

CITATION: *Commissioner of Police v ND* [2015] NTMC 010

PARTIES: Commissioner of Police
v
ND

TITLE OF COURT: Youth Justice Court

JURISDICTION: Child Protection (Offender Reporting and
Registration) Act

FILE NO(s): 21432556

DELIVERED ON: 5th May 2015

DELIVERED AT: Darwin

HEARING DATE(s): 17th April 2015

JUDGMENT OF: Ms Fong Lim SM

CATCHWORDS:

Prohibition Order – Youth offender – limitations on order-“risk”-“nature and pattern of conduct”-

Statutory Interpretation -Child Protection (Offender Reporting and Registration)
Act –ss 71,72,73- Prohibition Order- restriction of liberty- preventative not punitive

Fardon v Attorney-General (Qld) [2004] 210 ALR 50

Attorney – General v EE (No.2) [2015] NTSC 68

Commissioner of Police v Tak (No.2) [2011] WADC 219

Serious Sex Offenders Act (NT)

Community Protection (Offender Reporting) Act WA s 90

REPRESENTATION:

Counsel:

Applicant: Mr Dunham

Respondent: Mr Sexton

Solicitors:

Applicant: Solicitor for Northern Territory

Respondent: North Australian Aboriginal Justice Agency

Judgment category classification: C

Judgment ID number: 010

Number of paragraphs: 66

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21432556

BETWEEN:

COMMISSIONER OF POLICE
Applicant

AND:

ND
Respondent

REASONS FOR JUDGMENT

(Delivered 6th May 2015)

Ms FONG LIM SM:

1. The Commissioner of Police (“the Commissioner”) makes application for a prohibition order under section 71 of the Child Protection (Offender Reporting and Registration) Act NT (“the Act”) in relation to ND who was found guilty of a qualifying offence in July of 2012. It is accepted that ND is a reportable offender and can be subject to an application under section 71 of the Act. ND is a youth who will turn 18 years old on the 3rd July 2015 and until then is in the care of the CEO of the Department of Children and Families (NT).
2. ND pleaded guilty to an act of gross indecency upon a 3 year old female child where he admitted to rubbing his erect penis on the outside of the

child's vagina. He stopped his actions when caught out by the mother of the victim and immediately made admissions to the police the next day when arrested. ND was 13 at the time of his offending, one month shy of his 14th birthday. He was sentenced to 2 years and 8 months detention with a non parole period of 16 months. At the time of sentence he had been in detention for 11 months on remand.

3. At the completion of his non parole period in September 2012 he was not recommended to be released on the basis of the opinion of forensic psychologist Dianne Szarkowicz that he was still a high risk of recidivism unless he received sex offender treatment and continued psychological treatment for his complex problems.
4. For the next year he was reviewed by the parole board and the psychologists and was eventually recommended for release on certain conditions including that he had stable accommodation and access to services to continue to address his psychological issues. He never achieved parole because of delays in finding him suitable accommodation eventually indicating to the Board in February 2014 that he would rather complete his sentence because of all of the delays in the parole process. He was released on the 16th April 2014 into the care of the Department of Children and Families.
5. The Commissioner made this application in July of 2014 and on the 29th July 2014 was granted an interim prohibition order in the following terms: that the Respondent was
 - a. Not to associate or have contact with any child under the age of 18 years, either verbal or non-verbal under any circumstances, unless such person's parents, guardians or other responsible persons over the age of 18 years including your guardians or carers from the Department of Children and Families remain immediately present and consent to you being present.
 - b. Not to be in direct or indirect communication with any person under the age of 18 years under any circumstances unless such

person's parents, guardians or other responsible persons over the age of 18 years including your guardians or carers from the Department of Children and Families consent to you communicating with that person and remain present during that communication or your guardian or carer from the Department of Children and Families is present and aware of you conducting the communication.

- c. Not to attend, remain, loiter or be within 100 metres of the vicinity of educational or childcare premises frequented or intended to be frequented by children, including but not limited to playgrounds, play-rooms, school, pre-schools, kindergartens, libraries and bus stops unless in the company of your Department of Children and Families guardian or carer.
- d. Not to attend remain, loiter of be within 100 metres of the vicinity of recreational or entertainment premises frequented or intended to be frequented by children, including but not limited to parks, swimming pools or like venues, sporting events, food outlets or other places of recreation, entertainment, unless, at all times in the immediate company of a responsible adult, or your Department of Children and Families guardian or carer.
- e. To reside at Yirra House under the Protection Order granted to the Department of Children and Families and to obey all reasonable directions of guardians and/ or carers of the Department of Children and Families, including not leaving or absconding from the premises.
- f. Not to reside, visit or remain at any residence or location occupied by any persons under the age of 18 years in the absence of such person's , guardians or other responsible adult over the age of 18 years and without the prior permission and consent of such persons for you to be present.
- g. Not to enter or remain at Urapunga Community Outstation near Ngkurr or Ngkurr Community except with the permission of the Commissioner of Police, or delegate and must give at least seven days' notice of travel to the Commissioner of Police or delegate of such intention and to provide the reasons for such travel to Urapunga Community Outstation or Ngukurr Community.
- h. Subject to order g, upon return from Urapunga Community Outstation or Ngkurr Community advise the Commissioner of

Police or delegate that you have returned within seven days of returning.

- i. Not to attend, remain or loiter at bus stops, except for the purpose of using public transport with your Department of Children and Families guardian or carer.
- j. You are prohibited from knowingly associating with any other reportable offender.
- k. Prior to leaving Yirra House when you turn 18 years of age , inform the Commissioner of Police or delegate of where you intend to reside, seven days prior to leaving Yirra House.
- l. Not to travel to any other place or location within the Northern Territory but outside of Darwin from Yirra House without providing at least seven days notice to the Commissioner of Police and providing the reasons for such intention, the intended destination, where and with whom you will visit, associate or reside with.
- m. You are to attend any medical appointments including psychological appointments at the direction of the Department of Children's and Families guardians and or carers.
- n. Not to purchase, possess or consume alcohol, illicit drugs or volatile substances.
- o. You are prohibited from buying, possession, viewing or otherwise accessing pornographic images.
- p. Any other order this Honourable Court sees fit to impose.
- q. This order not to have effect whilst the Respondent is incarcerated in Don Dale Juvenile Detention Centre.

sic

6. The Commissioner now seeks a two year order in less restrictive terms as follows, that the Respondent is:

- a. Not to associate or have contact with any child under the age of 15 years, either verbal or non-verbal under any circumstances, unless :

- (i) such person's parents, guardians or other responsible persons over the age of 18 years remain immediately present and consent to you being present; or
 - (ii) as required for a lawful commercial transaction conducted in a business premises.
- b. Not to be in direct or indirect communication with a person under the age of 15 in any circumstances, unless:
 - (i) such a person's parents, guardians or carer or other responsible persons over the age of 18 years consent to you communicating with that person and remain present during that communication; or
 - (ii) as required for a lawful commercial transaction conducted in a business premises.
- c. Not to attend, remain, loiter or be within 100 metres of the vicinity of educational or childcare premises frequented or intended to be frequented by children, including but not limited to playgrounds, play- rooms, schools, pre-schools, kindergartens, and libraries without the prior written approval of the Commissioner of Police.
- d. Not to attend, remain, loiter or be within 100 metres of the vicinity of recreational or entertainment premises frequented or intended to be frequented by children, including but not limited to parks, swimming pools or like venues, sporting events, food outlets or other places of recreation, entertainment, unless, at all times in the immediate company of a responsible adult who has no history of sexual offending and who is aware that you have has committed a sexual offence against a child.
- e. Not to reside, visit or remain at any residence or location occupied by any persons under the age of 15 years in the absence of such persons, guardians or other responsible adult over the age of 18 years and without the prior permission and consent of such persons for you to be present.
- f. Not to attend or remain or loiter at bus stops, except for the purpose of using public transport.

- g. You are prohibited from knowingly associating with any other reportable offender.
- h. Not to purchase, possess or consume alcohol, illicit drugs or volatile substances.
- i. You are prohibited from buying, possession, viewing or otherwise accessing pornographic images
- j. This order is not to have effect if the Respondent is incarcerated in Don Dale Juvenile Detention Centre.

sic

- 7. The Respondent objects to the making of the order and submits the orders sought are unnecessarily restrictive and balanced against the low level of risk would not reduce that risk. The Respondent submits the medical evidence supports a finding that the terms of the order requested would be punitive upon him as they would deny him the opportunity to continue to mature and develop pro-social skills and relationships.
- 8. Alternatively the Respondent submits if the court is minded to make an order, that order must be the least restrictive possible.
- 9. The burden of proof lies with the Commissioner to prove on the balance of probabilities to a high degree that there is reasonable cause to believe the Respondent poses a risk to the sexual safety of children and that the making of the order may reduce that risk (see section 72 of the Act).
- 10. This Act is one of a group of legislation enacted by parliaments all over Australia that seek to restrict the liberty of a person with the intention of protecting more vulnerable members of our community. In the Northern Territory other such legislation is the Domestic and Family Violence Act which allows the issue of a Domestic Violence Order even when the Respondent is not facing criminal charges and the Serious Sex Offenders

Act which allows for the indefinite detention of offenders or continued supervision in the community after they have completed their sentence.

11. The High Court in *Fardon v Attorney –General (Qld) (2004) 210 ALR 50* considered the effect of the Serious Sex Offenders Act(Qld) and ruled that such legislation, which encroaches on a person’s liberty beyond the term of a prisoner’s sentence, must be read in the Respondent’s favour if unclear and the burden of proof, is higher than the civil balance of probabilities.
12. Given the nature of the Act a court must also be careful to ensure any such orders made are not punitive.
13. In *Attorney –General of Northern Territory v EE (No2) [2013] NTSC 68* in considering an application under the Serious Sex offenders Act (NT) Her Honour Justice Blokland applied the reasoning in *Fardon’s* case and reiterated that of this sort of provision requires strict interpretation because substantial questions of civil liberty arise. Her Honour also emphasised that while the object of the legislation is to prevent further offending the court must be careful to ensure any order made should not have punitive consequences for the Respondent and any ambiguity should be determined in favour of the Respondent.
14. There are no authorities which consider the relevant section under the Child Protection (Reporting and Registration) Act NT or in particular the application of that Act in relation to a young offender.
15. Unlike the Serious Sex Offenders Act, the Child Protection (Reporting and Registration) Act does not set out a specific object. The preamble supports the view that the object of the Act is to prevent re-offending. The preamble reads as follows:

“An Act to require certain offenders who commit sexual or certain other serious offences against children to keep police informed of their whereabouts and other personal details for a period of time in order to reduce the likelihood that they will re-offend and in order to

facilitate the investigation and prosecution of any future offences that they may commit, to prohibit certain offenders from working in child-related employment, to enable courts to make orders prohibiting certain offenders from engaging in specified conduct, and for related purposes”.

16. Although there is no secondary object for the rehabilitation of the offender as there is under the Serious Sexual Offenders Act it is my view that in relation to a young offender his development and rehabilitation are relevant considerations. This is a view that is reflected in the section 72(3)(e) and (i) where the court is required to consider the age and the educational needs of the young reportable offender.
17. It is also important to note that the test under section 6 of the Serious Sex Offenders Act for a supervision or indefinite detention order is arguably higher than that under section 71 of the Child Protection (Offender Reporting and Registration) Act. Under the Serious Sex Offenders Act the test is whether the person is a “serious danger to the community” and poses an “unacceptable risk”. In the present case the Respondent only has to be a “risk” having regard to the nature and pattern of the Respondent’s conduct. Of course given the possibility of the substantial curtailment of the Respondent’s personal liberty that risk must be based in evidence. There must be acceptable and cogent evidence that there is a high degree of probability that the Respondent presents as a “risk” to the sexual safety of children and that the order sought may reduce that risk.
18. While sections 71 and 72 of the Act have not been the subject of decisions in the Northern Territory there have been some decisions in other jurisdictions considering similar provisions.
19. Of particular assistance is the decision *Commissioner of Police v Tak* [No 2] [2011] WADC 219 where Martino CJDC at para 17 decided (in relation to section 90 of the Community Protection (Offender and Reporting) Act[WA] and applying the reasoning in *Commissioner of Police v ABC* [2010] WADC

161 [16] - [17]) that the risk must be more than a “fanciful, minimal or theoretical risk”. Section 90 of the Western Australian Act is couched in very similar terms as to section 71 of the Act.

20. I adopt Justice Martino’s reasoning and find that for the court to be satisfied there is a “risk” to the sexual safety of children then that risk must be more than fanciful, minimal or theoretical. The assessment of the level of risk must be based on evidence, having regard to the nature and pattern of conduct of the person subject to the application and the curtailment of the person’s liberty.

The Evidence

21. The Court was presented with expert evidence of Dr Sullivan and Mr Nussey. Dr Sullivan was commissioned by the Respondent’s lawyers to provide a report into the risk factors which may contribute to re-offending, Mr Nussey was commissioned by the Department of Children and Families to conduct a therapeutic and risk assessment of the Respondent and recommend a plan to address his therapeutic needs. Both practitioners are eminently qualified to give the opinions sought. Dr Sullivan has extensive experience as a forensic psychiatrist working with both adult and youth sex offenders in the criminal justice system and providing treatment to those people. Mr Nussey has extensive experience as a psychologist working in the area of child protection and risk assessment of adult and juvenile sexual offenders. Dr Sullivan spent about an hour with the Respondent over a video link and Mr Nussey saw him face to face for several hours two days before Mr Nussey gave evidence. Mr Nussey has also been involved in assisting the carers of the Respondent in their therapeutic treatment of the Respondent. While both Dr Sullivan and Mr Nussey accepted that the time spent with the Respondent was less than ideal, that is too brief, Dr Sullivan had the benefit of previous reports of Dr Szarkowicz and Mr Nussey had access to the observations of the present carers of the Respondent.

22. Both Dr Sullivan and Mr Nussey were available for cross examination.
23. The treating psychologist Dr Szarkowicz who had a therapeutic relationship with the Respondent over 3 years was not available in court to give evidence even though most other expert reports refer back to her observations and reports. There was no real explanation as to why she was not made available to the Court by either the Applicant or the Respondent.
24. The Court also heard evidence from Ms Thompson the Respondent's present caseworker from the Department of Children and Families who will be responsible for his leaving care plan and who provided the court with some detail of what is planned for the Respondent's transition into the community when he leaves care upon turning 18 years on the 3rd of July 2015. There are no set plans as to where the Respondent might live upon turning 18 however Ms Thompson has confirmed the Department of Children and Families will continue to assist him in finding appropriate accommodation subject to the terms of any prohibition order the Court may make.
25. The Court was also provided with affidavit evidence of Police Officers Furnell and Maurice annexing further earlier reports from Dr Raeside, forensic psychiatrist, Ms Garda, a neuropsychologist, and parole reports on the Respondent during his incarceration. The affidavit of Officer Furnell proffered submissions and made assertions of her opinion as to what the court should conclude. I place no weight on those submissions or her opinion given that those matters are clearly not appropriate to be contained in an affidavit of evidence, and am I not satisfied the Officer qualified to make such assertions.
26. The reports of Dr Raeside dated the 4th December 2013 and of Ms Garde of the 3rd April 2014 were annexed to the affidavit of Officer Furnell and relied upon by the Applicant. Neither were available for cross examination and their reports were somewhat dated. Less weight can be placed on their evidence in those circumstances.

27. The Court was also provided with copies of the parole reports and copies of the reports of Dr Szarkowicz written for the purpose of those parole reports.
28. The parole reports show that since June 2013 the Respondent had been recommended for release on parole on strict conditions relating to the use of intoxicating substances, access to children under the age of 10, stable residence and a requirement to continue to engage in counselling. The recommendations were made with reference to the reports of Dr Szarkowicz.
29. The Respondent did not achieve parole because each time he came before the Board he was unable to be provided with suitable accommodation because the Department of Children and Families did not provide a suitable placement for him. It should be noted that originally the Department of Children and Families was involved in trying to find accommodation for the Respondent even though he was not formally in the care of the CEO. The Respondent had been subject to Temporary Protection Orders which had expired and only came into the more permanent care of the CEO on the 13th June 2014. Prior to that date the assistance from the Department of Children and Families was sporadic and sometimes unhelpful.

Is there a risk to the sexual safety children from the Respondent?

What is the nature and pattern of conduct of the Respondent?

30. The evidence of the Respondent's conduct before and after his incarceration is contained in various reports and the evidence of Ms Thompson
31. In relation to sexual behaviour there is only one proven incident of sexual offending and that is the offence for which he was incarcerated. There was a charge relating to similar offending a month later however that was not pursued and no evidence was offered. Accordingly, there is no **pattern** of sexual offending conduct to be considered in relation to this Respondent. He is not like other people who might be subject to an application under this

Act, such as someone who has been shown to be a habitual offender or groomer of children.

32. While incarcerated there was evidence of public masturbation and inappropriate touching of other inmates. There were also instances of misbehaviour (not sexual) while the Respondent spent 11 months on remand.
33. While incarcerated the Respondent was treated for his habit of auto asphyxiation, which may have been for sexual arousal. That behaviour reduced and ceased over his period of incarceration.
34. After release there was one instance of trying to access adult pornography on the internet and of “grinding against a pole”.
35. Significantly since release he has had an age appropriate sexual relationship with a teenage girl.
36. In relation to other conduct during his incarceration the Respondent’s behaviour became more compliant and less troublesome as time passed and he engaged in treatment with Dr Szarkowicz until she ceased treatment in 2013 stating she could not achieve any more while the Respondent was incarcerated.
37. Once released the Respondent fully engaged in training and any other activities organised for him by his carers and was compliant with his care arrangement for the main part. He was also compliant with the interim prohibition order except for the times when he left his residence without permission and visited family in another part of Darwin. He has, since the hearing of this application, been charged with five instances of failing to comply with his prohibition order and one unlawful use of motor vehicle. Four of the breaches predate the hearing of this application and the fifth allegedly occurred on the 21st of April, 3 days after the hearing of the application. He has indicated he will be pleading guilty to all of those charges. The Respondent’s breaches of the interim prohibition order

involved being absent from his residence without permission for short periods of time after which he returned voluntarily. There is no suggestion that there was any unlawful behaviour on those occasions.

38. The facts supporting the unlawful use of motor vehicle charge are that he was a passenger in a car stolen from a carer by another youth. He saw the other youth stealing the vehicle and he jumped into the passenger seat.
39. The Respondent has developed a stable relationship with his carers and continued to engage with therapeutic services until very recently.
40. The Respondent has been in the community since the 16th April 2014 and there have been no instances of the Respondent reoffending in a sexual manner.

What is the risk to sexual safety of children?

41. It is conceded by both Dr Sullivan and Mr Nussey that the Respondent is at risk of re-offending. However they conclude the risk is low although the level of risk might increase in certain conditions. They also both conclude that the Respondent did not show any indication of a preoccupation or sexual interest in prepubescent children male or female (see paragraph 60 of Dr Sullivan's report and paragraph 124 of Mr Nussey's report). They held this view even when referred to comment in Dr Szarkowicz's report to the parole board of the 14th of September 2013 where there was some concern of the Respondent's interest in another detainee's little sister who had come to visit who the Respondent described as "cute".
42. They were both concerned that the Respondent is not cut off from continued support and that he is not allowed back into the community without a gradual release of the limitations on him so he can adjust his behaviour accordingly (see paragraph 64 of Dr Sullivan's report and paragraphs 131-135 of Mr Nussey's report).

43. From June of 2013 the parole reports, referring to Dr Szarkowicz's reports, recommended the release of the Respondent on parole on certain conditions. Unfortunately for the Respondent he did not receive parole because of the inability of the Department of Children and Families to provide a proper plan for his accommodation upon release and finally he decided that the process was taking so long that he chose to serve his full term.
44. By the end of his incarceration the Respondent's behaviour had improved. He had acknowledged what he had done was wrong. He was able to express strategies for dealing with boredom and frustration and had demonstrated the ability to self regulate regarding his self asphyxiation.
45. Both Mr Nussey and Dr Szarkowicz say these developments were partly because of treatment and partly because the Respondent had matured over the period of time he was incarcerated (see paragraph 44 Dr Sullivan report, paragraphs 105-108 Mr Nussey's report and paragraphs 4 & 5 of Dr Szarkowicz's report of the 12..4.2013).
46. Since release from Don Dale the Respondent has been in the care of the Department of Children and Families and housed in their secure facility, being a group home staffed by Department of Children and Families. He has also been on the restrictive interim order as set out above. Since release the Respondent has established a relationship with his carers and continued to receive therapeutic services through the Department of Children and Families. He has participated in that therapy until very recently when he made himself unavailable for an appointment with the therapist he had been seeing for a short while. There is no explanation as to why he was unavailable nor did we hear from that therapist as to his sessions with the Respondent. There could be a myriad of reasons why this occurred. One could be he didn't feel it was assisting him or that he did not have a connection with that particular therapist. There was no evidence to support any one theory.

47. While subject to the restrictive interim order the Respondent has also attended and participated in employment training and football without incident.
48. The Respondent has also had an intimate, age appropriate, relationship with a female. That relationship was not seen as abnormal by the carers at the house.
49. In relation to substance misuse there was a suggestion by Ms Thompson that the Respondent may have been consuming cannabis on one or two occasions however that was denied by the Respondent and there is no objective confirmation of cannabis use. Ms Thompson could only put it as high as a suspicion by the carers and herself.
50. There have been some breaches of the interim order by the Respondent by absconding from his residence to visit family. There is no indication that on the occasions he has absconded he has used substances or that he has refused to return to the residence. Since the hearing of this application the Respondent has been charged with further breaches of the order, by leaving his residence without permission and finally unlawfully using a motor vehicle 3 days after the hearing of this application. Those charges have not been resolved although the Respondent has indicated pleas to all charges.
51. The allegation in relation to the unlawful use of motor vehicle is that he was a passenger in a stolen car driven by another young person who resided at the same facility. It is alleged the other youth had an argument with the carer, took the vehicle and the Respondent jumped into the car just as the other youth was driving off. This is an example of the Respondent's continued inability to completely control his impulses.
52. While it is clear the Respondent has responded well to treatment and has matured in his thinking it is also clear that there is still some work to be done to ensure he is, in the opinion of the medical practitioners, able to

reintegrate into society without further assistance. It is the opinion of both Dr Sullivan and Mr Nussey that the because the Respondent has been in a restrictive environment for the last 4 years it is difficult to say with any certainty whether he has the ability to self regulate in the community without restrictions.

53. The medical practitioners caveat their classification of the Respondent as a low risk of re-offending not in comparison to the general population but in comparison to other sex offenders' likelihood of re-offending.
54. The medical practitioners also agree that the young age of the Respondent means that his risk indicators are dynamic as he is still developing physically, psychologically and emotionally. It is also noted that while the Respondent has a diagnosis of ADHD and epilepsy he has no cognitive deficiency and has an ability to learn acceptable sexual behaviour and acceptable social interaction.
55. In the circumstances described above I find myself satisfied to a high degree on the balance of probabilities that the Respondent satisfies the first arm of the test and that is he poses a risk to the sexual safety of children and that risk is more than fanciful, minimal or merely theoretical. I must now consider whether the making of the order may reduce the risk.
56. When determining whether to make an order under section 72 I must take into account certain factors and those factors must be considered in the context of the section that is whether those factors are indicative of the risk and /or point to the whether an order may reduce that risk and the terms of the order.
 - a. **The seriousness of the reportable offender's reportable offences** – the Respondent has only one reportable offence in his criminal history and while that was a serious offence for which he was incarcerated it cannot be submitted that the risk to children is increased because of the Respondent's past offending. There is no pattern of sexual offending.

- b. **The period of time since those offences** - it has been 4 years since the offence and while 2 years and 8 months of that time has been spent in detention, since release there has been no sexual re-offending.
- c. **The age of the offender at the time and the age of the victim** – the offender was 13 years and 11 months at the time of the offending and the victim 3 years old. The relevance of the age difference can only be to consider the power imbalance between the two parties, how easily the offender could influence the victim by grooming for example, and the physical advantage the offender may have had over the victim. In the only relevant offence the Respondent clearly had a physical advantage over his victim who because of her age was physically unable to defend herself or even verbally discourage the Respondent.
- d. **The difference in age between the offender and the victim** - there was 10 year difference in this case. It was not a case where both parties were of similar age and therefore the offending may be of lesser concern, neither was it a case of an adult for example a middle aged man offending against a young person where paedophilia may be of some serious concern. It was a case which the psychologists and psychiatrist characterise as opportunistic when the Respondent was intoxicated, with poor impulse control and stimulated by pornography.
- e. **The reportable offender's age** – the Respondent is about to turn 18 years of age. From the time of his offence the Respondent has matured and through that maturity has expressed insight into his offending and what has contributed to that offending . He has learnt that private masturbation is an appropriate reliever of sexual desire.
- f. **The seriousness of the offender's criminal record** – apart from the one sexual offence in 2011 the Respondent has very limited criminal history. The offending was all dealt with by the Youth Justice Court by diversion and good behaviour bonds.
- g. **The effect the order sought on the offender in comparison to the level of risk of further reportable offending-** the order sought will have the effect of the Respondent not being able to be with young people under the age of 15 except in the company of a responsible adult or conducting a business

transaction. He will not be able to be within 100 metres of any place children may be unless with and responsible adult who has knowledge of his prior offending. He could not live with any child under the age of 15 or visit their house unless there is a responsible adult present and with the consent of that person to be there. Taken to the extreme if the orders were put in place in their present form the Respondent could not walk along a street adjacent to a school or park or indeed go to a park and kick a football with a friend or relative younger than 15 without an adult present. The Respondent would also have to remain sober for two years and not access pornography. The restrictions in relation to access to educational facilities will give the Commissioner the power to decide where and with whom the Respondent goes to school and practically where the Respondent lives. The term of the order relating to education would take away the ability for the Respondent to decide where he might want to finish his schooling or do vocational training.

- h. The risk described by the medical practitioners is that the Respondent is at low risk of re-offending because he has matured over the past 4 years, that risk would be increased with access to intoxicating substances and exposure to pornography, the risk is also increased should the Respondent not be slowly re-integrated into the community. The practitioners also say the risk is increased if the Respondent is in a situation where his impulse control is compromised eg intoxication, frustration or anger and lack of pro social activities (see paragraphs 60-65 of Dr Sullivan's report and 124 -127 and 131-135 of Mr Nussey's report, Dr Szarkowicz's report of the 19.9.2013 page 3). The risk is increased if he is feeling sexually aroused and he is alone with a young female. He shows no paedophilic tendency only opportunistic tendency to find someone to be the object of his sexual desire.

The Respondent needs the opportunity to start to make decisions for himself and to put into practice the skills he has learnt through counselling. The order sought will not afford him that opportunity and would be punitive in the sense that it would limit the opportunity for the Respondent to develop pro-social relationships with other young people.

- i. **The circumstances of the reportable offender, including the reportable offender's accommodation, employment needs and integration into the community** – the Respondent's accommodation will continue in the present secure facility run by the Department of Children and Families and there has been

some planning as to the options available to him once he turns 18. Unfortunately for the Respondent nothing has been confirmed partly because the Department were concerned about what restrictions may be placed on the Respondent through a prohibition order. The Respondent has suggested some options he looks favourably on:

1. Return to Urapunga and get work on a cattle station
2. Stay in Darwin and complete his schooling
3. Live in Katherine and find work

The Respondent has not set his mind to any particular option although that is not unusual for a 17 year old teenager.

Wherever the Respondent decides to reside he will be required to report that address to Police as per his obligations as a reportable offender under Part 3 of the Act. The medical practitioners opine it is very important for the reduction of the risk of re-offending that the Respondent is gradually allowed to start to make decisions for himself, develop positive relationships with others and engage in pro-social activities such as training, employment and sport.

- j. **Educational needs of the Respondent** – since his release the Respondent has been attending vocational training in Construction and Land Management and Horticulture. He almost completed the Certificate IV in construction but then changed to Certificate 1 in Horticulture and Land Management he hopes to complete that Certificate.

Should an order be made and if so in what terms?

57. The Applicant submits, taking into account the experts' opinions, the uncertainty of the Respondent's plans, the risk he poses to the sexual safety of children, and his recent refusal to participate in therapy, that the Court should be satisfied that unless a prohibition order is made in the terms put forward the sexual safety of children is at risk of harm from the Respondent.
58. However that is not the correct test. The test is that the Court must be satisfied on the balance of probabilities that an order may reduce the risk. I must also be satisfied that any order made is not punitive and given the Respondent is a person under the age of 18 it is also important to give weight to the opinions of the doctors and psychologists that he must be allowed to mature and develop in an unrestricted environment if he is going

to be able to develop healthy relationships with other young people and the community in general.

59. In cross examination Dr Sullivan and Mr Nussey were asked whether the risk of the Respondent re-offending would be higher if the Respondent was placed in the same situation he was in when he offended. That is, if the Respondent were intoxicated, viewing pornography and had access to a female child was there a higher risk he may reoffend. Both Dr Sullivan and Mr Nussey agreed that was a risk. However it is also clear that the Respondent was a virgin at the time of his offending and since then has had an age appropriate sexual relationship. This fact was not included in the scenario Dr Sullivan and Mr Nussey were asked to comment on. The Respondent could never be placed in exactly the same position as he was at the time of his offending given those developments in his sexual life and that is clearly an example of why the risk factors for a young person are described by the psychologists as dynamic.

Conclusion

60. Taking into account all of the above, I can be satisfied upon the balance of probabilities that the Respondent should avoid situations where his ability to self regulate is lessened. He should avoid intoxication and associating with other people who may encourage unacceptable and risky behaviour including sexual offending against young girls. I am not satisfied there is sufficient evidence to find with a high degree of probability that the Respondent is at risk of sexual offending against older girls or against males. I am not satisfied on the balance of probabilities to a high degree that the Respondent is at risk of re-offending when he is sober and involved in pro-social activities such as sport, training and education. The evidence supports a finding that the Respondent's risk of re-offending is mitigated if he is allowed to reintegrate into society with limited restrictions. The evidence also supports a finding that if the Respondent continues to be severely

restricted in what he can do he will not be able to develop life skills to make appropriate decisions in relation to his sexual urges.

61. Given the opinions of Dr Sullivan, Mr Nussey and Dr Szarkowicz I am satisfied that an order may reduce the risk posed by the Respondent however it is my view the effect of the orders sought by the Commissioner would be punitive on the Respondent requiring him to have no contact with children male and female under the age of 15, requiring him not to be able to stand on a street opposite a school or any other child care facility unless with the prior written permission of the Commissioner of Police, he couldn't be at a public swimming pool with a group of teenaged friends without an adult in attendance or participate in a football game without being in the immediate company of a responsible adult or go to the movies with a group of friends without being in the immediate company of a responsible adult who knows of his offending. There are many other examples of why the effect of these orders would be punitive.
62. The Respondent submitted if the Court was satisfied that an order be made then the restrictions relating to access to other children should be limited to girls under the age of 10 given there is no evidence of offending against males or older girls. There is some concern however that the Respondent still has an issue with his impulse control and given the age of consent is 16 years and there is a defence relating to girls between 15 and 16 years it is my view his access to girls under 15 years should be limited.
63. The Respondent also submitted that as he has been on the interim order for about 10 months, to impose a further 2 years of restrictions on him would be punitive given the maximum length of time for a prohibition order relating to a young offender is 2 years. The effect of a two year order now would mean the Respondent would be subject to a prohibition order for almost 3 years. The Respondent submitted 6 months would be more acceptable.

64. Further it is of note that the Respondent has been in the community for 10 months on restrictive conditions and in a very restrictive living arrangement which has given him limited freedom and there has been no indication of a desire to sexually offend.
65. It is my view that the risk the Respondent poses may be reduce if he is subject to a prohibition order however I am also of the view that the order should be in terms that allows the Respondent some freedom to mature and continue to show his ability to self regulate and be involved in pro-social activities.

Order

66. Pursuant to section 71 of the Child Protection (Registration and Reporting) Act I make the following order:

For a period of 12 months the Respondent is prohibited from:

- a. Remaining at any place where he is alone with any female under the age of 15 years and to leave such place immediately when it is evident to the Respondent he is alone with a female who is under the age of 15.
- b. Not to purchase, possess or view or otherwise access pornographic images.
- c. Not to purchase, possess or consume alcohol, illicit drugs or volatile substance.

Dated this 5th day of May 2015.

Tanya Fong Lim SM
STIPENDIARY MAGISTRATE

