Supervision Orders, Judicial Review and Human Rights

Matt Black
Barrister-at-Law

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Introduction

1. The *Dangerous Prisoners (Sexual Offenders) Act 2003* (the **DPSOA**) provides for the making of 'continuing detention orders' and 'supervision orders'. The focus of this paper is the operation of 'supervision orders' and the scope for review of the various exercises of power by the corrective services officers who provide the 'supervision'.

2. This paper will briefly discuss:

   (a) Supervision orders generally.

   (b) Some of the mandatory requirements of a supervision order.

   (c) The exercise of power by corrective services officers.

   (d) Avenues to review the exercise of power by corrective services officers.

   (e) The role of human rights in the exercise of power by corrective services officers.

3. This does not purport to be a comprehensive discussion of these topics.

Supervision orders generally

4. The definition of "prisoner" in the DPSOA is a "prisoner within the meaning of the *Corrective Services Act 2006*" (the **CSA**), which generally means "a person who is in the chief executive's [ie, Commissioner's] custody". A person who is not serving a period of imprisonment is not in the Commissioner's custody, but s 43A(3) of the DPSOA relevantly extends the meaning of a "prisoner" as follows:

   > A person who is subject to a supervision order or interim supervision order remains a prisoner for the purposes of any relevant application, appeal or rehearing.

5. Also, a person who is subject to a supervision order is generally referred to as a "released prisoner": DPSOA, s 18, Sch 1.

6. Under s 13(5), if the Supreme Court is satisfied that a "prisoner is a serious danger to the community" (as provided for in s 13(2)-(4)) the Court may order:

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (“***continuing detention order***”); or

(b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (“***supervision order***”).

7. The DPSOA “establishes a rather high hurdle to be overcome before an application for an order under s 13 will be successful”: *Attorney-General (Qld) v Watt* [2012] QSC 291, [37]. The hurdle is, though, far from an impossible one: as at 2019, there were over 130 individuals subject to a supervision order.

8. Section 15 provides that a “supervision order … has effect in accordance with its terms … for the period stated in the order”. The powers of a corrective services officer “are given effect by s 15”: *Taylor v O’Beirne* [2010] QCA 188, [35].

9. Under s 16 of the DPSOA, a supervision order “must contain requirements that the prisoner” do various things. Some of those requirements are quite specific, such as the requirement to “notify a corrective services officer of every change of the prisoner’s name, place of residence or employment at least 2 business days before the change happens” (s 16(1)(c)) or “not leave or stay out of Queensland without the permission of a corrective services officer” (s 16(1)(e)). Other requirements are far broader:

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

(da) comply with a curfew direction or monitoring direction; and

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

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

10. A supervision order “must state the period for which it is to have effect”: s 13A(1). The order must state a finite, not indefinite, period: *Attorney-General (Qld) v Van Dessel* [2006] QCA 285, [22], [27], [44]. “In considering the period of the order, the Court makes a current assessment of future risks and asks: when will the respondent reach a point at which he is an acceptable risk without a supervision order?”: *Attorney-General for the State of Queensland v DXP* [2019] QSC 77, [29]. Towards the end of an order, the Attorney-General may applied for a further supervision order: s 19B.

11. The purpose of a supervision order is to protect the community, not to punish the prisoner: *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [34], [216]. However, that distinction might be lost on some of those who are subject to an order—after all, even the High Court finds that "the distinction between a punitive and a protective (or non-punitive) purpose can be elusive": *Jones v Commonwealth of Australia* [2023] HCA 34, [94]. And, plainly enough, a supervision order has "serious consequences" for a person in terms of "having their liberty and autonomy … in qualified terms … further curtailed": *Attorney-General v DBJ* [2017] QSC 302, [10].

12. The "reality" that a protective order might have a "punitive effect" on its subject is well recognised: *Rich v the Australian Securities & Investments Commission* [2003] NSWCA 342, [308]. That is, the fact that an order has a "protective, rather than punitive, purpose does not mean that it does not also have a punitive effect on the" person subject to the order: *R v CV* [2013] ACTCA 22, [50].

13. A contravention of the requirements of a supervision order is a criminal offence: s 43AA. Further, a reasonable suspicion of a contravention—or reasonable suspicion the prisoner is likely to contravene—a requirement of a supervision order may lead to a return to custody and (if the Court is satisfied of the contravention or likelihood) the making of a detention order: DPSOA, ss 20-22.

Some of the mandatory requirements of a supervision order

14. For the purposes of this paper, three of the mandatory requirements that must appear in a supervision order will be considered—namely, the requirements that the prisoner:

    (a) Must "comply with a curfew direction or monitoring direction": s 16(1)(da).

    (b) Must "comply with any reasonable direction under section 16B given to the prisoner": s 16(1)(daa).

    (c) Must "comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order": s 16(1)(db).

15. ***Section 16(1)(da) curfew or monitoring:*** The concepts of a "curfew direction" and "monitoring direction" are dealt with in s 16A. The purpose of s 16A "is to enable the movements of a released prisoner to be restricted and to enable the location of the

released prisoner to be monitored": s 16A(1). Section 16A(2) provides:

> (2) A corrective services officer may give 1 or both of the following directions to the released prisoner—
>
> (a) a direction to remain at a stated place for stated periods ("***curfew direction***");
>
> (b) a direction to do 1 or both of the following ("***monitoring direction***")—
>
> (i) wear a stated device;
>
> (ii) permit the installation of any device or equipment at the place where the released prisoner resides.

16. The power in s 16A(2) to give a curfew direction or a monitoring direction is not (expressly) conditioned on any requirement of objective reasonableness (*cf* s 16A(3)).

17. For the purposes of a "curfew direction", s 16A gives this example: "a direction to remain at the released prisoner's place of residence from 2.30p.m. to 7.00p.m. on school days, if the prisoner is not required to be at a place of employment during these hours".

18. The provision does not give any examples of a "monitoring direction". It clearly contemplate the use GPS location tracking devices, but it is just as clearly not limited to such devices. Presumably, the "installation of any device or equipment" at a prisoner's residence might extend to cameras or other surveillance devices.

19. ***Section 16(1)(daa) reasonable direction under s 16B:*** Section 16B is headed "Other directions". Section 16B(1) provides:

> (1) A corrective services officer may give a released prisoner a reasonable direction about—
>
> (a) the prisoner's accommodation; or
>
> (b) the released prisoner's rehabilitation or care or treatment; or
>
> (c) drug or alcohol use by the released prisoner.

20. The examples given in s 16B are that a direction about accommodation might include "a direction that the released prisoner may only reside at a place of residence approved by

a corrective services officer" and a direction about treatment might include "a direction that the released prisoner participate in stated treatment programs".

21. ***Section 16(1)(db) any reasonable direction:*** All supervision orders must require the prisoner to "comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order": s 16(1)(db). The DPSOA does not give examples of this type of direction. Other than the touchstone of reasonableness, and the need to avoid direct inconsistency with the supervision order itself, no express limits on the scope of this direction-giving power are stated.

22. In *Attorney-General for the State of Queensland v Kynuna* [2020] QSC 205, Davis J said that "the scope of the discretionary powers under the DPSOA and the considerations relevant to the exercise of the powers are determined upon the construction of the DPSOA by reference to grammar, context and purpose" (at [34]; and see *Shrimpton v The Commonwealth* (1945) 69 CLR 613, 629–630).

23. Section 16C is titled "Criteria for giving directions" and provides:

> (1) A corrective services officer may give a direction under this subdivision or a direction mentioned in section 16(1)(db) only if the officer reasonably believes the direction is necessary—
>
> (a) to ensure the adequate protection of the community; or
>
> (b) for the prisoner's rehabilitation or care or treatment.
>
> (2) In this section—
>
> "***reasonably believes***" means believes on grounds that are reasonable in all the circumstances of the case.

24. Those purposes mirror the essential purposes of the DPSOA: s 3. As has been established in relation to the making of orders by the Court, the "adequate protection of the community" is broad, but cannot mean a "guarantee" of safety or "watertight" protection: *Attorney-General v DBJ* [2017] QSC 302, [15].

25. Also, as discussed further below, the requirement of s 16C is additional to any other reasonableness requirement in ss 16A, 16B, or s 16(1)(db).

Exercise of powers by corrective services officers

26. One mandatory requirement of a supervision order is that the prisoner must "be under the supervision of a corrective services officer": s 16(1)(d). Under Sch 4 of the DPSOA, a "corrective services officer" (**CSO**) means a person appointed as such under the CSA.

27. Neither the term "supervision" nor the phrase "be under the supervision of" is defined in the DPSOA. In *Taylor v O'Beirne* [2010] QCA 188, the CSOs supervising a released prisoner had issued various letters asserting he had contravened the supervision order, advising that no formal action would be taken, and warning him about his conduct. In respect of the concept of supervision, the Court said (at [35]):

> The writing of the letters was clearly part of the supervision which the orders mandated and without which the applicant could not have been released from prison. It should be noted that the corrective services officers charged with the responsibility of supervising released prisoners have only the powers, express and necessarily implicit, in the order. They are given effect by s 15 of the Act. To emphasise the need for compliance with orders, to point out the consequences of non-compliance and to issue warnings as to the consequences of misbehaviour all fall within the designation of supervision. The writing of the letters was clearly within the powers conferred on the respondents by the terms of the orders and s 15.
> …

28. The requirement that the Court must order a prisoner to "be under the supervision of" a CSO might raise some uncertainties, because it is unclear how a prisoner is to comply with that obligation, or what steps would amount to compliance (or non-compliance) with the obligation. At the same time, the concept of "supervision" tends to imply a duty falling on the CSOs and, in *Taylor v O'Beirne* [2010] QCA 188, reference was made to the "duty imposed upon [the CSOs] by the supervision order" (at [38]).

29. At a practical level, there can be little doubt that the task of a CSO in supervising a released prisoner is a difficult one. Indeed, it has been said that the "demands of supervision orders [are], no doubt, difficult for released prisoners and supervisors alike": *Taylor v O'Beirne* [2010] QCA 188, [44].

30. It is also of interest that the legislature elected to specify individual CSOs as the various repositories of power, rather than a single office-holder or authority as a central repository of power. In contrast, for example, under s 36 of the *Serious Offenders Act*

2018 (Vic), a Court may include in a supervision order a condition "authorising the Authority to give directions to an offender in relation to the operation of any condition of a supervision order". The "Authority" means the "Post Sentence Authority", which is a body corporate. Another example is the *Migration Act 1958* (Cth), under which almost all discretionary powers are vested in the Minister, who controls the delegation of those discretions to selected officers.

31. The investiture of direction-making power in individual CSOs may have practical implications. Section 276 of the CSA provides:

> (1) A corrective services officer—
>
> (a) has the powers given to the officer under an Act; and
>
> (b) is subject to the directions of the chief executive in exercising the powers.
>
> (2) The powers may be limited—
>
> (a) under a regulation; or
>
> (b) under a condition of appointment; or
>
> (c) by written notice given by the chief executive to the corrective services officer.

32. Section 276 would seem to apply to a CSO's powers under the DPSOA. Those powers "may be limited" as provided for in s 276(2) and a CSO is subject to any directions of the chief executive (Commissioner) in exercising the powers. However, in circumstances where a CSO is otherwise acting within any limits on his or her powers, there may be a question over the extent to which the CSO's exercise of discretion may validly be controlled, curtailed, or guided by the CSO's superior officers. In *Loielo v Giles* [2020] VSC 722, for example, one ground of challenge to a COVID-19 curfew direction in Victoria contended (unsuccessfully) that the officer in whom the discretionary power was vested had acted at the behest of the Minister instead of making an independent decision.

<u>Avenues to review the exercise of power by corrective services officers.</u>

33. The powers of CSOs in respect of released prisoners are broad but not unfettered and

not immune from review. As with many areas of administrative law, options for informal or ‘soft review’ of decision-making should not be ignored. For example:

(a) The very nature of the power of CSO’s to give directions to a released prisoner indicates that the directions will almost always be open to future reconsideration, revision, or adaptation. To borrow language from a different context, the DPSOA direction-giving powers clearly allow for the “progressive and evolving decision-making” “that may be required in the light of evolving circumstances”: *Telstra Corporation Ltd v Hannaford* (2006) 151 FCR 253, [57].

(b) Where a released prisoner is dissatisfied with directions given by a CSO, it is possible that active engagement with the decision-making process and efforts to persuade the relevant CSOs based on the evidence and merits of the circumstances could be the quickest and most effective means of ‘review’ (albeit not independent or external review) of the directions in question.

34. Similarly, the various statutory administrative law rights or remedies in relation to access to information should be considered. Both the *Right to Information Act 2009* and the *Information Privacy Act 2009* provide certain avenues to access information held by the authorities. The *Information Privacy Act 2009* also enables relevant persons to apply to an agency for amendment of personal information held by the agency. These administrative law avenues might sometimes assist with reviewing the exercise of power by enabling access to information that assists in understanding the decisions that have been made.

35. Where a direction has been given to a released prisoner by a CSO, it might also be possible to obtain a statement of reasons for that direction. There is no common law right to reasons for an administrative decision: *Public Service Board of NSW v Osmond* (1986) 159 CLR 656. Sometimes, though, a CSO might be prepared to give an informal explanation of some of the issues that informed the decision.

36. It might also be possible to rely on the rights in Part 4 of the *Judicial Review Act 1991* (the **JR Act**) to compel the CSO to provide a formal statement of reasons. For the moment, most directions given by a CSO in respect of a supervision order will be decisions ‘under an enactment’ and thus within the scope of the JR Act: *Fuller v*

Lawrence [2023] QCA 257. However, at the time of writing, an appeal on that point is pending before the High Court.

37. If directions given by CSOs in the exercise of their powers over released prisoners are decisions 'under an enactment', then the statutory grounds for review provided for in Part 3 of the JR Act will be available. If not, many such directions will nonetheless be reviewable under Part 5 of the JR Act ('common law' review for jurisdictional error). Where 'objective reasonableness' is required, a challenge might alternatively be brought by way of an application for declaratory relief under s 10 of the *Civil Procedure Act 2011* or in the Court's inherent jurisdiction.

38. There are several notable cases in which released prisoners have sought review of DPSOA-related decisions or directions. In *Bickle v Chief Executive, Department of Corrective Services* [2008] QSC 328, the CSOs gave various directions to a released prisoner requiring compliance with a curfew and requiring the wearing of a monitoring device. The review proceeded pursuant to Part 3 of the JR Act without any dispute about (or consideration of) whether the directions were decisions 'under an enactment'. Among other things, the Court accepted that a broad range of matters were permissibly relevant (ie, were not irrelevant considerations) in the CSOs decision-making process. Those matters included the released prisoner's "unwillingness to share information" with the CSOs, his use of codeine, certain comments he made about contact with the media, and "details of intimate contact with his partner" (at [37]-[41]).

39. In *Dunkley v Queensland Corrective Services* [2013] QSC 261, the supervision order included a condition that the released prisoner not have contact with children under 16 years of age without the approval of a CSO. A CSO gave an approval for the released prisoner to have contact with his stepson subject to a condition that the contact be supervised by a nominated person. The released prisoner applied for a statutory order of review under Part 3 of the JR Act.

40. The Court in *Dunkley* concluded that the condition imposed by the CSO was not a decision 'under an enactment' and so not amenable to review under Part 3 of the JR Act. However, the Court did acknowledge that, if an 'excess of jurisdiction' (jurisdictional error) had been identified, review under Part 5 of the JR Act was available.

41. In *Wallace v Tannock* [2023] QSC 122, the released prisoner was receiving support under the National Disability Insurance Scheme (**NDIS**). The supervising CSO issued directions in reliance on the condition in the supervision order that the prisoner comply with every "reasonable direction" given by CSOs. Those directions included that:

   (a) The prisoner was only permitted to have male, and not female, NDIS support workers; and

   (b) The prisoner was to obtain approval to have any persons at his residence, including family members and associates.

42. The prisoner sought review under Part 5 of the JR Act on grounds of jurisdictional error and so no occasion arose for the consideration of whether the directions were decisions 'under an enactment'. Relevantly, the Court held that:

   (a) The exercise of the power to give a "reasonable direction" was subject to the rules of natural justice (procedural fairness), although what was required by those rules would vary depending upon the particular circumstances of each case (at [33]).

   (b) The use of the term "reasonable direction" in s 16(1)(db) of the DPSOA (and thereby in each supervision order) imports an "objective requirement" of reasonableness and the requirement in s 16C of subjective reasonableness is a "further fetter or limitation upon the power to give a direction" (at [62]).

43. As such, *Wallace v Tannock* establishes that the exercise of a CSO's power to give any "reasonable direction" mentioned in s 16(1)(db) may be subject to review on grounds that include:

   (a) A failure to comply with the rules of natural justice; and

   (b) A failure of the dual-reasonableness requirement—that is, the requirement for both a reasonable belief and the objective reasonableness of the direction itself.

44. The requirement that a s 16(1)(db) direction be objectively reasonable provides a valuable avenue for judicial review. The requirement of objective reasonableness means that the Court itself may review the facts and determine the reasonableness of the direction for itself: eg, *Rowe v Kemper* [2009] 1 Qd R 247, [22], [31], [67], [72], [112]*ff*.

This enables a process much closer to a 'merits review' of the direction, including an evaluation of the proportionality of the direction in light of the relevant circumstances at which it was directed (*Rowe v Kemper*, [32], [61]).

<u>The role of human rights</u>

45. As noted above, a CSO will generally be required to form the relevant reasonable belief before giving a direction to a released prisoner. The direction itself will also often (not always) need to be objectively reasonable in all the circumstances. At least in respect of the broad power mentioned in s 16(1)(db) of the DPSOA, the CSO will usually also need to ensure natural justice (procedural fairness) by way of an opportunity for the released prisoner to be heard before the direction is given. These reasonableness and natural justice grounds are classic 'jurisdictional error' points and so allow for judicial review under Part 5 of the JR Act.

46. The *Human Rights Act 2019* (the **HRA**) provides that it is unlawful for a public entity to act in certain ways. Section 58(1) states:

> (1) It is unlawful for a public entity—
>
> (a) to act or make a decision in a way that is not compatible with human rights; or
>
> (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

47. This does not enable a separate, free-standing right of review. It does, however, through s 59, permit a person to seek relief in relation to unlawfulness under s 58 by adding—or piggy-backing—that claim to another action seeking relief for unlawfulness: *Sandy v Queensland Human Rights Commissioner* [2022] QSC 277, [59], [98]-[99].[1] As such, HRA claims may be relied upon in a Part 5 JR Act application.

48. In *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, s 58 of the HRA was described as giving rise to two separate obligations (at [125]):

    (a) A substantive limb, being an obligation not to make a decision in a way that is incompatible with human rights: s 58(1)(a).

1 See, also, *PJB v Melbourne Health* (2011) 39 VR 373.

(b) A procedural limb, being an obligation not to fail to give proper consideration to a relevant human right in making a decision: s 58(1)(b).

49. The substantive limb is potentially of particular utility in the context of a supervision order. That limb makes it unlawful for a CSO to act or make a decision in a way that is "not compatible with human rights". Section 8 of the HRA provides:

> An act, decision or statutory provision is "***compatible with human rights***" if the act, decision or provision—
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

50. Section 13 of the HRA provides:

> (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
>
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
>
> (a) the nature of the human right;
>
> (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
>
> (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
>
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
>
> (e) the importance of the purpose of the limitation;
>
> (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
>
> (g) the balance between the matters mentioned in paragraphs (e) and (f).

51. An applicant seeking relief under the HRA would bear the onus of establishing that the directions imposed a limit on human rights. However, once such a limit has been

established, the respondent then bears the onus of justifying the limit: *Owen-D'Arcy*, [128]-[129].

52. If the Court accepts that any relevant human right was limited by the direction, the respondent bears the onus of showing that the limitation is justified. In that task, the "the standard of justification is stringent"; the "standard of proof is high and requires a degree of probability commensurate with the occasion": *Owen-D'Arcy*, [133], [243].

53. In *Wallace v Tannock* [2023] QSC 122, the released prisoner argued that the CSO's directions—which prevented him from have female NDIS workers and from having any visitors to his home without approval—limited his right to freedom of association. The Court thought it was "clear enough that this right was engaged and limited by both directions" (at [45]).

54. The Court then considered whether those directions were justified on the evidence. It concluded that the direction regarding NDIS workers was justified. That direction "was a move calculated to mitigate the damage to society that may arise from the applicant's offending against a female support worker" (at [46]).

55. The Court found, however, that the direction limiting the prisoner's right to have visitors at his home was not justified. The Court said (at [49]):

> The onus might have been discharged in respect of a direction that was confined to ensuring that QCS was appraised about any prospect of the applicant's association with women. However, a direction that extends to a requirement for approval of "any persons" represents a limitation on the applicant's right to associate with men, including those from his own family. The materials do not justify such an exacting requirement.

56. The Court also, though, pointed to the 'incremental' limitation of rights that was involved and said (at [54]):

> It can be accepted that the applicant's human rights are already inhibited by the supervision order and directions made pursuant to it. It follows that the relevant concern is only to identify the "incremental" burden of the direction, and then to determine whether there is anything in the material that might justify it. In this case, the relevant "increment" may not be of great magnitude, and if there was any material to weigh in the balance it might have been justified. It remains that, as a matter of logic and proof, no such material can be identified.

57. Ultimately, the Court in *Wallace v Tannock* had already concluded that the CSO's directions should be set aside on traditional JR Act grounds. The Court said, however, that the conclusion under the HRA would have resulted in an identical order. Note that in *Johnston v Carroll* [2024] QSC 2, the Court observed that under s 58(6)(a) of the HRA a decision is not invalid merely because of a contravention of s 58(1). However, the Court also pointed out that a "finding of unlawfulness (coupled with an appropriate injunction) will have the same practical effect as a finding of invalidity" and made orders to that effect (at [266], [464]-[466]).

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Matt Black

Barrister-at-Law