court a discretion to make one or other of the orders contemplated by s 17, or no order at all.

155 In ***GTR***, after considering the relevant statutory framework and various authorities, including cases decided in Queensland and New South Wales on similar legislation, we concluded that there is nothing in the reasoning of the majority in ***Williams*** that should lead us to conclude that it was plainly wrong, or that it should, for some other reason, not be

followed. We consequently applied it. See ***GTR***, [49]. Also see ***Craig v Troy*** (1997) 16 WAR 96, 162; ***Traegar v Pires de Albuquerque*** (1997) 18 WAR 432, 447; ***Re Calder; Ex parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343, 354.

156 It follows that ground 15(a) fails.

157 Further, in our opinion, ground 15(b) has not been made out. Our reasons are as follows.

158 First, the learned trial judge had regard to the appellant's age and health. See [97], [129] - [133] above.

159 Secondly, the learned judge had regard to gaps in the appellant's prior offending. See [97] above.

160 Thirdly, the learned judge had regard to the limitations of the psychiatric evidence. See [40] above.

161 Fourthly, the Act is not retrospective in its operation.

162 As Steytler P (McLure and Buss JJA agreeing) noted in ***Napier v The State of Western Australia*** [2008] WASCA 106 [20], in general, at common law, a statute changing the law should not, absent clear language to that effect, be understood as applying to events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events. See ***Maxwell v Murphy*** (1957) 96 CLR 261, 267 (Dixon CJ). Prima facie, a statute is construed as not attaching new legal consequences to events which occurred before its commencement. See ***Fisher v Hebburn Ltd*** (1960) 106 CLR 188, 194 (Fullagar J); ***Mathieson v Burton*** (1971) 124 CLR 1, 22 (Gibbs J); ***Geraldton Building Co Pty Ltd v May*** (1977) 136 CLR 379, 399 - 400 (Stephen J), 401 (Mason J). Also see s 37 of the *Interpretation Act 1984* (WA) which, in general, reflects the common law.

163 In our opinion, the Act does not have a retrospective operation. Any rights or liabilities attaching to the appellant as a result of his convictions were not affected by the enactment of the Act. The Act 'merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future': ***Robertson v City of Nunawading*** [1973] VR 818, 824 (Winneke CJ, Gowans and Starke JJ). Also see ***R v Rowe*** (1992) 5 WAR 491, 495 - 496 (Franklyn J, Rowland J agreeing), 498 (Nicholson J). In ***Coleman v Shell Co of Australia*** (1943) 45 SR (NSW) 27, Jordan CJ said:

> … as regards any matter or transaction, if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities (31).

164 Consequently, ground 15(b) fails.

Conclusion

165 We would dismiss the appeal.

MURRAY AJA:

The proceedings

166 This appeal arises out of an application made on 11 June 2007 pursuant to s 8 of the *Dangerous Sexual Offenders Act 2006* (WA) (DSO Act) for orders under s 14 and s 17(1) of the Act. The terms of s 14 which provides for a preliminary hearing of such an application are not presently material. Section 17 provides the powers of the court upon the final determination of the application, as follows:

> (1) If the court hearing an application for a Division 2 order finds that the offender is a serious danger to the community, the court may -
>
> (a) order that the offender be detained in custody for an indefinite term for control, care, or treatment; or
>
> (b) order that at all times during the period stated in the order when the offender is not in custody the offender be subject to conditions that the court considers appropriate and states in the order.
>
> (2) In deciding whether to make an order under subsection (1)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

167 As to the threshold finding that the offender is a serious danger to the community, the court is instructed by the provisions of s 7, the terms of which are:

> (1) Before the court dealing with an application under this Act may find that a person is a serious danger to the community, the court has to be satisfied that there is an unacceptable risk that, if the person were not subject to a continuing detention order or a

supervision order, the person would commit a serious sexual offence.

(2) The DPP has the onus of satisfying the court as described in subsection (1) and the court has to be satisfied —

(a) by acceptable and cogent evidence; and

(b) to a high degree of probability.

(3) In deciding whether to find that a person is a serious danger to the community, the court must have regard to -

(a) any report that a psychiatrist prepares as required by section 37 for the hearing of the application and the extent to which the person cooperated when the psychiatrist examined the person;

(b) any other medical, psychiatric, psychological, or other assessment relating to the person;

(c) information indicating whether or not the person has a propensity to commit serious sexual offences in the future;

(d) whether or not there is any pattern of offending behaviour on the part of the person;

(e) any efforts by the person to address the cause or causes of the person's offending behaviour, including whether the person has participated in any rehabilitation program;

(f) whether or not the person's participation in any rehabilitation program has had a positive effect on the person;

(g) the person's antecedents and criminal record;

(h) the risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence;

(i) the need to protect members of the community from that risk; and

(j) any other relevant matter.

168 In ***Director of Public Prosecutions (WA) v GTR*** [2008] WASCA 187 at [94] I expressed the view that the finding that the offender is a serious danger to the community is to be made if the court is satisfied according to the standard of proof in s 7(2) that there is an unacceptable risk that if the person were not subject to a continuing detention order or a

supervision order, the person would commit a serious sexual offence. In so saying, I followed the similar observation of Wheeler JA, Le Miere AJA agreeing, in ***Director of Public Prosecutions (WA) v Williams*** (2007) 35 WAR 297; [2007] WASCA 206, 313 - 314 [66]. Since writing these reasons, I have noted that in their joint judgment in ***GTR*** at [14] - [25], Steytler P and Buss JA express the same view.

169 The application was supported by particulars. Apart from making it clear that the application was for either a continuing detention order or a supervision order, without specifying which, the particulars are really concerned to notify the evidence upon which the applicant proposed to rely. Reference was made to the various convictions sustained by the appellant, and the sentences imposed, for serious sexual offences committed by him, his criminal record generally and the reports of the two consultant forensic psychiatrists, Dr Brett and Dr Wynn Owen. Dr Brett's report (exhibit 1) is dated 5 September 2007 and Dr Wynn Owen's report (exhibit 4) is dated 14 September 2007.

170 Ultimately, the evidence presented on the final hearing of the application included not only those reports, but other materials received in documentary form - court transcripts, the appellant's criminal record, various official reports concerned with relevant matters during the service of the appellant's sentence and statements and transcripts of evidence concerned with the various criminal proceedings material to the application. In addition, at the final hearing, Dr Brett and Dr Wynn Owen were called and extensively cross-examined. A senior community corrections officer at Maddington, Ms Jelavic, presented a report, dated 13 September 2007, part of which was received in evidence as exhibit 5. She gave evidence about conditions which might be incorporated into a supervision order. Where witnesses were not called to give evidence orally the documentary material was received in evidence pursuant to the DSO Act s 42(4).

171 The appellant then went into evidence. Indeed, he gave evidence himself. He was asked one question in his evidence-in-chief (ts 147) in response to which he said that if the judge decided to let him go home and he was asked by the Department of Corrective Services to undergo counselling with a psychologist from time to time, he would agree to do that. He was not cross-examined. Mrs Woods was called, she gave evidence of her domestic circumstances and what was proposed for the appellant upon his release from prison. She was not cross-examined on behalf of the applicant. By consent, the appellant tendered in evidence an article entitled 'Reconviction rates of serious sex offenders and

assessments of their risk' published in 2002 by the Research, Development and Statistics Directorate of the Home Office of the United Kingdom (exhibit 7).

172 There was another report received in evidence as exhibit 8. It is dated 11 December 2007. The author is a forensic psychologist, Ms Caple. It is ostensibly concerned to assess the appellant's suitability to receive individual psychological counselling in the community. It seems that it did not meet the expectations of Jenkins J as to the assessment she wished to have made and it does not appear to have been relied upon by either party (see ts 224 - 236). Jenkins J discusses this matter in her Honour's judgment: ***The State of Western Australia v Woods*** [2007] WASC 320 at [134] - [139].

173 The preliminary hearing of the application was conducted by Blaxell J on 20 June 2007. The final hearing by Jenkins J was over a period of five days - 30 and 31 October 2007, 1 November 2007, 30 November 2007 and 21 December 2007. On the last-mentioned date, her Honour published her reasons for her finding that the appellant is a serious danger to the community within the meaning of s 7 of the DSO Act. Her Honour ordered the appellant's release on a supervision order for a period of seven years.

174 The terms of the order are not presently in contest. Suffice it to say that pursuant to s 18 of the Act, the order was subject to various conditions as contemplated by that section. I note particularly that there were onerous reporting and supervision conditions. The appellant was to reside with his wife, Mrs Woods, and advise any change of address. He was to be supervised by her or an approved adult when, in any room in his residence, he was with any child under the age of 16 years other than one of his children or grandchildren, and he was to attend, as required by a community corrections officer, psychological counselling at least once a week for the first 12 months of the order.

The appeal

175 The appeal is brought against that decision and order: DSO Act s 34. Leave to appeal is not required. The appellant seeks to have the application dismissed. There are numerous grounds. They are as follows:

> 1. The learned trial judge erred in law in speculating that Dr Brett's and Dr Wynn Owen's reports applied the statutory definition of 'serious sexual offence', absent an express declaration to that effect in their reports or in their oral evidence and absent any reference to a consideration of the Evidence Act.

1B. The learned trial judge erred in law in making an order for supervision under the Dangerous Sexual Offenders Act 2006, in circumstances where there were no psychiatric reports in accordance with the requirements of s37 of the Act.

2. The learned trial judge erred in law in interpreting the Dangerous Sexual Offenders Act as deeming psychiatrists, and thereby deeming the two court appointed psychiatrists as having expertise in predicting recidivism.

3. The learned trial judge erred in law in giving any weight to the opinions of Dr Brett and Dr Wynn Owen, in their reports or oral evidence when the facts upon which they based their opinions were not proven by admissible evidence and were based on unproven speculative assumptions and where no evidence was adduced as to their ability to predict recidivism generally or in relation to serious sexual offences as defined by the Dangerous Sexual Offenders Act.

4. The learned trial judge erred in law in concluding that the court appointed psychiatrists would have come to the same opinions concerning the respondent's risk of committing serious sexual offences without reliance on the Static 88 or PCL-R when there was no evidence to that effect and such a conclusion was a matter of pure speculation.

5. The learned trial judge erred in law in failing to give adequate reasons as to why the 'risk' was unacceptable.

6. The learned trial judge erred by concluding that the psychiatric opinion evidence that the respondent was 'a high risk' of committing serious sexual offences was a relevant consideration in determining whether the risk was unacceptable, when the psychiatrists gave no evidence as to what 'high risk' meant and there was no other relevant evidence as to what 'high risk' meant.

7. The learned trial judge erred in law in reversing the burden of proof in relation to the issue of whether the 'risk' was unacceptable and failed to have regard to all the appellant's arguments.

8. Abandoned.

9. There has been a miscarriage of justice, alternatively the learned trial judge erred in law, in admitting in evidence or having any regard to the information provided to Dr Brett and Dr Wynn Owen by the appellant in that it was involuntary and therefore inadmissible; alternatively should not have been received or accorded any weight in the proper exercise of the court's discretion.

10. The court erred in failing to inform the appellant, alternatively, of giving a direction that the appellant be informed, prior to the court ordered psychiatric examinations that:

    a. He was not legally obliged to answer any questions put to him by the psychiatrists;

    b. If he did so his answers may be used in evidence in the proceedings against him; and

    c. If he failed to co-operate, this could have an adverse effect on the court's assessments of the matter.

11. The learned trial judge, having found that there was 'information which indicates that the appellant's propensity to commit serious sexual offences in the future may have diminished over time', erred in law by reversing the burden of proof by concluding, adverse to the appellant that, 'there is no evidence that his physical health problems will prevent him from committing serious sexual offences or that they significantly diminish the risk of him committing further serious sexual offences.

12. The finding of the court was unreasonable and cannot be supported by the admissible evidence.

13. The learned trial judge erred in law having regard to the appellant's Children's Court convictions and in having regard to the opinions of Dr Brett and Dr Wynn Owen given their reliance upon those convictions.

14. The cumulative or aggregate of the errors of law and errors of fact have caused the hearing to miscarry: (***Leary v R*** [1975] WAR 133 at 137).

15. The learned trial judge erred -

    (a) in proceeding on the basis that the court had no discretion not to make an order; and

    (b) in failing to have regard to the applicant's age, health, the gaps in his prior offending, the limitations of the psychiatric evidence and the retrospective effect of the relevant legislation, in determining whether or not to impose a supervision order.

Some background facts

176 It is convenient to set the argument presented on the appeal in its factual context. The following is taken substantially from the findings made by Jenkins J in her discussion of the evidence.

177 The appellant was born on 15 November 1946. He was therefore 61 when the application was dealt with by Jenkins J. He is an indigenous person, a member of the Noongar people, born in a country town. As a child he was removed from his family and placed in care in his early years. He has had little education. He appeared regularly before Children's Courts from the age of 12. At 14 he was made a ward of the State. The offences he committed as a child were the usual range of offences of dishonesty, burglary offences and motor vehicle offences. On occasions, orders were made for his detention.

178 In 1965, when he was 18, the appellant committed an offence of unlawful carnal knowledge of a girl under the age of 16 for which he was sentenced to 3 months imprisonment. Thereafter, during the 1960s and the 1970s, as her Honour found, the appellant committed numerous dishonesty, property, disorderly and weapon offences for which he was fined or imprisoned for short periods. There were over 50 such offences.

179 On 9 January 1978 the appellant was indicted for the unlawful detention of a woman and with her rape. The matter was tried in this court before Burt CJ and a jury on 16 and 17 January 1978. On 17 January 1978, the appellant was convicted of the offence of unlawful detention, but acquitted of the rape. He was sentenced to 8 months imprisonment. Upon his release, the offending continued. They were mainly offences of dishonesty, burglary offences and motor vehicle offences. During this period the appellant married his present wife. There have been six children of the marriage.

180 Nonetheless, it was at this time that the appellant was first convicted of rape, an offence committed on 11 October 1984. Although the offence of rape has since been repealed and replaced by other sexual assault offences, it is a serious sexual offence as defined by s 3 of the DSO Act because it is such an offence as defined by s 106A of the *Evidence Act 1906* (WA) and sch 7 to that Act. The offence of rape falls within par (b) of the definition of a 'serious sexual offence'.

181 The facts of the 1984 offence are most conveniently taken from the judgment of Jenkins J at [30]. In this and all subsequent quotes from her Honour's judgment, the appellant is referred to as the respondent:

> Briefly, the facts of the offence were that the co-offender, an associate of the respondent, offered a 22 year-old female student a lift to her place of employment. He then picked the respondent up and drove the complainant and the respondent to a deserted area. The respondent's co-offender then threatened violence to the complainant. He took her away from the car

> and raped her. The co-offender returned to the car and the respondent went over to the complainant. Despite the complainant telling him that she did not want to have sexual intercourse with him, the respondent then raped the complainant. After that occurred the complainant got dressed and returned to the car. The co-offender then drove the complainant to her place of employment. At trial, the respondent admitted to having had sexual intercourse with the complainant but denied that the complainant had not consented to it. The respondent gave evidence in his defence. By the conviction, the jury were satisfied beyond reasonable doubt that the complainant had not consented to the sexual intercourse.

182 The appellant was indicted for that offence and was tried by Olney J and a jury on 10 and 11 April 1985. He was convicted, and on 11 April 1985 was sentenced to 5 years imprisonment with a minimum term before eligibility for parole of 2 1/2 years. He was in fact released on parole on 29 August 1987.

183 On 22 March 1988, and therefore in breach of his parole, he committed an offence of aggravated sexual assault upon a niece who was temporarily staying with the appellant and his family. She was 12. The facts of that offence may also be taken from the judgment of Jenkins J at [34]:

> On the morning of the offence, the complainant and two of the respondent's children were supposed to have been taken to school by the respondent. The respondent dropped his own children at school and took the complainant to a bush area. He told the complainant to get a rug from the car and to sit down on it. The respondent grabbed the complainant from behind, pushed her onto the rug and tried to take her jeans off. The complainant started to scream and she told the respondent that she was a virgin and did not want to have sex. After a short time the respondent desisted. The two of them got back into the car but instead of driving the complainant home or to school, the respondent drove to another remote location. He again got out of the car and put the rug on the ground and told the complainant to sit on it. She refused to do so. The respondent threatened to tie her arms and legs to a tree. Because she was afraid, she sat on the rug. The respondent then pushed the complainant down, took her jeans off and had sexual intercourse with her. Later, the respondent drove the complainant to some shops and left her there. He gave her money not to tell anyone.

184 He was indicted for that offence, which again is a serious sexual offence as defined. On the morning when the trial was due to commence before Pidgeon J and a jury, the appellant pleaded guilty upon arraignment and was convicted. On 8 December 1988 he was sentenced to 7 years imprisonment. Eligibility for parole was denied and Pidgeon J expressed the view that if the appellant was again convicted of such an

offence, it would be appropriate under the law as it then stood, to declare him an habitual criminal, a declaration which would lead to an indeterminate sentence. The sentence of 7 years imprisonment was ordered to be served cumulatively upon the current term. There was an appeal against that sentence which was dismissed.

185 Jenkins J noted that during the service of this term, attempts were made to engage the appellant in sexual offender treatment programmes, but he was uncooperative because he believed that he had rehabilitated himself and would not re-offend in future. He was not prepared to participate simply to facilitate his release from prison. There was no sexual offender treatment programme specifically designed in culturally appropriate terms. The appellant served the full term and was probably released in November 1995.

186 He returned to live with his wife and children. A fifth child was born. Jenkins J appears to have accepted that the appellant attempted to obtain employment, participated actively in social activities, became an active member of his community and campaigned against the use of amphetamines. His health was deteriorating, he had heart disease, high cholesterol and high blood pressure. Jenkins J noted that his offending was much reduced. Between 1996 and 2000, he had four separate court appearances for minor traffic and drug offences. His sixth child was born in 1998.

187 About four years after his release from prison, on 4 December 1999, the appellant, with another, committed offences of aggravated sexual assault upon a woman. The circumstance of aggravation was that the appellant and his co-offender were in company with each other. He was indicted with two offences. In respect of one offence he aided the sexual penetration of the victim by the co-offender and in relation to the other offence, the appellant was the principal offender.

188 The matter went to trial in the District Court before Deane DCJ and a jury in January 2003. On 23 January 2003 the appellant was convicted. On 4 February 2003 he was sentenced to 7 years imprisonment for each offence. The sentences were ordered to be served concurrently. There was an order of eligibility for parole. The sentences were backdated to 23 January 2003. He appealed against conviction and sentence. The appeal was dismissed.

189 Again, the facts may conveniently be taken from the judgment of Jenkins J at [45] - [46]:

> The facts in relation to the offences were that on 4 December 1999 the complainant, a 43-year-old woman, visited the respondent's unit to offer her condolences to members of his family who had suffered a recent bereavement in the family. The complainant regarded the respondent and his co-offender as friends. After a short time it was agreed that the respondent and his co-offender would give the complainant a lift to a nearby railway station in order for her to catch a train home. After 8 pm the complainant left the flat in company with the respondent and the co-offender. The complainant understood that the respondent and the co-offender were also going to obtain some amphetamines. After a period of time the complainant appreciated that the vehicle had been driven past the location where she understood that the drugs were going to be collected. Eventually, the vehicle was driven to the Kent Street Weir area, which the judge noted appeared to be a relatively isolated location and poorly lit. The complainant was ordered out of the car and the respondent and the co-offender also got out of the car. The rear door of the station wagon was opened and the respondent ordered the complainant to get into the back of the vehicle. The respondent told the co-offender that he could go first. The complainant, in fear of her safety did as she was instructed and pulled her pants and underpants down. The co-offender then had sexual intercourse with the complainant against her will. Whilst this occurred, the respondent held the complainant's arms up and behind her back so that she could not struggle or resist the co-offender's acts.
>
> The respondent then had sexual intercourse with the complainant, also against her will, whilst the co-offender got behind the complainant and held her arms up and back behind her head. After this offence occurred, the complainant put on her clothing and she was driven back to a block of flats. The respondent threatened her that if she told anybody he would kill her and her children. Approximately one week later the complainant made a complaint about the offences. When interviewed by the police about the offences, the respondent denied them and made derogatory remarks about the complainant and her lifestyle. He pleaded not guilty to the offences and did not give evidence at his trial. He continues to deny the offending.

190 The appellant was ultimately to be released on the completion of the service of his sentence, not on parole, on 23 September 2007. Attempts had been made to engage him in treatment programmes for sex offending, violent offending, addictions offending and cognitive skills but he continued throughout to deny his guilt and he refused to cooperate, although he was seeing a counsellor attached to the prison. Jenkins J expressed her regret that she had not received a report from this officer.

191 Her Honour found that the appellant proposed, if possible, to return to the home maintained by his wife. His two youngest children were still at home, as were two grandchildren. The appellant's wife continued to be strongly supportive. Jenkins J noted that Mrs Wood's evidence was that if the appellant was released, she proposed that they would simply stay at

home and 'grow old together looking after their children and grandchildren'. Her Honour noted that she had some limited information about the state of the appellant's health. He has heart disease and high blood pressure.

Is there a discretion to make no order?

192 As I understand ground 15(a) the contention is that the proper interpretation of s 17, and in particular s 17(1) of the DSO Act, is that even if the court has found that the offender is a serious danger to the community, the use of the word 'may' in s 17(1) establishes that the court has a discretion to make a continuing detention order under s 17(1)(a), to make a supervision order under s 17(1)(b), or to make neither order and presumably, in that event, simply dismiss the application. If the court should accept that proposition then, in this case, ground 15(b) collects the matters which, it is argued, were established in this case and would compel the conclusion that the only decision open to Jenkins J in the exercise of the discretion contended for, was to take the last-mentioned course, even though her Honour found that the appellant is a serious danger to the community in that there is an unacceptable risk that if he were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence; giving the concept of a serious danger to the community the meaning it bears under s 7(1) of the Act.

193 Before briefly examining the question of discretion, I simply observe that to put it in that way, as it must be put in terms of the statute if error is to be shown in the exercise of the discretion contended for, shows the magnitude of the task confronting the appellant. Jenkins J did give attention to the appellant's age, his health, the nature and frequency of his prior offending and the psychiatric evidence (in considerable detail), together with the evidence as to how the risk presented by the appellant might be managed in the community, before making a supervision order.

194 Her Honour did not make that order because she thought that she had no other choice than to do so if she was to avoid making a continuing detention order. Her Honour made the supervision order because, in her judgment, that was the appropriate form of order to meet the paramount consideration expressed in s 17(2), 'the need to ensure adequate protection of the community': see her Honour's judgment at [142]. In other words, it is abundantly clear that even had her Honour taken the view that she had a discretion to make no order, she would have made the supervision order in the terms that she did.

195 However, I turn to the question whether a discretion, in the terms contended for, is provided by s 17(1). The matter has been considered before by this court. The proposition that there was a discretion not to make an order was rejected in ***Williams*** by Wheeler JA, Le Miere AJA agreeing, at 314 - 315 [68] - [71]. Martin CJ, upon whose reasons the appellant relies in this case, dissented on this point at 307 [39] - [40]. His Honour noted that at first instance, I had expressed the view that there was no discretion not to make an order under s 17 upon a finding that the respondent is a serious danger to the community in the early case of ***The State of Western Australia v Latimer*** [2006] WASC 235 at [19] - [22]. On the other hand, McKechnie J at first instance in ***Williams*** had taken the view that there was such a discretion, following in that regard, a decision of Hasluck J in ***Director of Public Prosecutions for Western Australia v Mangolamara*** (2007) 169 A Crim R 379; [2007] WASC 71 at [183] - [184].

196 It is of course, a question of the construction of s 17(1), not only in the context of s 17(2) but also having regard to other material provisions of the DSO Act which provide the entire statutory context in which s 17(1) is to operate. It will therefore be the case that decisions of courts interpreting other statutory provisions, although apparently similar in form to s 17 of the DSO Act, but which deal with a different subject-matter in a different statutory context, will be of little assistance. There are many such examples, from the oft cited ***Finance Facilities Pty Ltd v Commissioner of Taxation (Cth)*** (1971) 127 CLR 106 onwards. The case of ***R v Mesiti*** [1984] WAR 21, which was concerned with s 746A of the *Criminal Code*, a provision which then existed to provide the power to estreat a recognisance and make consequential orders against a surety, held that there was no power to decline to order forfeiture of the recognisance when the conditions for its estreatment were satisfied.

197 The Court of Appeal in ***Channel 7 Perth Pty Ltd v S (A Company)*** [2007] WASCA 122 considered s 31 of the *Surveillance Devices Act 1998* (WA) which provided that the court 'may' order publication of a conversation recorded by the use of a device under the Act if the judge was satisfied that the publication should be made in furtherance of the public interest. That provision was held not to import a discretion to make no order, even though a judge was so satisfied.

198 Most recently, perhaps, the Court of Appeal, constituted by a bench of five judges, in ***Moody v French*** [2008] WASCA 67, was required, among other matters, to arrive at a conclusion as to the proper interpretation of the provisions of s 89 of the *Sentencing Act 1995* (WA)

concerning the making of a parole eligibility order. Section 89(1) provides a general discretion, by the use of the word 'may', to make a parole eligibility order. Section 89(4) provides a power not to make a parole eligibility order if at least two of four specified factors are present. Then the court 'may' decide not to make a parole eligibility order. The way in which the provisions are constructed is somewhat different from the present case, but the same process of statutory construction can be observed: per Steytler P, Wheeler, McLure and Buss JJA, Miller JA dissenting, at [47] - [49].

199 The statutory precursor to the DSO Act was the equivalent Queensland legislation, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). Section 13 of that Act combines in substantially the same terms, ss 7 and 17 of the DSO Act. The validity of the Queensland legislation, having regard to the provisions of Ch III of the *Commonwealth Constitution* was considered by the High Court in ***Fardon v Attorney-General (Qld)*** [2004] HCA 46; (2004) 223 CLR 575. In the course of their judgments, the members of the High Court made some obiter observations which bear upon the question presently under consideration.

200 At [19], Gleeson CJ, speaking of the Queensland Act as a whole, made the observation that, 'It confers a substantial discretion as to whether an order should be made, and if so, the type of order.' At [34], McHugh J put the same proposition more precisely when his Honour said:

> The Court has a discretion as to whether it should make an order under the Act and, if so, what kind of order (s 13(5)). The Court is not required or expected to make an order for continued detention in custody. The Court has three discretionary choices open to it if it finds that the Attorney-General has satisfied the 'unacceptable risk' standard. It may make a 'continuing detention order' (s 13(5)(a)), a 'supervision order' (s 13(5)(b)), or no order.

201 On the other hand, at [109], Gummow J said that:

> Section 13(5) states that if the Supreme Court attains the necessary satisfaction it 'may order' what is a 'continuing detention order' or the lesser option of conditional release under a 'supervision order'. It will be assumed that 'may' is used here in a sense that requires one or the other outcome, without the possibility of declining to make either order (***Samad v District Court (NSW)*** (2002) 209 CLR 140 at 152 - 154 [31] - [38], 160 - 163 [66] - [76].

Hayne J expressed general agreement with the reasons of Gummow J [196] and that appears also to have been the view of Callinan and Heydon JJ who, at [227] said:

> Even if the Court concludes under s 13(1) of the Act that the prisoner is a serious danger to the community, it still has a discretion under s 13(5) as to the way in which the application should be disposed of. It may, for example, order that the prisoner be released from custody subject to conditions. Section 16 prescribes the contents of such an order.

202 I know of no authorities in Queensland which would support the view that s 17 imports a discretion to make no order of either kind. The closest one comes to such a case is the decision of the Court of Appeal of Queensland, Keane and Holmes JJA and Dutney J, in ***Attorney-General (Qld) v Francis*** [2006] QCA 324. At [30] and [31] their Honours said:

> It may be, however, that, in some instances, a dangerous prisoner has such clear and pressing prospects of rehabilitation that the court's choice of an order under s 13(5)(a), rather than under s 13(5)(b), will turn on the answer to the factual question whether further treatment, necessary to ensure adequate protection to the community, is likely to be available or effective only while the prisoner remains in detention. If the court were to be satisfied in a particular case that further treatment of a prisoner was necessary, and likely, to reduce the risk of reoffending to acceptable levels, but that such treatment would not be made available to the prisoner in detention, then that would be a good reason to make an order under s 13(5)(b). The choice between an order under s 13(5)(a) or (b) must, of course, be controlled in the end by s 13(6) of the Act; but, in such a case, it might make little sense to make a continuing detention order for the purpose of 'control, care or treatment' of the prisoner.
>
> It is possible, too, that the view taken by Gummow J in ***Fardon v Attorney-General for Queensland*** supports an argument that executive government repudiation of the preventive objects of the Act in a particular case (as, for example, by the refusal of any treatment to a prisoner clearly capable of, and amenable to, rehabilitation) could lead the court to refuse to make any order at all. If it were to appear to the court that any further detention would be truly punitive in character and, thus, contrary to the intention of the legislation, there would be no basis for the court to make an order of any kind under the Act. The conditions of further restraint upon the detainee's liberty would be out of character with the intention of the legislature: that such restraint is preventive. The character of the detention authorised by the Act is, as was explained in the reasons of the High Court in ***Fardon v Attorney-General for Queensland***, not punitive but preventive.

I note that the Queensland provisions, s 13(5)(a) and s 13(5)(b), correspond to the DSO Act s 17(1)(a) and s 17(1)(b). The Queensland s 13(6) corresponds to the DSO Act s 17(2).

203 The reference to the decision of Gummow J in ***Fardon***, is a reference to what his Honour said at [113] in relation to s 30(2) of the Queensland Act which corresponds with the DSO Act s 33(2), a provision concerned with the orders which may be made upon an annual review of a continuing detention order. Again, it seems to me, that it was a purely obiter observation that in an appropriate case, the court may 'refuse to make any order at all.'

204 With respect, I can see no basis upon which this court, even if it was prepared to do so, absent a bench of five judges, should depart from the decision of the majority in ***Williams***. The question is whether, on the proper interpretation of s 17, it confers a discretion upon such an application as this, to make a continuing detention order, a supervision order, or no order at all. Whether, in other words, the use of the word 'may' imports a general discretion in the disposition of the application. The alternative view is that the use of the word 'may' is apt to provide a power which must be exercised upon the establishment of the precondition for the exercise of that power. That is the view that appeals to me.

205 The threshold question under s 17(1) is the finding of the court that the offender is a serious danger to the community. That is a finding under s 7(1) made because the court is satisfied that there is an unacceptable risk that if the offender were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence. In my opinion, it cannot be the case that, although the court is satisfied that there is an unacceptable risk of the kind described in s 7(1), in the application of s 17(1) the court might consider that neither order provided for in that subsection should be made.

206 It is to be borne in mind that the objects of the Act, set out in s 4, are:

> (a) to provide for the detention in custody or the supervision of persons of a particular class to ensure adequate protection of the community; and
>
> (b) to provide for continuing control, care, or treatment, of persons of a particular class.

The 'particular class' of person is, in my opinion, a person who is a serious danger to the community within the meaning of s 7(1). To my mind, that

conclusion is reinforced by s 17(2) which talks in terms of a decision whether to make an order under s 17(1)(a) or (b). It does not speak of an alternative of making no order at all, but provides a reinforcement that the paramount consideration is the need to ensure adequate protection of the community. In my opinion, ground 15 may not succeed.

207 Again, since writing these reasons, I have had access to the joint judgment of Steytler P and Buss JA in ***GTR*** and note that at [35] - [51] their Honours discuss this issue and come to the same conclusion.

Dealing with the psychiatric evidence

208 I have mentioned that Dr Brett and Dr Wynn Owen both made reports which were tendered in evidence and that both gave evidence and were cross-examined at length. As Jenkins J noted at [63] no objection was taken to the admissibility of the reports in evidence. However, it appears that at first instance, a number of submissions were made directed to establishing the proposition that the judge should not place any weight on the reports or, as I gather, upon the oral evidence given by the two psychiatrists.

209 Her Honour refers in her judgment to a number of other psychiatric, psychological and like assessments made of the appellant which were tendered in evidence pursuant to the DSO Act s 42(4)(b) and to which Jenkins J had regard. In relation to those reports, her Honour said at [111] that although she would take them into account, she bore in mind that she had not had the benefit of hearing oral evidence from the authors. It is not clear to me what submission was made to Jenkins J in respect of such reports.

210 In seems that the submissions made to Jenkins J at first instance, were repeated on the hearing of the appeal. They are the subject of a number of the grounds which allege that Jenkins J erred in dealing with those submissions.

211 I have in mind ground 1, which contends that the judge erred in speculating that Dr Brett and Dr Wynn Owen in their reports were predicting the likelihood that the appellant would commit a serious sexual offence as defined in the Act. Ground 1B appears to assert that the psychiatric reports before the judge were not made in accordance with the requirements of s 37 of the Act. Although there was no elaboration upon that proposition in argument before us, the written submissions suggest that it is the lack of a specific reference in the reports to serious sexual offences as defined, which is said to rob them of the character of reports

envisaged by s 37 of the Act. Although the submission is not put in this way, it would presumably follow that if the reports and the evidence of the psychiatrists contained an error in that regard, that evidence would be inadmissible.

212 Ground 2 also flirts with a proposition which would appear to relate to the admissibility of the evidence, because, as I understand it, it is said that Jenkins J erred by accepting that the psychiatrists were deemed by the DSO Act to have the necessary expertise in predicting recidivism, which would make their evidence admissible and cause it to be accorded at least some weight in the decision of the application.

213 Ground 3 treads delicately the margin between admissibility and weight of evidence of expert opinion by complaining that the facts upon which the opinions were based, 'were not proven by admissible evidence and were based on unproven speculative assumptions'. Grounds 9 and 10 may relate to this argument, because they assert that the appellant, not having been warned that he was not obliged to answer the questions put to him by the psychiatrists, that if he did so his answers might be used in evidence against him, but on the other hand that if he failed to cooperate the court could draw an inference against him, rendered the evidence of what the appellant told the psychiatrists involuntary and inadmissible.

214 In an endeavour to deal with these arguments in a coherent fashion, I propose first to state my views about the statutory scheme in relation to psychiatric evidence and its admissibility. In doing so, I refer, without quoting it here, to the very useful summation of the general principles in relation to the admissibility of, and weight to be attached to, evidence of expert opinion by Hasluck J in ***Mangolamara*** at [145] - [152].

215 However, the first point of reference in considering issues concerning the psychiatric evidence is, of course, the statute. In an application of this kind, s 42 gives some guidance as to the evidence which may be admissible. Section 42(2) commences by making it clear that these are adversarial proceedings in which evidence will be called by the DPP and may, if the respondent 'elects to give or call evidence' be given by, or on behalf, of that person. In other words there is no statutory obligation upon the respondent to go into evidence. That is consistent with s 40 which provides that proceedings under the Act, 'are to be taken to be criminal proceedings for all purposes'. In a case of this kind, it is also consistent with s 7(2) which places an onus of proof upon the applicant DPP and provides the standard of proof to a high degree of

probability which may be discharged by adducing 'acceptable and cogent evidence'.

216 That, I think, is a reference to evidence which may carry weight in the mind of the court, rather than an observation about admissibility.

217 It is worth also bearing in mind, that at the first level the evidence adduced will be directed to satisfying the court that there is an unacceptable risk that if the respondent were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence: s 7(1). If the evidence satisfies the court about that, it will make the finding to which s 17(1) refers, that the offender is a serious danger to the community. Thereupon, the second phase of the proceedings and the determination of the application, comes into play. The DPP will be concerned to establish that the need to ensure adequate protection of the community requires the court to make either a continuing detention order, or a supervision order: s 17.

218 In the latter case, the DPP will be concerned to establish what should be the terms of the supervision order in relation to the particular offender: s 18, particularly s 18(2). Where a continuing detention order is sought, there will be an onus on the DPP to persuade the court that an adequate degree of protection of the community may only be obtained by making that order, rather than by making a supervision order: ***Latimer*** per Murray J at [22]; ***Mangolamara*** per Hasluck J at [63].

219 Section 42(3) provides that generally speaking, except as modified by s 42(4), the 'ordinary rules of evidence apply'. Section 42(4) is a clear provision about admissibility:

> In making its decision, the court may receive in evidence -
>
> (a) any document relevant to a person's antecedents or criminal record;
>
> (b) anything relevant contained in the official transcript of any proceeding against a person for a serious sexual offence, or contained in any medical, psychiatric, psychological or other report tendered in a proceeding of that kind.

I take the effect of that subsection to be that if the document is of a kind described, it is admissible in evidence without more, certainly without the need to call the maker of the statement which the document represents.

220 Further, although it is not necessary to finally determine the point for the purpose of this appeal, I incline to the view that insofar as such a document contains assertions of primary fact, it may be received in

evidence to prove those facts. Insofar as such a document contains an expression of opinion, it follows from the terms of s 42(4), in my view, that the document may be received as evidence of that opinion. However, it is worth noting that, although by s 42(4) the court is permitted to receive in evidence such documents as evidence of the facts recorded therein, despite their hearsay character, the court is not obliged to receive such material in evidence and there may well be circumstances affecting the reliability of the document which would justify its exclusion from evidence. It is unnecessary for the purpose of this appeal, to come to any final decision about such matters.

221 The position in relation to psychiatric reports which are ordered, and other documentary material of that kind, is in my opinion, equally clear. I have mentioned the purpose or the end to which such evidence is directed by reference to s 7(1). Section 7(3)(a) and (b) provide:

> In deciding whether to find that a person is a serious danger to the community, the court must have regard to -
>
> (a) any report that a psychiatrist prepares as required by section 37 for the hearing of the application and the extent to which the person cooperated when the psychiatrist examined the person;
>
> (b) any other medical, psychiatric, psychological, or other assessment relating to the person;

222 The genesis of the process by which such reports may be created, is the preliminary hearing of the application under s 14. Section 14(2)(a) provides:

> If the court is satisfied as described in subsection (1) -
>
> (a) the court must order that the offender undergo examinations by 2 psychiatrists named by the court for the purposes of preparing the reports required by section 37 that are to be used on the hearing of the application;

Under s 15, by that order, each psychiatrist is authorised 'to examine the offender and report in accordance with Part 5.'

223 Part 5 commences with s 37 which is in the following terms:

> **37. Preparation of psychiatric report**
>
> (1) Each psychiatrist named in an order under section 14(2)(a) or with whom the chief executive officer makes an arrangement under section 32(1) must examine the person

> to whom the order or arrangement relates and prepare an independent report.
>
> (2) The report has to indicate -
>
> (a) the psychiatrist's assessment of the level of risk that, if the person were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence; and
>
> (b) the reasons for the psychiatrist's assessment.
>
> (3) The psychiatrist must have regard to any report or information that the chief executive officer gives to the psychiatrist under section 38(1).
>
> (4) The obligation under subsection (1) to prepare a report applies even if the person to be examined does not cooperate, or does not cooperate fully, in the examination.

224 There are a number of things that I would wish to note about this provision. In the first place, the reports are obviously to be prepared for the purpose of the hearing of the application under s 17. Under s 39, having been prepared, they are to be provided to the DPP and the DPP is to provide them to the respondent to the application. That is consistent with the general duty of disclosure of evidence imposed on the DPP by s 9. All of that is for the purpose of ensuring that the respondent has an adequate opportunity to prepare to deal with the psychiatric evidence.

225 Such reports are not directly made admissible by s 42(4), but the scheme of the Act and the terms of the sections in Pt 5, particularly s 37, I think make it clear that such reports are admissible in evidence on the hearing of the application if they satisfy the description of reports prepared under s 37. In other words, the psychiatrist 'must have regard' to information given to that person by the CEO under s 38(1): s 37(3). And, the report must deal with the matters set out in s 37(2). If it is, then, a report of the character envisaged by s 37, the intention of the Act, particularly as set out in s 7(3)(a) is that the report must be tendered because the court must have regard to it.

226 Again, it seems to me, however, that in the context of this statutory scheme, the weight to be attached to any such report, and, it follows, to the psychiatric evidence generally, will be entirely a matter for the judge, having regard to the extent to which the evidence may properly be described within the terms of s 7(2)(a) as 'acceptable and cogent evidence'.

227 There is no need then, in my opinion, in considering this matter, to have regard to the common law cases in relation to the admissibility of expert evidence, although such decisions may, I think, provide useful assistance in relation to the weight to be accorded to expert evidence in proceedings under the Act for what is described as a Division 2 order.

228 In short, it is my view that pursuant to the ordinary rules of evidence and s 7(3)(a) and s 37 of the Act, expert psychiatric evidence as described in the Act, and the reports made by psychiatrists, is admissible evidence in proceedings upon an application for a Division 2 order. Whether such evidence carries weight as acceptable and cogent evidence, and the extent to which it may fall short of that, is a matter for the judgment of the court. All that is required is that the court 'have regard' to it. As I read the Act, there is a necessary implication that the DPP, having been provided with the reports, must call the psychiatrists who are the authors of those reports and adduce evidence of the reports and the psychiatrists' opinions, whether favourable or unfavourable to the success of the application.

229 In relation to expert evidence and the duties of expert witnesses, a case very often cited is the decision of the Court of Appeal of New South Wales in ***Makita (Aust) Pty Ltd v Sprowles*** [2001] NSWCA 305; (2001) 52 NSWLR 705. In that case, Heydon JA made a thorough review of relevant authorities decided both in this country and the United Kingdom, including two decisions of the Full Court of this State ***Pownall v Conlan Management Pty Ltd*** (1995) 12 WAR 370 and ***Pollock v Wellington*** (1996) 15 WAR 1 and in the High Court, the case of ***HG v The Queen*** (1999) 197 CLR 414 per Gleeson CJ at 427 - 429 [39] - [44].

230 At 743 - 744 [85] of ***Makita***, Heydon JA expressed the result of his review of the authorities in summary form. Relevantly, for present purposes, his Honour made the point that, given the demonstration of a field of specialised knowledge in which the witness is expert:

> the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or

> substantially based', applies to the facts assumed or observed so as to produce the opinion propounded.

Heydon JA went on to say that if those matters were not made explicit, 'the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.'

231 The notion that evidence of expert opinion is strictly inadmissible if there is not strict proof of all the facts observed or assumed, upon which the opinion is based, may be developed further. In relation to establishing the underlying facts, care needs to be taken to distinguish between evidence which is hearsay and that which refers to an accepted body of general knowledge commonly held within the professional discipline in question. Generally in that regard, the opinion evidence will be received, but its weight will be discounted, if it relies to any significant extent upon hearsay material strictly so called which has not otherwise been substantiated by admissible evidence. That was a point made clearly in ***Pownall***.

232 In ***Australian Securities and Investments Commission v Rich*** [2005] NSWCA 152; (2005) 218 ALR 764, Spigelman CJ, with whom Giles and Ipp JJA agreed, made the same point at 788 [94] when he summed up his consideration of the law by the observation that the expert evidence in that case was admissible because it adequately set out the factual basis assumed by the expert and the reasoning process which was said to justify the opinion expressed. Otherwise, 'Matters concerning the process by which an opinion was actually formed go to weight, not admissibility.' Included in such matters would be the underlying facts assumed or sought to be proved by the expert. If the process of inference leading to the formation of the relevant opinion is revealed so that the opinion may be tested and a judgment may be made about its reliability, then the expert evidence will be admissible. This was the approach adopted (in a different statutory context) by this court in ***Batoka Pty Ltd v Conocophillips WA-248 Pty Ltd*** [2006] WASCA 44; (2006) 198 FLR 93 per Steytler P [75], McLure JA and Murray AJA agreeing.

233 In ***Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*** [2002] FCAFC 157; (2002) 55 IPR 354, Weinberg and Dowsett JJ said of the reasons of Heydon JA in ***Makita***, to which I have previously referred:

> [Heydon JA's] use of the phrase 'strictly speaking' in the last sentence should not be overlooked. It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all of the qualities discussed by Heydon JA. However many of those qualities involve questions of degree, requiring the exercise of judgment. For this reason it

> would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of his Honour's requirements before receiving it as evidence in the proceedings. More commonly, once the witness's claim to expertise is made out and the relevance and admissibility of opinion evidence demonstrated, such evidence is received. The various qualities described by Heydon JA are then assessed in the course of determining the weight to be given to the evidence.

234 That was the view taken by Sundberg J in ***Neowarra v Western Australia*** [2003] FCA 1399; (2003) 134 FCR 208, a native title case, in relation to anthropological evidence, referring to statements made by indigenous persons about their customs and practices. The case was naturally concerned with the opinion provisions of the *Evidence Act 1995* (Cth) which recognise that opinion evidence may be based on evidence which has a hearsay quality. Sundberg J considered, in summarising his conclusions at [39], that that would not render the expert's opinion inadmissible, 'though the weight to be accorded the opinion may be reduced by the hearsay quality of the material'. That, I think, is the appropriate view within the context of the DSO Act.

The grounds concerning the psychiatric evidence

235 Grounds 1 and 1B are intended to advance the submission that the reports and evidence of Dr Brett and Dr Wynn Owen could not be accorded weight because it was not clear that they were making an assessment of the risk of the commission of a serious sexual offence. In my view, these grounds are without merit. As Jenkins J makes clear, and as the evidence in the reports reveals, the reports and the expert opinions proffered, were made in the context of s 37(2). The psychiatrists were concerned with the assessment of the risk of the commission in future of sexual offences. Whether that was probative of the risk of the commission of a serious sexual offence was a matter for Jenkins J. There was ample support in the evidence for the view her Honour took, that the opinions expressed were relevant and probative of an assessment of the risk of the commission of a serious sexual offence.

236 As to ground 2, this submission was made to Jenkins J. At [75] and [76] of her judgement, her Honour said that the statutory scheme revealed that the psychiatrists ordered to prepare reports under s 37 must be taken to be qualified to give the opinions required of them. That is not, I think, quite to the point, but at [76] her Honour made it clear, 'that in an appropriate case the court could decide to put little weight on an opinion because it came from a psychiatrist with little experience or who lacked

credibility.' That was not the case, her Honour thought, with respect to either Dr Brett or Dr Wynn Owen.

237 I have set out the statutory scheme and my views with respect to it. It seems to me that the ground is without merit. Psychiatrists as such, are certainly deemed by the Act to be persons qualified to give an expert opinion assessing the level of risk of the commission of serious sexual offences which a particular individual poses. The court must have regard to such evidence, but it is of course the case that the weight to be attached to the opinion expressed by any particular psychiatrist briefed to prepare a report under s 37, and giving evidence on an application for a Division 2 order, will be a matter which may be tested and upon which the judge hearing the application will be obliged to form a view. Her Honour is not criticised in this appeal for the view she formed that the evidence presented by the two psychiatrists was acceptable and cogent.

238 Ground 3 was not amplified in argument before us. So far as its content may be discerned from the written submissions, to the extent that it relies on the proposition that for the evidence to be admissible, the psychiatrist concerned had to demonstrate that psychiatrists are experts in predicting recidivism, I have said enough, I think, in discussing my views of the statutory scheme, as to the admissibility of such evidence and as to the freedom preserved to the judge hearing the application to make his or her own assessment in the particular circumstances of the case of the weight to be attached to that evidence.

239 As to the use of predictive tools or models in making the psychiatric assessments, the complaint is made that the operation manuals or other documents describing the models completely, were not tendered in evidence, 'thereby depriving the tribunal of fact of the capacity to determine the validity or otherwise of their application.' For my part, I would think that unnecessary, given that the evidence was sufficient to describe what the models were directed to measuring, what conclusions were drawn from their application and what limitations there were, if any, inherent in the use of the models in their application to the particular case before the court. All of those were matters which might be explored by the parties and in relation to which counsel might assist the judge with submissions about the weight and cogency of the evidence.

240 As I have said, it is evident that Jenkins J gave careful attention to the psychiatric evidence. In my opinion, her Honour's approach to that evidence, her assessment of its weight and her appreciation of its limitations were unexceptionable. At [77] - [79] her Honour said:

> There are clear limitations on the psychiatrists' abilities to predict future behaviour. The psychiatrists acknowledged those limitations. There was no evidence which causes me to decide that their opinions were of little weight. To the contrary, I was assisted by their opinions and their reasons for them. At the same time, I am cognisant of the fact that Parliament has given to me the responsibility for determining this application. The opinions of the psychiatrists are one of the matters which I must take into account but they do not determine the outcome of the application.
>
> The next matter raised by the respondent was the alleged failure by the applicant to prove the facts upon which the psychiatrists' opinions were based. In particular, it was submitted that the applicant was required to prove the contents of the doctors' interviews with the respondent. Further, it is submitted that the applicant was required to prove the substance of the risk assessment tools that each psychiatrist used and the assessments and calculations, for want of a better word, that they did in order to draw their conclusions in respect to those tools.
>
> In respect to the content of the interviews, whilst the psychiatrists did not produce any record of those interviews, they did refer to the comments that had been made in the interviews that led them to form their opinions. Further, all the documentary material that they relied upon to form their opinions is in evidence. On the other hand, the psychiatrists did have some conversations with third parties, the contents of which were not proven. In my opinion, the applicant proved the relevant portions of the interviews with the respondent. Even though it would have been preferable for the psychiatrists not to have had any conversations with third parties or to have included in their reports the substance of any information they used from them, I am satisfied that there was no information which the psychiatrists received in such conversations which materially affected their views.

241 Her Honour went on to discuss the predictive tools which had, to some extent, been relied upon by Dr Brett and Dr Wynn Owen. At [85] she said:

> The next question is whether, given Dr Brett and Dr Wynn Owen used the Static 99 test and Dr Wynn Owen placed some weight on the respondent's PCL-R score in arriving at his opinion, I should place weight on their final opinions. I am of the view that there was a much broader basis for each of the psychiatrist's opinion than the results from those tests. I am satisfied that regardless of them Dr Brett and Dr Wynn Owen would have come to the same opinions concerning the respondent's risk of committing a serious sexual offence if unsupervised in the community. Thus, I have decided to give weight to their opinions.

242 Ground 4 in the appeal criticises this observation, asserting that there was no evidence of this and that the conclusion was 'a matter of pure speculation.' I disagree. When one examines the evidence, accurately

summarised, to the extent that Jenkins J relied upon it, it may be seen that there was ample justification by way of clinical assessment for the conclusion reached by the psychiatrists that, although there was no evidence of major mental illness, the appellant has an antisocial or psychopathic personality disorder which was described. In no respect, in my view, was her Honour guilty of appellable error in relation to her handling of the psychiatric evidence.

243 I have referred to grounds 9 and 10 as being related to the psychiatric evidence. They concern the interview conducted by each psychiatrist as part of the clinical examination of the appellant. I have noted that by s 15 of the DSO Act, when an order is made that the offender undergo examinations by two psychiatrists, each psychiatrist is authorised 'to examine the offender'. There is nothing in the Act which requires the offender to cooperate in the process. Indeed, s 37(4) recognises that he may not cooperate, or cooperate fully, in the examination. As we have seen, the extent to which the offender cooperates, is obviously a relevant matter in the assessment of risk by the court. It is a matter upon which the psychiatrist must report under s 7(3)(a).

244 In support of these grounds, the appellant refers to the rule that upon a person's trial for an offence, evidence of declarations against interest or admissions made outside the court will be admissible against the accused person if the admissions were voluntarily made in the exercise of a free choice to speak or remain silent and if no discretionary ground exists to require the exclusion of the otherwise admissible evidence. The appellant argues that s 42 of the DSO Act characterises proceedings under the Act as 'criminal proceedings for all purposes' and says that the rule should be applied.

245 It is a rule of the common law which operates as an exception to the rule against hearsay, and part of its content is that where a confessional statement sought to be adduced in evidence is made to a person in authority in the course of an official investigation, then it will generally be the case that its voluntariness will not be able to be established unless the interrogator warns the accused person in terms approved by the court about his right to remain silent and the fact that any statements made may be given in evidence. No authority was cited to support the view that such a rule would be applicable, in the context of the procedures under the DSO Act, to a clinical interview of the respondent to an application by a reporting psychiatrist.

246 It is clear, I think, that the law is not as the grounds assert. I note in passing that this argument was not put to Jenkins J, perhaps, if for no other reason, because it was clear that the appellant felt himself to be under no obligation to cooperate with the clinical assessments. In her judgment at [108] - [110], Jenkins J said:

> The respondent co-operated with Dr Brett to a greater extent than he did with Dr Wynn Owen. However, even with Dr Brett, he was difficult to engage and was often superficial in his responses. He liked to dominate the interviews and did not like it when he was directed. As I have said, at a point in his second interview with Dr Brett he became aroused and, in effect, terminated the interview.
>
> Dr Wynn Owen said that the respondent co-operated with him during the first interview but did not do so in the second interview when Dr Wynn Owen was deliberately 'challenging'. The respondent terminated his second interview with Dr Wynn Owen. I have also noted that Dr Wynn Owen found the respondent's answers to be superficial.
>
> It is notable that the respondent denied or minimised his sexual offending when discussing it with both psychiatrists and was not prepared to examine the reasons for his sexual offending or to devise plans to minimise the chances of it re-occurring.

An 'unacceptable risk'

247 Grounds 5, 6 and 7 raise different aspects of criticism concerning her Honour's discussion and conclusion in this regard. Again, there was effectively no elaboration of the matters raised in the written submissions in the argument presented to us.

248 In the first place, it needs to be borne in mind that a risk, which must be found to exist at the time the court is dealing with the application, will be found to be unacceptable, having regard to the matters enumerated in s 7(3) and having regard to the sort of considerations adumbrated by Wheeler JA, Le Miere AJA agreeing, in ***Williams*** at 312 [63], where her Honour said:

> In my view, an 'unacceptable risk' in the context of s 7(1) is a risk which is unacceptable having regard to a variety of considerations which may include the likelihood of the person offending, the type of sexual offence which the person is likely to commit (if that can be predicted) and the consequences of making a finding that an unacceptable risk exists. That is, the judge is required to consider whether, having regard to the likelihood of the person offending and the offence likely to be committed, the risk of that offending is so unacceptable that, notwithstanding that the person has already been punished for whatever offence they may have actually

> committed, it is necessary in the interests of the community to ensure that the person is subject to further control or detention.

249 Needless to say, Jenkins J reviewed the evidence concerned with each of the matters set out in s 7(3). Her conclusions about the psychiatric evidence appear, so far as Dr Brett's evidence is concerned, at [94] of her judgment and so far as Dr Wynn Owen is concerned, at [106] - [107]. Each psychiatrist expressed the view that the appellant presents a high risk of sexual re-offending and they gave reasons for that conclusion, to which Jenkins J refers.

250 Ground 6 complains that to describe the risk as 'high' was meaningless, but in my opinion the submission is not maintainable. Certainly, the use of the word 'high' imports a value judgment to distinguish the level of risk from one which is perhaps, moderate, or merely low. It is a reference to the likelihood of re-offending of this character. In my view, if, as was the case here, her Honour accepted the evidence that the risk of sexual re-offending is high, she was well on the way to the conclusion that there was an unacceptable risk of the commission of a serious sexual offence.

251 At [112] - [114], Jenkins J found that there was a certain pattern to the serious sexual offending of the appellant, the commission of offences with a co-offender and taking the victims to isolated places. She could well have added a reference to the persistence of his conduct and his preparedness to use, or threaten, violence.

252 The trial judge found that the appellant had a propensity to commit serious sexual offences. Her reasoning in this regard is contained in [112]:

> I have received a great deal of evidence which is information of assistance in indicating whether or not the respondent has a propensity to commit serious sexual offences in the future. I take propensity to mean an inclination or a tendency. In my opinion, the following information is important information in indicating that the respondent has a propensity to commit serious sexual offences in the future:
>
> (a) the respondent's past history of serious sexual offending;
>
> (b) the respondent's failure to obtain treatment to assist in his rehabilitation;
>
> (c) the respondent's denial or minimisation of his serious sexual offending;

(d) the respondent's failure to devise plans to assist him not to re-offend once released;

(e) the respondent's poor insight into the existence of his propensity to commit serious sexual offences and of the need to address that propensity;

(f) the respondent's extremely long and extensive criminal record for non-sexual offending; and

(g) the respondent's poor history of compliance with bail and parole orders.

253 Her Honour found that the appellant had not effectively sought to address the causes of his offending behaviour, he had not made any particular strides in efforts towards his rehabilitation, and having regard to all of those matters, her Honour expressed her conclusions at [120] - [124] as follows:

> Based on the evidence, I have no doubt that if the respondent is not subject to a continuing detention order, or a supervision order there is a risk he will commit a serious sexual offence in the future. His history of offending, in particular his commission of serious sexual offences on four separate occasions over 30 years, his denial or minimisation of his serious sexual offences and his failure to undergo treatment or rehabilitative programmes establishes the existence of that risk. The issue, under the Act, is whether that risk is unacceptable.
>
> The respondent submits that, given his age, his health problems and his determination not to return to prison, the risk is not unacceptable.
>
> I have already dealt with the issue of his physical health. It does not seem to me that the respondent's physical health significantly reduces his risk of committing serious sexual offences in the future.
>
> I am satisfied that age is a factor that does correlate with reducing the recidivism risk in sexual offenders over time. However, I take into account Dr Wynn Owen's and to a lesser extent, Dr Poli's views to the effect that the fact that the respondent committed his last serious sexual offence at the age of 53 indicates that in his case age is not a significant factor in reducing his risk of committing further serious sexual offences. I also take into account that the respondent has committed prison offences until recently. Also relevant is Dr Brett's view that whilst age is a relevant factor in reducing the respondent's risk of recidivism, he is still of the view that the respondent is at high risk of re-offending by the commission of further serious sexual offences.
>
> I have already dealt with the third factor relied upon by the respondent. That is that he is personally motivated and determined not to return to prison. I am not prepared to put any weight on that sentiment given his

> previous expression of similar sentiments prior to him re-offending when he was released into the community.

254 Her Honour further summarised these matters in appropriate terms at [130]:

> I have taken into account all the evidence and all the comments that I have made in respect to it. The evidence includes the opinions and evidence of Dr Brett and Dr Wynn Owen. I have also considered and taken into account the inferences that can be drawn from the defendant's past offending. I have considered those matters in light of the standard of proof, the statutory provisions and the Court of Appeal's dicta in ***Williams***' case. I conclude that the DPP has proven that there is an unacceptable risk that if the respondent is not subject to a continuing detention order or a supervision order, he will commit a serious sexual offence. Thus, I find that the respondent is a serious danger to the community.

255 In my opinion, no criticism, on the ground that the reasons were inadequate to explain the reasoning of the judge in reaching the fundamental conclusion that she was satisfied that there was an unacceptable risk of the commission of a serious sexual offence, can be justifiably made.

256 Nor, I think, can it seriously be contended that the matters relied upon and presented as arguments by the appellant, were overlooked or not considered by Jenkins J. She referred expressly to age, to the appellant's medical condition, to the nature of the offending on the occasions and over the period of its occurrence, the appellant's assertions about his rehabilitation and his motivation not to offend again, and matters concerning the appellant's past alcohol and cannabis use.

257 Finally, I can see nothing to support the contention that her Honour reversed the onus of proof for which s 7(2) provides. At [130] she expressly did not do so.

258 This leads me to the contention raised in ground 11 of a reversal in the onus of proof in respect of the impact of the appellant's physical health problems. Her Honour had regard to the impact of age on the risk of sexual re-offending. At [92] she referred to the evidence given by Dr Brett and at [93] she referred to the article which was received in evidence as exhibit 7. She referred to the evidence of Dr Wynn Owen in relation to age at [104]. She tied this consideration in with a reference to the appellant's 'serious health problems' at [113] where she concluded:

> There is no evidence that his physical health problems will prevent him from committing further serious sexual offences or that they significantly diminish the risk of him committing further serious sexual offences.

As has been seen, her Honour returned to this topic at [122] - [123]. It is clear that so far as the appellant's health is concerned, her Honour was simply expressing a view about whether this alone, or in combination with the appellant's age, was a material consideration of any weight. That has nothing to do with the reversal of an onus of proof.

Convictions and offending behaviour as a child

259 Ground 13 asserts that evidence of both the convictions and the offending behaviour was inadmissible. Reliance is placed on the decision of McKechnie J in ***Director of Public Prosecutions (WA) v GTR*** [2007] WASC 318. As I have noted, that matter has been dealt with on appeal: ***The State of Western Australia v GTR***. At [106] - [119] I expressed the view, obiter in that case, that evidence of convictions as a child is admissible, if otherwise relevant, and also that the evidence of offending behaviour as a child, if otherwise relevant, would be admissible. I would adhere to those views, for the reasons there expressed, in this case. In the result, ground 13 cannot, in my view, be maintained.

Was the finding of a serious danger to the community open on the evidence?

260 Ground 12 puts this in the form of an assertion that the finding was unreasonable and not supportable by the admissible evidence. I have discussed the significant features of that evidence by reference to the judgment of Jenkins J.

261 In brief summary, there was evidence to support her Honour's conclusions in respect of each of the matters set out in s 7(3) of the DSO Act. This appellant, aged 61 when before her Honour, had been guilty of serious sexual offending on a number of occasions, spread over many years. On the last occasion he was 53. There was ample psychiatric opinion evidence that in the psychiatrists' view he presents a high risk of re-offending sexually despite his age and physically precarious health. He has continually denied or minimised the seriousness of his offending. He has made no significant efforts to come to grips with the cause of that offending and obtain treatment.

262 The best he came up with was a self-serving observation that upon release he would engage in counselling if required, but he has a poor history of compliance with the law and he has committed offences while

in prison. He presented little in the way of effective plans to prevent his re-offending in the community without the compulsion of a supervision order. His serious sexual offending is the product of a personality disorder which remains extant.

263 In my opinion there was abundant evidence to support her Honour's conclusion that the appellant is a serious danger to the community. Her Honour did not fall into error in her consideration of this case. There has been no miscarriage of justice. In my view, the appeal should be dismissed.