CITATION:	*The Chief Executive Officer Department of Health v KMD & Ors* [2024] NTCCA 8
PARTIES:	THE CHIEF EXECUTIVE OFFICER DEPARTMENT OF HEALTH Appellant AND KMD First Respondent AND THE KING Second Respondent AND CHIEF EXECUTIVE OFFICER DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE (Northern Territory Correctional Services) Third Respondent
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CCA 6 of 2023 (21319440)
DELIVERED:	23 July 2024
HEARING DATES:	22 February 2024
JUDGMENT OF:	Blokland J, Reeves & Burns JJ

CATCHWORDS:

CRIMINAL LAW – Appeals – Mental Impairment – Part IIA of the *Criminal Code 1983* (NT) – Appeal under s 43ZB(2) of the *Criminal Code* – Supervision orders – Whether a supervised person poses a serious risk if released on a non-custodial supervision order – Current mental state of a supervised person – Consideration of reports under s 43ZN(2) of the *Criminal Code* – Insufficient material to determine risk to the public by making non-custodial supervision order – Terms of non-custodial supervision order – Appeal upheld.

Statutes

Criminal Code 1983 (NT), s 43A, s 43H, s 43J, s 43R(3), s 43V, s 43X(1)(2)(a), s 43Y(1)(b), s 43ZA(1)(a) (b), s 43ZB(2)(3), s 43ZG, s 43ZH (1)(2)(a), s 43ZJ, s 43ZK(1), s 43ZL(3)(a), s43ZM, s 43ZN(1)(2)(a)(b)(c)(d)(f)(e)(i).

Mental Health and Related Services Act 1988 (NT), s 14(b)(iii), s 39.

Briginshaw v Briginshaw (1938) 60 CLR 336; *Collaery v R* [2021] ACTCA 28; *Fox v Percy* [2003] HCA 22; 214 CLR 118; *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore (GLJ)* [2023] HCA 32; *House v R* [1936] HCA 40, 55 CLR 499; *KMD v The Mental Health Review Tribunal & Anor* (2020) 351 FLR 324; *Lacey v AG (Qld)* (2011) 242 CLR 573; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541; *Nigro v The Secretary Department of Justice* (2013) 41 VR 359; *NJE v The Secretary Department of Justice* (2008) 21 VR 526; *NOM v The Director of Public Prosecutions* (Vic) (2014) 36 VR 618; *R v Bauer* 2018 HCA, 266 CLR 56; *R v Dick* [1966] Qd R 301; *R v KMD (No 4)* [2021] NTSC 27; *R v KMD [No 2]* [2017] NTSC 18; *RJE v Secretary to the Department of Justice & Ors* [2008] VSCA 265; *Taylor v The Queen* (1978) 45 FLR 343; *The King v KMD & Ors (No 6)* [2023] NTSC 51; *The Queen v KMD & Ors (No 3)* [2017] NTSC 95; *The Queen v KMD & Ors (No 5)* [2022] NTSC 69; *The Queen v KMD (No 1*) [2015] NTSC 31; *The Queen v KMD (No 2)* [2017] NTSC 18; *Warren v Coombes* (1979) 142 CLR 531; cases referred to:

REPRESENTATION:

Counsel:

Appellant:	I. Read SC
Respondent:	E. Nekvapil SC

Solicitors:

Appellant:	Solicitor for the Northern Territory
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Number of pages:	99

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Chief Executive Officer Department of Health v KMD & Ors [2024] NTCCA 8
No. CCA 6 of 2023 (21319440)

BETWEEN:

THE CHIEF EXECUTIVE OFFICER DEPARTMENT OF HEALTH
Appellant

AND

KMD
First Respondent
AND

THE KING
Second Respondent
AND

CHIEF EXECUTIVE OFFICER DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE (Northern Territory Correctional Services)
Third Respondent

CORAM: BLOKLAND J, REEVES & BURNS JJ

JUDGMENT

(Delivered 23 July 2024)

Blokland J:

Background

[1] This is an appeal by the Chief Executive Officer of the Department of Health (NT) ('the CEO') from the decision of a Judge of the Supreme Court ('the primary Judge') to place the first respondent ('KMD') on a non-custodial supervision order pursuant to s 43ZA(1)(b) of the *Criminal Code*.

[2] I agree with the observations and analysis by their Honours Reeves J and Burns J about the nature of an appeal brought pursuant to s 43ZB(3) of the *Criminal Code*. The appeal is by way of rehearing, in this instance based on the same material which was before the primary Judge.

[3] Although I agree with the observations made on the nature of the appeal discussed by their Honours Reeves J and Burns J, in my view the particular non-custodial supervision order formulated by the primary Judge was appropriate in all of the circumstances and correct in the legislative context in which it was made.

[4] The conditions were such that the supervision order substantially reduced the risk of danger to the community and to KMD. The conditions of this particular non-custodial supervision order are sufficiently demanding and strict that the public will *not* be seriously at risk from KMD, accepting that risk can never be fully eliminated. KMD has been released from custody, but the terms of the non-custodial supervision order which are set out below

have the hallmarks of a quasi-custody arrangement with strong incentives for KMD to comply.

[5] On 5 July 2023 the Court of Criminal Appeal[1] refused an application filed by the appellant to stay the non-custodial supervision order pending appeal. Reasons were not given, save the finding 'The Court is satisfied that sufficient safeguards are in place in the comprehensive NCSO to manage any risk, pending the appeal'. On a fuller examination in the context of the appeal proper, that view is retained here. The risks are appropriately managed by the imposition of the non-custodial supervision order.

[6] The delusional condition KMD suffers from means that the consequences of her offending, the extreme violent offending of some 10 years ago,[2] and the issues associated with it have been fraught. Although from the psychiatric and psychological evidence it is clear that KMD does not accept that she has a mental illness, will no longer engage with particular health professionals,[3] and that her lack of engagement is a serious impediment to her treatment, the primary Judge found a mechanism whereby despite those difficulties, KMD could be released on conditions which effectively managed the attendant risks to the community.

[7] The nature of KMD's illness has meant that it has been difficult, if not impossible to treat because the delusional disorder, described also by Dr Das

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1 Blokland J, Barr and Huntingford JJ.

2 Set out in *The Queen v KMD & Ors (No 5)* [2022] NTSC, [2]-[16].

3 *R v KMD (No 4)* [2021] NTSC 27, at [4]-[13]; [15]-[16]; Exhibit SO45, report of Dr Das; Exhibit SO46 report by Dr Das, *The Queen v KMD & Ors* [2022] NTSC 69.

as a delusional disorder with paranoid features, extends to the dedicated health professionals who would be able to help her and consequentially contribute to the safety of both the community and KMD.

[8] There can be no doubt as to the dedication of the health professionals who have tried to assist KMD and tried to encourage her to accept her illness and treatment including medication. The facts of the offending are fully set out in the primary Judge's reasons and for efficiency will not be repeated here, however, it may be noted KMD's core belief within her delusional system is that her son was sexually abused by his father. While there is no logic behind KMD's various delusional conspiratorial beliefs which stem from that core belief, those beliefs remain real to her. Nine years of imprisonment, the various reviews and even unsuccessful attempts to have her involuntarily treated have not shifted those beliefs.[4] The fact that KMD's beliefs in regard to treatment are part and parcel of the delusional disorder was recognised by the primary Judge and acknowledged by senior counsel for the appellant in oral argument before this Court.[5] There is no evidence that further time in prison will shift KMD's insight, level of engagement or willingness to be treated. Plainly, keeping KMD in custody will protect the community, however so too will the particular regime ordered by the primary Judge.

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4 *R v KMD [No 2]* [2017] NTSC 18; *KMD v The Mental Health Review Tribunal and Anor* (2020) 351 FLR 324.

5 See eg. *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [15]; Transcript, Court of Criminal Appeal, *Chief Executive Officer of Department of Health* v *KMD* & Ors, 22 February 2024 at 76.

The non-custodial supervision order

[9] In short, the non-custodial supervision order provides protections in three crucial areas. First, social support and some limited treatment for KMD. It is accepted this is not the psychiatric treatment that is recommended or required, however counselling and medical appointments with a general practitioner are included. It is an improvement on what could be realistically done in custody given her lack of engagement with Dr Das and members of Forensic Mental Health Team. Second, it provides for protection of the community including the victims by restrictions on KMD's movements and monitoring her movements. Third, it provides coercive orders for arrest and custody in the event of non-compliance.

[10] To illustrate the strict terms of the non-custodial supervision order, it is necessary to set it out in full:[6]

> **THE COURT ORDERS THAT:**
>
> 1. The Custodial Supervision Order made on 3 June 2015 and as varied on 14 December 2015 is revoked, with effect from [DATE].
>
> 2. Until that date, the General Manager of the Darwin Correctional Centre is permitted to allow KMD to leave the Centre for the purposes of transitioning to a Non-Custodial Supervision Order. During all such periods of leave, KMD is to comply with all reasonable directions of NT Correctional Services staff.
>
> 3. With effect from [DATE], KMD is subject to a Non-Custodial Supervision Order pursuant to s 43ZA(1)(b) of the *Criminal Code Act 1983* (NT).
>
> 4. During the period of the Non-Custodial Supervision Order, KMD is subject to the following conditions:

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6 Annexure to *The King v KMD & Ors (No 6)* [2023] NTSC 51.

(a) KMD will be under the care of and receive support from a support team comprising the following people:

(i) Janet Guy, social worker;

(ii) KMD's mother;

(iii) KMD's aunt;

(iv) a General Practitioner nominated by KMD who has consented, in writing, to act in this capacity after being provided with a copy of the Court's reasons for decision in *R v KMD (No 5)* [2022] NTSC 69 and *R v KMD (No 6)* [2023] NTSC 51 and this Non-Custodial Supervision Order; and

(v) a staff member of the Top End Mental Health Service ('TEMHS') nominated by the CEO (Health) to act as the Case Manager,

('the Support Team').

(b) The identities of the members of KMD's family who are members of the Support Team are suppressed from publication.

(c) The CEO (Health) will notify the Court, KMD, the other parties and the members of the Support Team of the person nominated to be the Case Manager and their contact details at least 7 days before the date referred to in Order 3.

(d) KMD will notify the Court, the CEO (Health), the other parties and the members of the Support Team of the person nominated to be the General Practitioner and their contact details at least 14 days before the date referred to in Order 3. KMD will provide the Court with the General Practitioner's written consent to act in this capacity.

(e) If any of the members of the Support Team become unable or unwilling to act in this capacity, KMD or the CEO (Health) (as applicable) must nominate another person who is able and willing to act in this capacity. The nomination is to be made as soon as practicable with the applicable party to give written notice of the nomination to the Court, the other parties and the members of the Support Team. In the case of the General Practitioner, KMD will provide the Court with their written consent to act in this capacity.

(f) KMD will undertake counselling with Janet Guy at least weekly, or at such longer intervals as Ms Guy considers appropriate and

informs members of the Support Team in writing (which may include by email).

(g) KMD will attend all medical appointments advised by the General Practitioner.

(h) The role of the Case Manager is to:

(i) liaise with Janet Guy and KMD's probation and parole officer on a regular basis to discuss KMD's mental state and progress in the community; and

(ii) be a point of contact for KMD's probation and parole officer and any member of the Support Team who has concerns about KMD's mental state to be able to raise those concerns with the Support Team for consideration of additional care, support or intervention to be provided to KMD; and

(iii) consult with KMD's probation and parole officer, other members of the Support Team and, if necessary, other members of the TEMHS regarding the need for any steps to be taken pursuant to ss 43ZD or 43ZE of the *Criminal Code Act 1983* (NT) or Order 5; and

(iv) report significant concerns to the Director of Public Prosecutions for consideration of the making of an urgent application to the Court pursuant to s 43ZE of the *Criminal Code Act 1983* (NT) and/or the Authorised Person referred to in Order 5.

(i) KMD will reside at the home of her aunt and uncle.

(j) The address and location of KMD's residence is suppressed from publication.

(k) KMD will be under the ongoing supervision of a probation and parole officer, and must obey all reasonable directions of a probation and parole officer related to her supervision.

(l) KMD will report to a probation and parole officer within two clear working days of the date in Order 3.

(m) KMD will be subject to a curfew and must be at the residence referred to in Order 4(i) between 10pm and 6am, or such other hours as directed by a probation and parole officer (subject to a personal, medical or dental emergency). The probation and

parole officer may lift the curfew, either for a specified period of time or indefinitely, and may reimpose it, as they see fit.

(n) KMD may, with the prior permission of a probation and parole officer, have overnight visits with her parents or other family members at the Stations.

(o) The names and location of the Stations referred to is suppressed from publication.

(p) KMD must not contact, directly or indirectly, or remain at any place where the victims, RL, Mrs L or Mr I, may be living, working or visiting. KMD must not enter or remain at any place within 5 km^2 of the residences of RL or Mrs L.

(q) KMD is only permitted to have contact with the children R and M in accordance with any parenting plan or order made pursuant to the *Family Law Act 1975* (Cth).

(r) The identity of the victims and the children (including their dates of birth) is suppressed from publication.

(s) KMD must not leave the Northern Territory without the prior permission of a probation and parole officer.

(t) KMD must wear or have attached an approved monitoring device in accordance with the directions of a probation and parole officer, and allow the placing, or installation in, and retrieval from, the premises or place of residence of such machine, equipment or device necessary for the efficient operation of the monitoring device.

(u) KMD must comply with the electronic monitoring rules as set out in the Rules for Electronic Monitoring document.

(v) KMD must not possess, use or have access to any firearm.

5. Pursuant to s 43ZA(2A) of the *Criminal Code Act 1983* (NT), the CEO (Health) may authorise a person who may use any reasonable force and assistance:

(a) to enforce this order; and

(b) take KMD into custody, or to restrain KMD, in order to prevent KMD harming herself or someone else.

6. If KMD breaches any condition of this Non-Custodial Supervision Order, members of the Northern Territory Police are authorised to apprehend her, take her into custody and convey her to the Darwin

Correctional Centre, whereupon the General Manager of the Darwin Correctional Centre is authorised to receive her and hold her in safe custody, to be brought before the Court as soon as practicable.

7. The appropriate person (the CEO (Health)) is to file and serve a s 43ZH report by close of business on ..... [7]

8. The matter is listed for mention at ..... on ..... [8]

9. The parties have liberty to apply on short notice.

[11] In terms of support and available treatment 'the Support Team' includes a social worker, KMD's mother and aunt, a general medical practitioner and a staff member of the Top End Mental Health Service who is the Case Manager, nominated by the appellant. The role of each of those persons and how they will provide information is set out in the non-custodial supervision order. It may also be noted that as well as family members and health professionals who are under obligations to report concerns which may lead to revocation of the order, KMD is additionally under the supervision of a probation and parole officer.

[12] As well as the social support and conditions directed to medical supervision, supervision akin to a form of home or community detention is provided. Not only is KMD under supervision from a probation and parole officer, she must live at an unnamed Aboriginal community with her aunt and uncle and be subject to a curfew between 10:00pm and 6:00am, unless other times are directed by the probation and parole officer. Permission must be granted by

7 The return date was subsequently fixed by the primary Judge.

8 The mention date was subsequently fixed by the primary Judge.

the probation and parole officer to visit her parents and other family members who reside at various Territory stations and on an Aboriginal Land Trust. Restrictions are placed on KMD's movements specifically to provide for the safety of the victims and she must wear an electronic monitoring device. She must not have access to a firearm. Any breach of any of the conditions will lead to arrest and consequentially the revocation of the order and the likely return to prison under a custodial supervision order. If any part of the non-custodial supervision order is not operating as intended, the parties have liberty to apply on short notice and in any event a review takes place at least annually.

[13] While it is frustrating for all concerned that KMD does not accept she suffers the delusional disorder, even given the opinions of nine psychiatrists over the nine years that she was in custody, lack of such acceptance is part and parcel of the illness. It does not disentitle her from an objective consideration of all of the evidence measured against the criteria set out in the *Criminal Code*.

[14] It is also frustrating for all concerned that KMD will no longer engage with the mental health professionals. The evidence indicates that such lack of engagement *may* be a sign in itself of elevated risks of deterioration of her condition and therefore an elevated risk to members of the community. In the end the evidence was not conclusive on that point.

[15] While it may appear KMD has the capacity to decide whether or not to engage with the professionals, her decision-making takes place within the construct of the delusional disorder which now extends beyond the victim, his family and the justice system and embraces medical professionals. Because of the condition, KMD has previously been found to be unable to give meaningful consent to treatment. Chief Justice Riley noted Dr Kini and Dr Walton described KMD as being unable to provide meaningful consent to treatment or refusal.[9] Justice Hiley noted with respect to the criteria under the *Mental Health and Related Services Act* including s 14(b)(iii), KMD's lack of capacity to give informed consent or unreasonable refusal to consent had been accepted by the Mental Health Review Tribunal.[10]

[16] While it is important not to reinforce the delusional thinking, the respondent is not to be deprived of an objective assessment available under the *Criminal Code* to determine, consistent with the machinery of the *Criminal Code* whether there are measures which enable her condition to be managed outside of the prison if community safety is not seriously at risk.

[17] The primary Judge decided to revoke the custodial supervision order and replace it with a non-custodial supervision order. On any reading, the resultant non-custodial supervision order is so strict that it should be characterised as being directed primarily to the safety of the community and the victims.

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9 *R v KMD* [2015] NTSC 31 at [49].

10 *R v KMD [No 2]* [2017] 18 at [19] and [20].

Main legislative provisions

[18] The primary Judge was engaged in the review process contemplated by s 43ZH of the *Criminal Code*, namely a review to determine whether the supervised person the subject of a report under s 43ZK of the *Criminal Code* 'may be released from the supervision order' (at that time a custodial supervision order). When the order being reviewed is a custodial supervision order, s 43ZH(2) provides the court *must* (emphasis added):

> (a) vary the supervision order to a non-custodial supervision order *unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order*; or
>
> (b) if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order:
>
> (i) confirm the order or,
>
> (ii) vary the conditions of the order, including the place of custody where the supervised person is detained.

[19] Additionally, the primary Judge was obliged by virtue of s 43ZH(2)(a) to reduce the order from a custodial supervision order to a non-custodial supervision order, *unless* she was satisfied of a *serious risk* to the safety of the public or to KMD.

[20] The primary Judge was obliged to apply the principle of least restrictive means consistent with community safety. Section 43ZM of the *Criminal Code* provides:

In determining whether to make an order under this Part, the court must apply the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community.

[21] Section 43ZN sets out the matters the Court must take into account when making an order under Part IIA of the *Criminal Code*, including the type of order made by the primary Judge:

43ZN Matters court must take into account when making order

(1) In determining whether to make an order under this Part, the court must have regard to the following matters:

(a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;

(b) the need to protect people from danger;

(c) the nature of the mental impairment, condition or disability;

(d) the relationship between the mental impairment, condition or disability and the offending conduct;

(e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

(f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;

(g) any other matters the court considers relevant.

(2) The court must not make an order under this Part releasing a supervised person from custody (whether conditionally or otherwise) or significantly reducing the supervision to which a supervised person is subject unless:

(a) the court has:

(i) obtained and considered 2 reports, each report being prepared by a person who is a psychiatrist or other expert (but the same person must not prepare both reports); and

(ii) considered the reports submitted to the court under sections 43ZJ and 43ZK and received by the court under section 43ZL, if any; and

(b) subject to subsections (3) and (4), the court is satisfied that each of the following persons was given reasonable notice of the proceedings concerned:

(i) the victim of the offence concerned;

(ii) if the victim concerned is deceased – the victim's next of kin;

(iia) the next of kin of the supervised person concerned;

(iii) if the supervised person concerned is a member of an Aboriginal community – the Aboriginal community.

(3) Notice is not required to be given to a person referred to in subsection (2)(b) if the person cannot be found after reasonable inquiry.

(4) Notice is not to be given to a person referred to in subsection (2)(b)(i) or (ii) who has given notice to the court that he or she does not wish to be notified of any hearings in relation to the supervised person concerned and has not withdrawn that notice.

[22] The reports under s 43ZN(2)(a)(i) are required to be reports from an 'expert'. One of the two reports must be from a psychiatrist. The other need not be from a psychiatrist. Section 43A states: 'expert means a person who holds a qualification or has experience or expertise that is relevant to the mental impairment, condition or disability of an accused person or a supervised person'.

[23] The reports required by s 43ZK of the *Criminal Code* must be prepared when the Court makes a supervision order (whether a custodial or non-custodial supervision order) and are to contain:

> (a) details of the treatment, therapy or counselling that the supervised person has received, and the services that have been provided to the supervised person, since the supervision order was made or the last report was prepared (as the case may require); and
>
> (b) details of any changes to the prognosis of the supervised person's mental impairment, condition or disability and to the plan for managing the mental impairment, condition or disability.

[24] Part IIA of the *Criminal Code* is intended to enable the Court to make appropriate orders which ensure the safety of the community and at the same time protect the rights of people who have not been found guilty of any offence due to mental impairment or unfitness to be tried. The substantial vulnerabilities of people in those circumstances are protected by strict application of the provisions referred to. There is a strong legislative

presumption in favour of the liberty of the subject,[11] but community safety remains paramount. Within that context, Part IIA should not be applied in a manner which is punitive.

Ground 1

The finding that pursuant to ss 43ZH(2) and 43ZN that the Court was not satisfied that the safety of the public will be seriously at risk if KMD is released on a non-custodial supervision order was not reasonably open on all of the available evidence

[25] Much of the argument on behalf of the appellant is couched in terms which suggest the primary Judge rejected or watered down the evidence of the experts including those from in the Forensic Mental Health Team, contending there was a preference for a therapeutic approach.[12] The primary Judge carefully scrutinised the expert evidence which is illustrated across two major judgements.[13] Although she reduced the weight given to some elements of that evidence, she also accepted a substantial amount of the expert evidence. This is illustrated in the findings.[14] She took an approach to the central question of risk which she was obliged to do under Part IIA of the *Criminal Code*, which differed in its emphasis in some respects from the approach of the experts. In any event the findings rely primarily on the material and evidence provided by the experts.

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11 *R v KMD* [2015] NTSC 31, per Riley CJ.

12 Outline of Appellant's Submissions, 18 August 2023, [7]-[16].

13 *The Queen v KMD & Ors (No 5)* [2022] NTSC 69; *The King v KMD & Ors (No 6)* [2023] NTSC 51.

14 See in particular *The Queen v KMD & Ors (No 5)* [2022] NTSC 69 at [139].

[26] The primary Judge remarked, reasonably in my view that whether the safety of KMD or the public will be seriously at risk if she is released on a non-custodial supervision order, depends significantly upon the terms of any such order and the mechanisms in place to support KMD to live in the community in compliance with such terms.[15] This remark clearly envisaged restrictions on KMD to deal with the risks identified by the expert evidence. The resultant order does not involve a simple matter of release into the community with little by way of monitoring. As above, it is a highly structured order with elements designed to protect the community.

[27] In terms of risk, the primary Judge was focused on the principle set out in s 43ZH(2). To justify the continuation of the custodial supervision order, the risk must be 'serious' and it is not sufficient to simply find some risk; the inquiry is to focus on whether there is an actual 'serious' risk.[16] The primary Judge accepted a great deal of the psychiatric material. However, the primary Judge applied the concept of 'risk' in conventional terms as would be expected when construing or applying a statute such as the *Criminal Code*. The psychiatric material tended to illustrate the concept of 'risk' as largely directed to the magnitude of harm that might result if the risk was realised, as opposed to the likelihood of the risk being realised at all. While clearly the nature of the harm that may eventuate is a relevant factor,

15 *The King v KMD & Ors (No 5)* at [144].

16 *The King v KMD & Ors (No 5)* at [142].

considerable weight must still be given to the likelihood of the risk materialising.[17]

[28] There was no doubt that given KMD's core belief system and because of her refusal to engage, assessments were difficult, or could not be made at all. The primary Judge rejected a substantial amount of material placed before the Court by KMD and rejected many of KMD's submissions, however when applying the statutory standard 'serious risk' her Honour gave weight to an accepted judicial approach taken to the question of risk in similar legislative contexts.

[29] The primary Judge found the likelihood of KMD engaging in violent behaviour was low, but real rather than fanciful. It was open to her Honour to make this finding. Dr Das acknowledged the risk in that sense was low. Based on all of the material, in my view the primary Judge's conclusion was correct.

[30] It is unsurprising that Dr Das maintained his opinion from previous reports that KMD's care, treatment and risk management could only be provided in a secure facility given KMD's refusal to meet with him and/or members of the Forensic Mental Health Team.[18] Dr Das' opinions included his view on the nature of the illness. He thought KMD continued to hold the delusional beliefs, notwithstanding earlier opinions (2015) from Dr Kini and Dr

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17 *NOM v The Director of Public Prosecutions* (Vic) (2014) 36 VR at 618 at [57]-[58]; *Nigro v The Secretary Department of Justice* (2013) 41 VR 359 at [113]; *NJE v The Secretary Department of Justice* (2008) 21 VR 526 at [37].

18 Exhibits S046; S037.

Ventura[19] and Dr Walton who thought she no longer held those beliefs. Dr Das said that there was no way to confirm whether KMD continued to hold such beliefs, essentially given her lack of engagement. The difficulties arising from KMD's lack of engagement were well acknowledged by the primary Judge and are acknowledged here.

[31] On the basis of the risk assessment instrument HCR-20 (conducted in 2017),[20] Dr Das formed the opinion KMD was likely to engage in violent offending of the kind committed in 2013. However, he acknowledged the likelihood of her committing violent acts was low. Nevertheless, if KMD did engage in further acts of the kind she engaged in when she offended, the results could be catastrophic.

[32] The factors relevant to the HCR-20 assessment in 2017 were as follows. The nature of KMD's relationship with her partner and the violent offending of May 2013. Those factors are static. Further, that she suffers delusional disorder and fails to engage with mental health professionals. She denies her mental illness and refuses treatment. For a period she had been irritable and agitated with corrections staff but there was no recent behaviour of that kind. The primary Judge found that KMD may have had valid reasons not to engage given the information she might provide may support her detention. The primary Judge clearly meant this was as seen through the lens of KMD's distorted beliefs. The primary Judge found her illness was unlikely

19 Exhibit S013.

20 Exhibit S046.

to change but there was no objective evidence as to deterioration of her mental state.

[33] Although Dr Das was concerned about deterioration of KMD's condition, on the basis primarily that she would not engage with treatment, ultimately he accepted there was no evidence of a deterioration.

[34] Regrettably there could be no realistic updating of the risk profile, including what could be gleaned from HCR-20 because of KMD's continued refusal to engage with the Forensic Mental Health Team. Dr Das did attempt a further assessment utilising HCR-20 in 2022 but the findings were almost the same as in 2017.

[35] Because of the type of condition KMD suffers from and noting that she has previously been regarded as being unable to give informed consent to treatment, KMD cannot be assessed in the conventional manner, namely through talking to the professionals about her mental state. It would be inappropriate to speculate on what she may say if she had engaged with the Forensic Mental Health Team for assessment. The primary Judge did note, reasonably in my view that 'it is therefore difficult to see how that kind of engagement, in her present custodial setting, would assist in assessing the likelihood that she would, in the future act aggressively or violently in response to a delusional belief system'.[21]

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21 *The Queen v KMD & Ors (No 5)* [2022] NTSC 69.

[36] The appellant submitted insufficient weight was given to Distinguished Professor Ogloff's report which corroborated the previous risk assessments conducted by Dr Das (in 2017 and 2020) that KMD 'continues to present a high level of risk for future violence'.[22] Professor James Ogloff AM is a clinical and forensic psychologist. Clearly Professor Ogloff's vast experience, expertise and standing were acknowledged and accepted by the primary Judge.[23] His report was one of the reports received under s 43ZN(2)(a)(i),[24] although he is not a psychiatrist.

[37] The report was received over objection made by KMD who had refused to be interviewed by Professor Ogloff. Dr Ogloff's report[25] confirmed the delusional disorder, persecutory type, but unlike Dr Das' diagnosis, without symptoms of schizophrenia. Dr Ogloff gave detailed evidence of the HCR-20 assessment tool. He confirmed that it had been validated for women, including Aboriginal women in jurisdictions such as Canada, although not Australian Aboriginal women. He understood it was more challenging to validate the instrument for women.[26] Professor Ogloff agreed with some of the concerns about the use of the assessment tool HCR-20 in an academic article he was asked to comment on.[27]

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22 Outline of Appellant's Submissions at 10.

23 *The King v KMD & Ors (No 6)* [2023] NTSC 5 [10]-[11].

24 Exhibit S053.

25 Exhibit S053.

26 *The King v KMD & Ors (No6)* [2023] NTSC 51 at [71].

27 *The King v KMD & Ors (No6)* [2023] NTSC 51 at [79].

[38] The issue of stratification of risk concerned the primary Judge with respect to HCR-20, both its administration in 2017 and in 2022 because it does not stratify or quantify the risk where the potential consequences of the risk materialising could be catastrophic, but the likelihood of that risk materialising is low or very low.[28] In the circumstances it was unsurprising the primary Judge did not find the form of risk assessment by use of HCR-20 helpful, especially given the limited information that could be used by Professor Ogloff concerning current circumstances. In practical terms the results of the risk assessment tools left the primary Judge with assessments that characterised the risk as high because there is a risk, even with a low likelihood of it materialising, that KMD might offend in the future because she did so some 10 years before. Given the limitations of the assessment tool and the focus on the actions of KMD 10 years previously, it is unsurprising that the primary Judge had doubts as to the validity of parts of the assessment, particularly given KMD's lack of violent behaviour since that time.

[39] Rather than a rejection of the expert evidence, much of it was accepted, including evidence which was unfavourable to KMD. The evidence was scrutinised by the primary Judge as necessary to ensure compliance with the standards to be applied by the Court under the *Criminal Code*. An example of evidence accepted which appears to have made its way into the formulation of the non-custodial supervision order is the portion of

28 *The King v KMD & Ors (No6)* [2023] NTSC 51.

Professor Ogloff's report which stated that given the difficulties between KMD and the Forensic Mental Health Team, an independent clinician should be identified who KMD trusts who can broker a multiagency conference involving Forensic Mental Health Services, Corrections, Aboriginal and non-governmental organisations and KMD.[29] Those organisations, although utilizing the Top End Medical Services rather than the Forensic Mental Health Team, form part of the non-custodial supervision order.

[40] While uncontradicted expert evidence should not be rejected unless there is a sound reason for doing so,[30] the primary Judge was required to apply the legal standards set by the provisions of the *Criminal Code* which required analysis of the expert opinion. The health professionals who were called were faced with cross examination by or on behalf of KMD, bearing in mind she was unrepresented for much of the hearing. Given she was unrepresented, the primary Judge also asked a number of questions. There could have been no doubt that some of their evidence was not accepted by KMD or was being tested or at least questioned.

[41] In the context of Part IIA of the *Criminal Code* it is the Judge who must make the ultimate decision on all of the available material. The Judge is not bound by the opinions of the experts, although great care is to be taken if those opinions are to be rejected. Here the experts themselves acknowledged

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29 Exhibit S053.

30 As pointed out in *Taylor v The Queen* (1978) 45 FLR 343 at 352; *R v Dick* [1966] Qd R 301 at 305-6.

the limitations of some elements of their opinions, primarily because of the lack of engagement by KMD.

[42] It is accepted here that ordinarily the question of the risk of re-offending may only be informed by experts in the field and that such evidence would be accepted unless there were sound reasons not to.[31] Relevant also is the statutory context. Here there were challenges or at least probing questions made with respect to some of the expert evidence. The particular statutory context required the primary Judge to 'consider' the expert reports obtained under s 43ZN(2)(a)(i). Clearly that was done. The primary Judge was not required to adopt all elements of the expert's reports. The *Criminal Code* does not grant the decision making power on the question of whether there is a 'serious risk' to the psychiatrist or other mental health professional as is the case with involuntary treatment.[32]

[43] The Court also obtained a report from a clinical social worker (Ms Guy) who was accepted by all parties as an expert under s 43ZN(2)(a)(i). Although not medically trained, plainly Ms Guy had significant experience working with non-government organisations and the Aboriginal and Torres Strait Islander Health Service in Queensland. She worked with Aboriginal people who have suffered trauma, mental health disorders and physical health problems, providing support, advocacy and skills to 'get through the difficult times'.

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31 *RJE v Secretary to the Department of Justice & Ors* [2008] VSCA 265.

32 *Mental Health and Related Services Act* 1988 (NT), s 39; First Respondent's Outline of Submissions, 23 October 2023 at 31.

Before that, she worked for more than 20 years as a social worker in both mental health and alcohol and drug contexts. KMD does not have alcohol or drug problems[33] which Ms Guy thought made it less difficult to work with KMD.

[44] Ms Guy was able to spend 50 hours with KMD. She developed a relationship of trust with the mutual intention to continue counselling when KMD returned to the community. The primary Judge made the point that she would confine the experts to their areas of expertise.[34] It is reasonable to have placed considerable weight on Ms Guy's opinions, limited to her area of expertise, especially since she was the only professional who had been able to engage with KMD in recent times. Professor Ogloff had not spoken at all with KMD which produced limitations of different kind. It was accepted the counselling was directed to assisting Ms Guy's clients, in this instance KMD to move forward in their lives, to accept what had occurred in the past and to avoid any repeat of it in the future. The primary Judge considered Ms Guy's report along with those of Dr Das and Professor Ogloff, as she was obliged to do under s 43ZN(2)(a)(i).

[45] Ms Guy's report[35] included her opinion that she thought the counselling was having a positive effect on KMD, incorporating opportunities for KMD to tell her story and that she had indicated some willingness to rehabilitate and

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33 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [17].

34 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [21].

35 Exhibit S052.

recognised she would need ongoing counselling. The primary Judge made reference to Ms Guy's answers in cross examination to the effect that the counselling was broader than providing support and included therapy in the sense of a discussion of strategies to manage and control risk factors and to talk about what to do if her thoughts were 'not quite right'.[36] The evidence indicates Ms Guy well understood the limits of her expertise.

[46] There was no error in the primary Judge considering Ms Guy's evidence alongside the evidence of the mental health professionals. Engagement with Ms Guy appeared to be the first realistic clinical engagement with KMD for some time. In any event the primary Judge was obliged to consider her report.

[47] Reviewing the material and the extensive and careful consideration of the primary Judge's reasons, it is reasonable to conclude that the likelihood of KMD endangering people was low, but real rather than fanciful. For accuracy and proper comprehension I will set out the primary Judge's considerations under s 43ZH(2) and s 43ZN and the additional matters taken into account which I agree and were open on the evidence.[37]

> Section 43ZH(2)(a) of the *Criminal Code* obliges the Court to vary a CSO to a NCSO unless satisfied on the available evidence that the safety of KMD or the public will be seriously at risk if she is released on a NCSO.
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> None of the evidence considered in this tranche of the periodic review leads me to revise the finding I made in *R v KMD (No 5)* at

36 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [115].

37 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [145]-[167].

paragraph [139(b)] that there is no risk that, if KMD were released, she would endanger herself (other than by way of response against KMD to any violent action she might take towards members of the public). None of the parties submitted otherwise.

The real issue is whether I am satisfied that the safety of the public will be seriously at risk if KMD is released on a NCSO. As I held in *R v KMD (No 5)* (at [142]-[143]), I must be satisfied on the balance of probabilities, in accordance with the enhanced *Briginshaw* standard.[38]

In making that determination, I must take into account the matters in s 43ZN of the *Criminal Code*.

Whether KMD is likely to endanger another person – s 43ZN(1)(a)

The first matter is whether KMD would, if released, be likely to endanger another person because of her mental condition (s 43ZN(1)(a)). This matter is concerned with the *likelihood* that KMD would engage in acts of violence which would expose other persons to danger. So much is clear from the use of the word 'likely', and also from the use of the word 'endanger'.[39]

None of the evidence received in this tranche of the periodic review leads me to alter the finding I made in *R v KMD (No 5)* at paragraphs [140] and [144] that the likelihood that KMD would act on her delusional beliefs and endanger members of the public is low, but real rather than fanciful.

In Exhibit SO53, Professor Ogloff set out his opinion that KMD presents a high risk of harming another person if released without suitable forensic mental health care. His views about what that should involve have been set out above. Professor Ogloff did not dissect this assessment of high risk into its two limbs, likelihood and magnitude. He did not give any evidence which stratified his assessment of risk. In cross-examination, Professor Ogloff agreed with what Dr Walton wrote in his penultimate report dated 20 August 2016 ('Exhibit SO32') that simply because KMD has engaged in an isolated but very serious act of violence, on an actuarial basis she will remain in a category of elevated risk of recurrence indefinitely. To my mind, that suggests that Professor Ogloff's assessment of risk is substantially weighted by the magnitude of the risk, and is not inconsistent with a finding that the likelihood of the risk eventuating

38 See *Briginshaw v Briginshaw* (1938) 60 CLR 336.

39 See *NOM v Director of Public Prosecutions* (2012) 38 VR 618 at [58]-[59] per the Court.

is low. This is confirmed by Professor Ogloff's agreement with the 2017 HCR-20, in which Dr Das characterised the likelihood of violence as low. Dr Das's assessment of the likelihood was unchanged in the 2022 HCR-20.

Consistently with that evidence, the CEOs accepted that the likelihood of KMD endangering other persons is low. The DPP did not make any particular submission regarding this likelihood (separate from the risk of harm generally), and essentially joined in the CEO's submissions on this point.

The need to protect people from danger – s 43ZN(1)(b)

The next matter is the need to protect people from danger (s 43ZN(1)(b)). This matter brings into consideration both the likelihood of endangering people identified in s 43ZN(1)(a) and the magnitude of the risk of harm to people. Where the likelihood of endangering people is low but real, the greater the potential seriousness of the harm posed to people by KMD's release, the greater the need to protect members of the public.

Essentially, Professor Ogloff and Dr Das assessed the risk of harm to others by reference to the acts committed by KMD on 7 May 2013, on the basis that past behaviour is a reasonable predictor of, if not future behaviour, at least the capacity for future behaviour. I accept that the seriousness of the acts of violence towards the victims engaged in by KMD on that day, which went as far as firing a gun six times at three different people, striking two of them, makes the magnitude of the risk of harm to others high.

A low but real likelihood of a risk of high magnitude occurring means there is a need to protect people from danger.

Nature of the mental condition – s 43ZN(1)(c)

None of the evidence received in this tranche of the periodic review has led me to revise the findings I made in *R v KMD (No 5)* at paragraph [139(a)] about KMD suffering from a delusional disorder. Professor Ogloff's evidence confirms those findings and Ms Guy's evidence does not cause me to reconsider them.

I find that KMD has a mental condition, namely, a delusional disorder, whereby she holds a system of delusional beliefs on which she has acted, and may act.

Relationship between mental condition and offending conduct – s 43ZN(1)(d)

Again, none of the evidence received in this tranche of the periodic review has led me to revise the findings I made in *R v KMD (No 5)* at paragraph [139(c)(ii)]. I find that, on 7 May 2013, KMD acted on her delusional belief system, with serious aggression and violence towards three other people, firing six shots from a gun at or towards those people, causing two of them physical harm.

Adequate resources available for treatment and support in the community – s 43ZN(1)(e)

As I noted in *R v KMD (No 5)* at paragraph [145], it is irrefutable that there is treatment and support available in the community for KMD. No party suggested otherwise. Nor did any party suggest that there are not adequate resources available for her treatment and support in the community. Rather, the CEOs and the DPP submitted that KMD's current risk profile means that she should continue to be detained pursuant to a CSO in a secure environment until her risk is reduced. That submission turns on the assessment of risk and is addressed below.

Likely to comply with the conditions of a NCSO?

In Exhibit SO53, Professor Ogloff opined that KMD would not comply with any conditions of a NCSO that required her to engage with the FMHT or manage her mental illness. In written and oral submissions, KMD confirmed that she does not wish to engage with psychiatrists or forensic mental health practitioners, whether from the FMHT or of her choosing. Her reasons for that have been referred to above. However, she has engaged in counselling with Ms Guy and has said she intends to continue to do so.

Ultimately, whether KMD is likely to comply with the conditions of a NCSO depends on what those conditions are, noting her firm position in relation to psychiatric treatment, including medication. Motivated by her desire to remain out of custody, I consider KMD to be likely to comply with the conditions of a NCSO, other than any conditions requiring her to receive psychiatric treatment, medication or to engage directly with members of the FMHT.

Is the safety of the public seriously at risk? – s 43ZH(2)

The CEOs submitted that, unless and until there is an amelioration in the likelihood of the risk of harm eventuating, the Court cannot be satisfied there is 'no or an insufficient risk'. It was argued that amelioration can occur if KMD engages and participates in a transition plan that 'suitably addresses forensic risk management principles'. The CEOs accepted that the likelihood of KMD

endangering herself or others is low, but said KMD's lack of engagement to date 'makes her current risk profile untenable'.

This is a recognition that the limb of risk associated with the magnitude of the harm is virtually static and will effectively remain indefinitely, meaning the only way to lower risk is by lowering the limb of risk associated with likelihood of the harm occurring. Questions arise about the possibility of significantly lowering an already low risk. In any event, there are also a number of difficulties with the submissions.

First, the Court is not required by s 43ZH(2) of the *Criminal Code* to be satisfied that there is 'no or an insufficient risk'. The required satisfaction is that the safety of (relevantly) the public will be 'seriously at risk'. Secondly, in cases of this kind, where a supervised person has committed an act of violence for which they were found not guilty by reason of mental impairment, there will always be some element of risk, so a satisfaction that there is no risk is not attainable. Thirdly, it is not clear what is meant by an 'insufficient risk'. The term raises questions as to how the 'sufficiency' of the risk is to be identified or determined – insufficient to or for what? Fourthly, I do not accept that the converse of the safety of the public being seriously at risk is that there is an 'insufficient risk' to the safety of the public. What the section indicates, in its terms, is that the threshold for continuing a CSO will not be met if there is some risk to the safety of the public; it will only be met if the safety of the public is seriously at risk.

As to whether the safety of the public will be seriously at risk if KMD is released on a NCSO, I take into account the findings made about the matters in s 43ZN of the *Criminal Code* above and, further, the following matters:

(a) Ms Guy had not observed any symptoms of mental illness in KMD across the course of her 50 hours of counselling sessions with her (see paragraph [18] above).

(b) My findings about the consequences of KMD's actions on the victims (see paragraph [47] above).

(c) My finding that KMD's next of kin (her mother) was of the view that KMD's conduct on 7 May 2013 did not have any adverse impact on KMD's next of kin or other members of her family (see paragraph [60] above).

(d) My findings about the protective factors which KMD's family would provide her if she were released on a NCSO (see paragraph [69] above).

(e) The opinions of Professor Ogloff and Dr Das and Ms Roberts that KMD presents a high risk of harming another person if released without forensic mental health treatment.

(f) The limitations of the HCR-20 assessment tool in this case (see paragraphs [77] to [83] above).

(g) My doubts about the weight or relevance of matters relied on or not relied on by Professor Ogloff in his review of the 2017 HCR-20 (see paragraphs [85], [87], [90] and [92] above).

(h) My observations about the 2022 HCR-20 assessment referred to in paragraphs [97] to [101] above, which raise some doubt about its validity in the circumstances of this case.

(i) Professor Ogloff's opinions about the nature, utility and importance in risk management of forensic mental health treatment (see paragraphs [102] to [108] above).

(j) KMD's submission about the utility of forensic mental health treatment for her (see paragraphs [109] to [110] above) and my findings that the counselling KMD has engaged in thus far, and intends to continue to engage in, has elements of a forensic approach to it, with the same goals (see paragraphs [111] to [117] above).

(k) My findings about Ms Guy's capacity to address and mitigate risk by her engagement and counselling with KMD (see paragraph [124] above).

(l) My findings about KMD's family members' capacity to address and mitigate risk by their engagement and interactions with KMD (see paragraph [128] above).

(m) The likely rehabilitative and protective benefits to KMD which would flow from living in the community with access to her country and her culture (see paragraphs [129] to [131] above).

(n) The absence, across the past 10 years, of any acts of violence on KMD's part whilst in custody, and of any attempt to abscond during outings, despite her belief that she has been wrongfully detained (see paragraphs [132] to [136] above).

(o) The reflection and learning KMD has undertaken from her experience and her time in custody over the past 10 years, which I find is strong motivation to maintain her mental health so as to prevent anything like the original offending recurring (see paragraph [110] above).

(p) My findings that KMD has expressed some genuine remorse for the effects of her actions on the victims, and that she has sought to explain the original offending and the circumstances that gave rise to it without an acceptance that she was acting on delusional beliefs the result of a mental illness, rather than a belief that what she did was justified (see paragraph [145] above).

On the evidence available, I am not satisfied, on the balance of probabilities to the *Briginshaw* standard, that the safety of the public will be seriously at risk if KMD is released on a NCSO.

[48] Further, as the primary Judge found, the consequence of not finding an appropriate non-custodial supervision order would mean KMD remained in prison for life:[40]

> I find it unacceptable the proposition that KMD cannot be released from custody until her risk profile changes, which cannot occur until she engages with the Forensic Mental Health Team by exposing to them her belief system and thinking, and she accepts medication or at least gives consideration to taking it. If, for reasons including her delusional belief system at the heart of her mental condition, she refuses to so engage for the remainder of her life, she would be held in custody until she dies.

[49] The appellant submitted the primary Judge's decision was directly at odds with previous decisions and reviews by the Court.[41] In each previous instance the Court found KMD posed a serious risk to the public. Suffice to say each review undertaken by the Court is an independent review. Fresh

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40 *The Queen v KMD & Ors (No 5)* [2022] NTSC 69 at [147].

41 *The Queen v KMD* [2015] NTSC 31; *The Queen v KMD & Ors (No 3)* [2017] NTSC 95 and *The Queen v KMD & Ors (No 4)* [2021] NTSC 27.

reports are provided to the Court at the commencement of each review. It appears likely that new and fresh evidence was available for this review. From what can be ascertained from the reasons in previous reviews, there is no mention of reports from allied health such as social workers. Whatever the case was and whether there was any new material or old material seen in a different light than previous reviews, the Court in this instance was obliged to make an independent decision.

[50] I would not uphold ground one. The relevant findings were open on the evidence. Reviewing the material independently I would not disagree with the primary Judge's conclusions.

Ground 2:

That the terms of the non-custodial supervision order are insufficient to address the forensic risk issues because, in particular, there is no requirement that KMD is required to cooperate with the Forensic Mental Health Team and participate in any counselling and/or therapy with the team

[51] As indicated already, KMD was not engaging with the Forensic Mental Health Team. This is unfortunately part and parcel of her particular illness in the sense that the delusions here have extended to health professionals. In those circumstances it is unlikely that KMD would cooperate directly with the Forensic Mental Health Team. Imposing the condition suggested at this stage would be setting her up to fail, although it is appreciated the suggested

condition would be one of the commonly ordered conditions in a non-custodial supervision order.

[52] The non-custodial supervision order has an inbuilt mechanism which allows the Case Manager from the Top End Mental Health Services to liaise with other service providers listed in the order who are to report to the Case Manager: see paragraph 4(h)(i)-(iv) of the non-custodial supervision order.

[53] This indirect mechanism allows for reporting to authorities if any of the service providers hold any concerns about KMD's mental state. In the circumstances of this particular case where engagement has failed, the indirect mechanism providing a case manage from Top End Mental Health Services is appropriate.

[54] I would not uphold this ground.

Ground 3:

The Court erred in not accepting the unchallenged expert evidence as to the assessment of forensic risk and wrongly depreciated the weight of the expert evidence because the Court found that:

(a) There was doubt regarding the degree of reliance placed on the risk factor of lack of insight and justification for violence

[55] This refers to the primary Judge having regard to KMD's explanation for her violent offending in 2013. It involved an opportunity for KMD to explain the context of the offending. This was a legitimate factor going to the basis of the psychological opinion, but did not necessarily alter the weight given

to the opinion in a significant way. The primary Judge was careful not to entertain facts which could not be proven. It was merely accepted that when KMD offended, she was in a tumultuous, unstable and conflictual relationship, but she understood this did not rise to the level of a justification.[42] No party has suggested this was not so.

[56] The primary Judge was entitled to characterise KMD's explanation for her offending in a nuanced way. The explanation was not regarded as an attempted justification by the primary Judge. KMD's lack of insight was broadly accepted as established by the primary Judge who was acutely aware of KMD's refusal to engage with health professionals through therapy and medication. That is why the primary Judge went to great lengths to ascertain whether the forms of restrictions which eventuated in the non-custodial supervision order would be sufficient in the circumstances to protect the public from any reoffending.

(b) No weight was given to the counselling with Ms Guy and very little weight on KMD's personal support.

[57] The appellant points out that Professor Ogloff's report is dated 28 November 2022 and Ms Guy's report is dated 21 December 2022.[43] As mentioned above, Professor Ogloff suggested an independent clinician may be able to broker an arrangement with Forensic Mental Health Services, consistent with trying to move forward but was concerned that such a person might

42 *The King v KMD & Ors (No 6)* [2023] 51 at [87], [138]-[144]; *The Queen v KMD & Ors (No 5)* [2022] NTSC 69 at [135] (c)(iii).

43 Outline of appellant's submissions, 18 August 2023, p10.

then also be seen as part of the conspiracy. While he thought it was admirable that KMD had support from Ms Guy and from her family, he also pointed out that neither Ms Guy nor the family were equipped to manage the risk of violence. Further, Ms Guy's treatment would not attempt to address the existence of the delusions. He did not think any of the persons involved in support were appropriately qualified.

[58] Her Honour recognised the limits to Ms Guy's expertise, but also recognised there was some benefit to KMD and consequently the community to undertake counselling on an ongoing basis.

[59] The limitations of counselling are to some extent acknowledged and met by the indirect reporting available to the Top End Mental Health Service via the non-custodial supervision order and the involvement of a medical practitioner. There is to be liaison between Ms Guy and the Case Manager from the Top End Mental Health Service to discuss KMD's mental state and progress. Similarly, there is to be liaison between the probation and parole officer and the Case Manager from Top End Mental Health Services.

[60] This ground ignores the fact that the lack of expertise by any of the Support Team is dealt with through indirect channels to the Case Manager. It may not be perfect, but well manages the risk, taking into account the other restrictive elements of the non-custodial supervision order.

[61] The reports the primary Judge received from the corporate entity of the Aboriginal community where KMD resides pursuant to s 43ZL(3)(a) of the

Criminal Code[44] informed the Court that the family business which operates on the station close to KMD's residence would support KMD who would receive emotional and social support through stable employment and healthy recreation on the homeland. The letter also gives information about nearby services. KMD's family live on an Aboriginal Land Trust on their traditional country. KMD went to primary school locally in Batchelor and then completed high school in boarding school in Melbourne. Other members of the broader extended family, including those in KMD's kinship system were supportive of her living on country.[45] The Primary Judge received four letters of support from members of the community including family. It would seem positive in all of the circumstances that almost all of the Support Team involved in the non-custodial supervision order live in the same regional area as KMD, save that counselling with Ms Guy is to take place remotely, from Queensland. There is unlikely to be formal psychiatric or psychological services available near KMD's residence. This too in my view provides some context for the environment in which the non-custodial supervision order operates.

[62] The primary Judge acknowledged the concerns of experts in relation to the family not having forensic skills, but found they had certain advantages by their close personal relationship with KMD and awareness of what had happened and would most likely notice if KMD was expressing beliefs not

44 Exhibit S058.

45 Exhibit S062, S063.

grounded in reality, discuss them and raise them with others in the support team if they had concerns about KMD's mental state.[46] The expert opinion was appropriately acknowledged, however her Honour was not in error to acknowledge that Ms Guy and the family, including extended kinship members may have a valuable role by assisting to keep KMD healthy even though plainly they are not experts. They also had recourse to the indirect mechanisms provided in the non-custodial supervision order to the Case Manager.

(c) No weight was given to KMD's lack of violent behaviour in custody over 10 years.

[63] The primary Judge well understood the points that both Dr Das and Professor Ogloff made about this factor. Their opinion was that lack of violence over the past 10 years was not particularly significant because in the prison environment there would not be the 'triggers' likely to trigger violence as it did 10 years before. That in the community, there is a greater likelihood of acting on such a trigger and in the circumstances of custody it is more difficult for a person to actually be violent. Related to this was the view expressed by Dr Das that because there had been no overt signs of mental illness deterioration, this did not mean that there was no deterioration. His opinion was that a delusional illness would not resolve without treatment and would persist and be more difficult to treat in the future.

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46 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [128].

[64] While noting KMD's exceptional record while in custody, Professor Ogloff did not think KMD could control her thinking and emotions in the community as opposed to prison because he did not have evidence that her previous delusional thinking had been eliminated. He told the Court it was very common for people with delusional disorders to manage well in prison or forensic hospitals because the environment and circumstances do not contribute to their disorder or belief system.[47] His concerns understandably, were that KMD may not have the same level of control in the community.

[65] As her Honour pointed out, it was difficult to apply his reasoning directly to KMD as it could not be said that KMD's environment and circumstances in prison did not contribute to her disorder. Her belief system incorporates beliefs that she was wrongfully placed in custody because of a flawed trial and wrongfully detained in prison because of flawed assessments of the risk she posed to the public. There was a logical reason for reducing the weight to be given to that part of the expert opinion, given that the stressors of the prison environment and KMD's beliefs about it had not resulted in acts of violence to mental health professionals, staff or any correctional staff in the years she had been in custody.

(d) There had not been a breakdown of risk into its two elements, likelihood and gravity.

[66] It is suggested the breakdown of the risk could have been suggested to Professor Ogloff. Professor Ogloff simply did not describe risk in that way.

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47 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [135].

He relied on previous reports and a review of the 2017 HCR – 20. There is no indication that the primary Judge did not accept that risk assessment was a specialist field, however as already mentioned, the primary Judge was required to apply a statutory standard of whether KMD posed a 'serious danger'. This required more than simple adoption of the psychological opinion. Her Honour's reasoning as to risk and the assessment of risk is best captured as follows:[48]

> In exhibit S053 Professor Ogloff set out his opinion that KMD presents a high risk of harming another person if released without suitable forensic mental health care. His views about what that should involve have been set out above. Professor Ogloff did not dissect this assessment of high risk into its two limbs, likelihood and magnitude. He did not give any evidence which stratify his assessment of the risk. In cross examination, Professor Ogloff agreed with what Dr Walton wrote in his penultimate report dated 20 August 2016 (exhibit S032) that simply because KMD has engaged in an isolated but very serious act of violence, on an actuarial basis. She will remain in a category of elevated risk of recurrence indefinitely. To my mind, that suggests that Professor Ogloff's assessment of risk is substantially weighted by the magnitude of the risk, and is not inconsistent with the finding that the likelihood of the risk eventuating is slow. This is confirmed by Professor Ogloff's agreement with the 2017 HCR – 20, in which Dr Das characterise the likelihood of violence as low. Dr Das' assessment of the likelihood was unchanged in 2022 HCR – 20.
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> Consistently with that evidence, the CEO's accepted that the likelihood of KMD endangering other persons is low. The DPP did not make any particular submission regarding this likelihood (separate from the risk of harm generally), and essentially joined in the CEO's submission on this point.

48 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [152]-[153].

[67] The reasoning is clear and did not diminish the medical opinion in any significant way. Her Honour's conclusion was consistent in large part with Dr Das' expressed opinion with which Professor Ogloff had agreed.

(e) The family had the capacity to monitor any deterioration in KMD's mental health.

[68] The primary Judge understood the limitations of the family and of Ms Guy, and recognised that there would be difficulties in identifying mental illness. However as mentioned already there was no error in acknowledging the advantages the family had of close personal relationships along with their knowledge of what had occurred in 2013. The primary Judge also took into account that the family would be motivated by a desire to avoid any repeat of the original offending. The primary Judge did not think that the family would know the symptoms of the mental illness but rather would observe if KMD was expressing beliefs not grounded in reality. Through the non-custodial supervision order there is a mechanism to bring such an issue to the attention of others in the Support Team. The primary Judge did not overvalue the family support to the detriment of the expert evidence.

[69] I would not uphold this ground.

Ground 4

That the Court erred in placing considerable weight on the evidence of the clinical social worker Ms Guy who demonstrated "elements of the forensic approach" in circumstances where: (a) she did not have specialised knowledge regarding the threshold question of risk

assessment; and (b) her counselling and proposed supervision regime was not based on a clear acceptance or understanding of the critical risk factor for KMD, being the untreated delusional mental illness.

[70] From the outset, her Honour was clear that she understood Ms Guy was not a mental health professional. It would have been wrong however, to treat her as someone who did not have experience with assisting people in various ways who had a mental illness. The primary Judge was required to consider Ms Guy's report.[49] No party denied she was an expert. Ms Guy's evidence, whilst influential in terms of the ultimate structure and some of the content of the non-custodial supervision order, Ms Guy clearly saw her role as a supporting KMD and the primary Judge concluded after hearing from her that she had sufficient knowledge to report any observed deterioration to the Support Team.

[71] The structure of this particular non-custodial supervision order recognised the realities of KMD's circumstances with supports such as Ms Guy and a back channel to professional mental health support which KMD, because of her illness was not prepared to undertake directly.

[72] If this non-custodial supervision order involved simply monitoring KMD in the community, the appellant would have a strong case. In my view the terms of the non-custodial order must be taken into account and the restrictions placed on KMD well mitigate the risks, bearing in mind there was consensus that KMD was at low risk of actually becoming violent, with

49 *Criminal Code*, s 43ZN(2)(a)(i).

the understanding that if the risk materialised it could be catastrophic. Risk can never be completely eliminated.

[73] I would dismiss the appeal.

Reeves and Burns JJ:

Introduction

[74] These proceedings are an appeal brought by the Chief Executive Officer of the Department of Health (NT) (the CEO) from a decision of a Judge of the Supreme Court ('the primary Judge') determining that the respondent, KMD, be subject to a non-custodial supervision order rather than a custodial supervision order: *The King v KMD & Ors* (*No 6)*.[50] For the reasons that follow, the appeal will be allowed and the orders of the primary Judge set aside.

[75] The appeal is brought under s 43ZB(2) of the *Criminal Code 1983* (NT) which gives the CEO a right of appeal against a supervision order where the CEO believes that a different supervision order should have been made and an appeal should be brought in the public interest. On such an appeal, this Court may confirm the supervision order or quash the supervision order and make another supervision order in substitution for it: s 43ZB(3).

The Appeal

[76] The grounds of appeal pleaded by the CEO are:

50 [2023] NTSC 51.

Ground 1

That the finding pursuant to sections 43ZH(2) and 43ZN that the Court was not satisfied that the safety of the public will be seriously at risk if KMD is released on a non-custodial supervision order was not reasonably open on all of the available evidence.

Ground 2

That the terms of the non-custodial supervision order are insufficient to address the forensic risk issues because, in particular, there is no requirement that KMD is required to cooperate with the Forensic Mental Health Team and participate in any counselling and/or therapy with the team.

Ground 3

That the Court erred in not accepting the unchallenged expert evidence as to the assessment of forensic risk and wrongly depreciated the weight of the expert evidence because the Court found that:

(a) There was doubt regarding the degree of reliance placed on the risk factor of lack of insight and justification for violence;

(b) No weight was given to the counselling with Janet Guy and very little weight on KMD's personal support;

(c) No weight was given to KMD's lack of violent behaviour in custody over 10 years;

(d) There had not been a breakdown of risk into its two elements, likelihood and gravity; and

(e) The family had the capacity to monitor any deterioration in KMD's mental health.

Ground 4

That the Court erred in placing considerable weight on the evidence of the clinical social worker Janet Guy who demonstrated "elements of a forensic approach" in circumstances where:

(a) She did not have specialised knowledge regarding the threshold question of risk assessment; and

(b) Her counselling and proposed supervision regime was not based on a clear acceptance or understanding of the critical risk factor for KMD being the untreated delusional mental illness.

Ground 5

That the Court erred in reducing the nature of the supervision regime in circumstances where there was no evidence capable of establishing that the risk threshold had reduced since the previous risk

assessments or alternatively that the previous assessments were wrong.

[77] Subject to the qualification that the nature of an appeal will always depend on the terms of the statute by which it is created, there are, generally speaking, three classes of appeals. They are:

(1) Appeal in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.

(2) Appeal de novo – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.

(3) Appeal by way of rehearing – where the court conducts a rehearing on the materials before the primary Judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.[51]

[78] Section 43ZB(3) of the *Criminal Code* makes it relatively clear that this appeal falls into the third class. That sub section provides: "On an appeal under subsection (2), the Court of Criminal Appeal may confirm the supervision order or quash the supervision order and make another supervision order in substitution for it".

51 *Lacey v AG (Qld)* (2011) 242 CLR 573 at [57], citations omitted.

[79] In conducting an appeal by way of rehearing such as the present one, this Court is obliged to conduct a "real review" of the trial and the primary Judge's reasons. In *Fox v Percy*[52] the plurality[53] said:

> Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect".[54]

[80] Also affecting the Court's task in this appeal is the appropriate appellate standard. In *Minister for Immigration and Border Protection v SZVFW (SZVFW)*.[55] Gageler J identified two such standards: the discretionary standard explicated in *House v R*[56] and the "correctness standard" adopted in *Warren v Coombes*.[57]

[81] In an appeal of the former kind: "it is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion".[58]

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52 [2003] HCA 22; 214 CLR 118 at [25].

53 Gleeson CJ, Gummow and Kirby JJ.

54 See also *Minister for Immigration and Border Protection v SZVFW (SZVFW)* [2018] HCA 30; 264 CLR 541 at [29]-[34] per Gageler J.

55 Ibid at [35]-[50].

56 *House v R* [1936] HCA 40, 55 CLR 499.

57 *Warren v Coombes* (1979) 142 CLR 531.

58 *House v R* supra at 504.

[82] In an appeal of the latter kind, "the duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognise the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision they consider that it was wrong, they must discharge their duty and give effect to their own judgement."[59]

[83] Gageler J went on in *SZVFW* to observe that the line between these two standards was "tolerably clear and workable". His Honour described it in the following terms:

> The line is not drawn by reference to whether the primary Judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary Judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v R* standard applies.[60]

[84] More recently the separation line was described in similar terms as:

> … that between questions lending "themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions" in which event "it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal

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59 *Warren v Coombes* supra at 552 per Gibbs ACJ, Jacobs and Murphy JJ.

60 *SZVFW* at [49]. See also Kiefel CJ at [18], Nettle and Gordon JJ at [85] to [87] applied subsequently in *R v Bauer* 2018 HCA, 266 CLR 56 at [61] and *Collaery v R* [2021] ACTCA 28 at [53]-[54].

> and the judge at first instance", and questions to which there is but one legally permissible answer, even if that answer involves a value judgment.[61]

[85] For the following reasons we consider the legal criterion that fell to be applied by the primary Judge in this case dictates the application of the "correctness standard" in this appeal.

[86] The order the subject of this appeal was a non-custodial supervision order made by the primary Judge on 5 July 2023. It was made under the provisions of Part IIA of the *Criminal Code*. As its heading indicates, that Part concerns "mental impairment and fitness to be tried".

[87] The lengthy history of this proceeding leading up to that order being made is set out below. As can be seen from that history, the primary Judge made her order following a periodic review of the custodial supervision order made by Riley CJ on 3 June 2015 and confirmed twice by Hiley J on 26 July 2017 and 10 March 2021.

[88] The expression "supervision order" is defined in s 43A of the *Criminal Code* to mean: "… a custodial supervision order or a non-custodial supervision order made by a court under Division 5".Then the expression "custodial supervision order" is defined in that section to mean "a supervision order referred to in s 43ZA(1)(a)". Finally the expression "non-custodial

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61 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore (GLJ)* [2023] HCA 32 at [16] per Kiefel CJ, Gageler and Jagot JJ.

supervision order" is defined to mean "a supervision order referred to in s 43ZA(1)(b)".

[89] Section 43ZA(1) provides:

> A supervision order may, subject to the conditions of the court considers appropriate and specified in the order:
>
> (a) if it is a custodial supervision order – commit the accused person to custody:
>
> (i) subject to subsection (2) – in a custodial correctional facility; or
>
> (ii) subject to subsection (3) – in another place (an appropriate place) the court considers appropriate; or
>
> (b) if it is a non-custodial supervision order – release the accused person.

[90] Similar to Hiley J, the primary Judge conducted her review, under s 43ZH(1) of the *Criminal Code*. That sub section provides that: "After considering a report submitted by an appropriate person under s 43ZK, if the Court considers it is appropriate, the Court may conduct a review to determine whether the supervised person the subject of the report may be released from the supervision order."

[91] The critical factors affecting such a review are the safety of the individual concerned and that of the community. So much is clear from ss 43ZH(2)(a) which provides that, following the review, the Court must: "…vary the supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision

order". If not so satisfied the non-custodial order is to be confirmed by the Court with a power to alter its conditions.[62]

[92] It can therefore be seen from these provisions that they present the Court conducting a review of the kind undertaken by the primary Judge with a stark choice between ordering that the individual concerned be supervised in custody or ordering that he or she be supervised in a non-custodial setting.

[93] It necessarily follows, in our view, that there is "but one legally permissible answer"[63] available to a court conducting such a review. Conversely, this is not a situation which "tolerates a range of outcomes".[64] That is so, even though ascertaining that answer involves a "value judgment"[65] with respect to the reports required by s 43ZK of the *Criminal Code* and the matters of principle prescribed in ss 43ZM and 43ZN.

Background

Procedural history

[94] In 2013 KMD was charged with eight offences arising from events that occurred in Virginia, a rural area of Darwin, on 7 May 2013. On 1 May 2014, Riley CJ declared that KMD was unfit to stand trial and that she was not likely to become fit to stand trial within a 12 month period.

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62 See ss 43ZH(2)(b).

63 See *GLJ supra* at [16].

64 See *SZVFW supra* at [49].

65 See *GLJ* above at [16].

[95] Following those determinations, a special hearing was held as required by s 43R(3) of the *Criminal Code*. The purpose of a special hearing, as expressed in s 43V of the *Criminal Code*, is to determine, on the evidence available, whether an accused person who is not fit to stand trial:

> a) is not guilty of the offence with which he or she is charged;
> b) is not guilty of the offence with which he or she is charged because of his or her mental impairment; or
> c) committed the offence he or she is charged with or an offence available as an alternative to the offence charged.

[96] On 4 July 2014, following a special hearing, a jury found KMD not guilty by reason of mental impairment of eight offences arising out of the events of 13 May 2013. On that day, pursuant to s 43X(2)(a) of the *Criminal Code*, Riley CJ declared KMD to be a person liable to supervision. An interim supervision order, pursuant to s 43Y(1)(b) of the *Criminal Code* was also made remanding KMD in custody until a supervision order was made.

[97] There are two forms of supervision order available under the provisions of Part IIA of the *Criminal Code*, custodial and non-custodial: s 43ZA(1) of the *Criminal Code*. On 3 June 2015, Riley CJ imposed a custodial supervision order on KMD: *The Queen v KMD (No 1*).[66] In determining to impose that order, Riley CJ found that KMD presented a danger to other people who were, or may become, caught up in certain deluded beliefs held by KMD and which had been a causative factor in her offending.

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66 [2015] NTSC 31.

[98] Where a supervision order is made, the Court making the order must fix a term that is appropriate for the offence which was the subject of the special hearing: s 43ZG of the *Criminal Code*. Riley CJ fixed a period of 16 years imprisonment. In the absence of any other order, it must be taken that the period fixed commenced on 3 June 2015.

[99] Where a court makes a supervision order, an "appropriate person" must, at intervals of not more than 12 months during the period that the order is in force, prepare and submit to the Court a report on the treatment or management of the supervised person's mental impairment, condition or disability: s 43ZK (1) of the *Criminal Code*. In the present case, the appropriate person is the CEO: s 43A of the *Criminal Code*. After considering such a report, the Court may conduct a review to determine whether the supervised person may be released from the supervision order: s 43ZK(1) of the *Criminal Code*.

[100] On completing such a review of a custodial supervision order, the Court must make one of the orders permitted by s 43ZH(2) of the *Criminal Code*, which provides:

> (2) On completing the review of a custodial supervision order, the court must:
>
> (a) vary the supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order; or
>
> (b) if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously

at risk if the person is released on a non-custodial supervision order:

(i) confirm the order; or

(ii) vary the conditions of the order, including the place of custody where the supervised person is detained.

[101] A review of KMD's custodial supervision order was conducted by Hiley J between May 2016 and July 2017. On 26 July 2017 his Honour confirmed the existing custodial supervision order, having been satisfied that the safety of the public would be seriously at risk if KMD were to be released on a non-custodial supervision order: *The Queen v KMD & Ors (No 3)*.[67]

[102] A further review of KMD's custodial supervision order was undertaken by Hiley J between November 2020 and March 2021. On 10 March 2021, his Honour again confirmed the custodial supervision order, having been satisfied that the safety of KMD or the public would be seriously at risk if KMD were released on a non-custodial supervision order: *The Queen v KMD & Ors (No 4)*.[68]

[103] The final review was that undertaken by the primary Judge, which resulted in the orders presently under appeal. The reasons of the primary Judge are in two parts. In *The Queen v KMD & Ors (No 5)*,[69] the primary Judge found, on the basis of the evidence before her, that the degree of likelihood that KMD would act on her delusional belief system in a violent way in the community was low, but real rather than fanciful. The primary Judge found that whether

67 [2017] NTSC 95.

68 [2021] NTSC 27.

69 [2022] NTSC 69.

the safety of KMD or the public would be seriously at risk if KMD were released on a non-custodial supervision order depended significantly on the terms of any such order and the mechanisms in place to support KMD to live in the community in compliance with such terms.

[104] The primary judge then ordered the filing of expert reports as required by s 43ZN(2)(b) of the *Criminal Code* as well as reports from the victims of KMD's original offending and from KMD's next of kin and Aboriginal community as permitted by the *Criminal Code*. Having received that material, the primary judge made the orders presently under appeal: *KMD (No 6)*.

The original offending

[105] The facts of the events of 7 May 2013 are set out in the reasons of Riley CJ:

> KMD and RL had been in a relationship and their son was born on 16 September 2006. They separated in 2007 and there was a custody dispute concerning the child. In February 2013 an order was made in the Family Court that RL have the sole custody of the child and KMD was granted access. RL lived at Virginia with his mother, Mrs L, and his son. KMD had entered into a new relationship with Jason Cash and there was a child of that relationship.
>
> The events giving rise to the charges occurred on 7 May 2013. Sometime before that date KMD had obtained a Smith and Wesson Model 29, 44 Magnum revolver. On 7 May 2013 she went to the home of her former partner, RL, and her son in Virginia taking the gun with her. When she arrived no-one was in the house. RL was at work, Mrs L had gone to the shops and the child was in school. The jury found KMD unlawfully entered the premises with intent to commit an offence (count 1). The jury was not satisfied that the offence intended to be committed at the time of entry was depriving a person of their liberty.
>
> When Mrs L returned from the shops she discovered KMD hiding under a bed in the child's room. KMD pointed the gun at Mrs L and detained her for some time in her house. When the house was subsequently

searched police also found, under the same bed, a toy gun and an additional six rounds of hollow tipped bullets suitable for firing from the Smith and Wesson revolver. Whilst she detained Mrs L at gunpoint KMD repeatedly accused Mrs L, RL and others of sexually abusing her son.

At one point Mrs L sought to wrest the gun from KMD but she failed. Unsurprisingly, Mrs L was in fear for her life and, after some time and by way of diversion, suggested the two of them should attend at the school to collect the child.

Mrs L and KMD then got into Mrs L's vehicle. KMD sat in the passenger seat with the gun trained upon Mrs L. The conduct of KMD to this point constituted the offence of detaining Mrs L against her will (count 2).

They drove towards the school and, by happenstance, passed RL who was driving in the other direction. Mrs L flashed the lights of her vehicle causing RL to stop. Mrs L informed KMD that the child was in the car and, on that basis, was permitted to turn her vehicle around and drive back towards RL. Mrs L wished to alert her son to the fact that KMD was in the vehicle and armed. As she drove towards his vehicle he stood on the side of the road awaiting her return. Mrs L deliberately drove her car into the back of her son's car and immediately called out that KMD had a gun.

RL ran across the road and then turned, put his hands in the air, and sought to discuss matters with his former partner. She fired the gun at him and the bullet passed near to his head. He then sprinted down the road away from the scene. This and other matters yet to be discussed led the jury to conclude that she attempted unlawfully to kill RL (count 3).

Mrs L remained in the vehicle. She moved her car backwards and forwards to keep it between KMD and her son. KMD then came to the passenger side of Mrs L's car, pointed the gun at Mrs L and shot her. The bullet hit her in the arm. Mrs L slumped over the steering wheel and pretended to be dead. The jury was not satisfied beyond reasonable doubt that KMD intended to kill Mrs L and, instead, found that she had recklessly endangered the life of Mrs L. This is an alternative charge to count 4 available under the *Criminal Code*.

KMD then got into the car abandoned by RL and drove after him. Mrs L took the opportunity to depart the scene in her own vehicle. RL waved down a passing motorist, Mr Iversen. He told Mr Iversen in concise and urgent terms what was happening. As he did so KMD fired the pistol at the vehicle causing the rear window to shatter. Mr Iversen drove off at

speed, pursued by KMD. Mr Iversen's vehicle was not as fast as that driven by KMD and she caught up with the vehicle. She rammed it more than once and she sought to draw alongside the vehicle. The chase continued down Virginia Road and then left onto the Stuart Highway which, at this point, is a dual carriageway with a wide median strip.

During the chase KMD pulled her vehicle alongside the passenger side of Mr Iversen's vehicle and she fired a shot into the vehicle. The bullet passed through part of the door and struck RL on the thumb. His blood sprayed upon Mr Iversen who thought he had been shot. He kept driving. The vehicles continued inbound with one independent witness describing them as jostling for position.

Some distance along the highway Mr Iversen did a U-turn in order to avoid KMD and he then drove back into the oncoming inbound traffic. KMD pursued him. At the Virginia Road intersection he did another U-turn and drove inbound now confronting the outbound traffic. KMD continued to pursue him. He then drove his vehicle onto the median strip, slammed on his brakes, leapt from the vehicle and ran away. RL jumped from the vehicle and hid behind it. KMD could not immediately stop her vehicle and she drove a short way past before turning back. She then got out of her vehicle with the gun and RL wisely ran across the road. Another shot was fired. KMD then drove off.

It seems that she fired at least six shots. When KMD drove away she had no bullets left in her gun. This may explain why she did not continue to pursue RL. It will be remembered that she had left a clip of six bullets under the bed at the Virginia home.

The jury found that she recklessly endangered serious harm to Mr Iversen (count 9 which replaced the abandoned count 5). They also found that she unlawfully used the motor vehicle taken from RL and caused damage to it to the value of $5000 (count 6).

When she left the scene KMD drove to the school attended by her son and collected him contrary to the terms of the order of the Family Court and without the approval of the child's father, RL. This is the offence of having taken the child out of the custody or protection of his father (count 7).

She drove with the child to the home she occupied with Mr Cash. She refused to explain to Mr Cash why she had her son with her contrary to the provisions of the Court order. She advised Mr Cash that she wished to be taken to the police station and he drove her towards the police station. She was in the front of the vehicle and the two children were in the rear. The vehicle was stopped at a police roadblock and KMD was arrested.

KMD informed police that the firearm she had used could be located in a van on her property. When the firearm was recovered police found that the identifying serial number on the firearm had been defaced or altered. KMD was found by the jury to have possessed the firearm knowing that its serial number had been defaced or altered (count 8).[70]

The evidence regarding KMD's mental health in the earlier proceedings

KMD No 1

[106] In *KMD (No 1)*,[71] Riley CJ found, that KMD was unfit to plead to the charges against her based on the reports of three independent psychiatrists who each concluded that she suffered from a delusional disorder. The first relevant delusion was that there were threats to her life from a wide range of people. The second, and more significant, delusion was that her son was being sexually assaulted and was in danger of further sexual assault by her former husband and other people.

[107] For the purpose of determining whether to make a custodial or a non-custodial supervision order, Riley CJ received a series of psychiatric reports, including reports from Dr Walton, Dr Kini and Dr Ventura. There was a consensus of psychiatric opinion that, at a minimum, KMD was suffering from a delusional disorder. Two of the three psychiatrists who provide reports expressed the opinion that schizophrenia was a differential diagnosis. There was agreement between the psychiatrists that KMD's mental health had deteriorated in the time leading up to the incidence of 7 May 2013. The onset of the delusions commenced sometime after the birth of her first child. Dr Kini and Dr Walton were of the opinion that in the

70 *KMD No 1* at [8]-[23].

71 *KMD No 1* at [2].

absence of further treatment her condition was likely to have further deteriorated since 7 May 2013.

[108] Dr Kini and Dr Ventura said that KMD may be regarded as likely to cause serious harm to others. They believed that some treatment, whether voluntary or involuntary, was required. At that time, KMD had been in custody for two years without any further incident, possibly suggesting that the concerns expressed by the psychiatrists may not be as real or immediate as they thought. Dr Kini, however, pointed out that there had been a period of some years before the incident of 7 May 2013 during which KMD suffered from a delusional condition without evidence of violence before the events of 7 May 2013 occurred.

[109] Dr Walton thought that the risk of further violence from KMD was low, noting that there had been no reports of violence, threats of violence or other untoward behaviour by KMD during the time she had been in custody. Dr Walton did not think that KMD's mental state had deteriorated during her time in custody. Dr Walton expressed the view that the acts of violence which occurred on 7 May 2013 arose out of a particular set of circumstances where KMD was convinced her child was being harmed. The fact that this violence occurred meant that KMD would definitely be regarded as being of elevated risk of a further episode, but it was difficult to see the same circumstances being reproduced. In that regard, Dr Walton was reassured by KMD's statement that she no longer believed the abuse of her child was ongoing, although she continued to suffer from the delusion that her son had

been sexually abused. He felt the risk of further violence by KMD was low and he was "cautiously optimistic" that she could safely be released into the community.

[110] The views of Dr Kini and Dr Ventura regarding KMD's risk of further were set out in the judgment of Riley CJ: (footnotes omitted)

> Dr Kini and Dr Ventura had a quite different view of the level of risk posed by KMD to those victims and to others in the wider community. They expressed the view that because KMD had not been treated, her illness would have "seriously deteriorated over time and that she is likely to cause serious harm to others". The risk was described as a "high level of risk". The rationale for this opinion was expressed in the joint report of 10 November 2014 as arising from her deluded beliefs which were initially confined to her former partner RL and then expanded to include two separate friends of RL. They observed that her "beliefs became more systematised such that she believed there was a paedophile ring" which involved judges, senior police, Freemasons, Mrs L and others.[21] Both psychiatrists were of the view that the clinical notes revealed that she "is incorporating more people in her paranoid beliefs whilst in custody." Dr Ventura described the beliefs of KMD as "bizarre and extending to multiple people".
>
> The deterioration in her mental health contributed to her actions on 7 May 2013. The psychiatrists referred to research that indicated that the longer the duration of untreated psychoses, the poorer the expected outcome and went on to express the view that "depriving KMD of treatment for her psychotic illness is highly likely to lead to serious mental deterioration".
>
> In his evidence before me Dr Kini stated that the fact that KMD had not shown signs of violence whilst in custody did not mean that the risk had abated. He noted that before 7 May 2013 she had been under the relevant delusion for some years without manifesting high risk behaviour. He expressed the view that because of her history "the frequency of risk is low" but "the impact of that risk behaviour in this case was high from a forensic psychiatric risk assessment point of view". He said:
>
> > Past behaviours are the best predictors of future behaviour and given that untreated psychotic illness in my view contributed to

> her high risk behaviours at the material time and it hasn't been treated, it is my professional view that that risk remains.

Dr Ventura said:

> It is highly unlikely that, knowing the natural history of her disease, that all of a sudden her deterioration had stopped merely because she entered custody because she has shown marked deterioration for a number of years until the time of the offence. The fact that she will have stopped deteriorating just because she entered custody, it makes absolutely no clinical sense whatsoever and is not only inconsistent clinically but inconsistent with international literature.

The fact that KMD had informed Dr Walton that she was satisfied that her child is not being further abused, if it reflected her true beliefs, was a matter to be considered in assessing her level of risk but would need to be considered along with other factors. Dr Kini said such a comment, if it be true, is a sign of reduction of risk and of progress but would need to be the subject of further assessment which he had not been able to undertake because of his strained relationship with her. He would not support her treatment in the community. Her claim was but one piece of information that would have to be considered.

In cross-examination Dr Ventura said, in this regard, that no conclusion could be drawn until the claimed beliefs of KMD had been tested including the wider beliefs she previously held and said:

> Unless it can be proven otherwise, she continues to hold those beliefs and she could very well act on those beliefs whenever she interprets the environment to be a danger to her.

And later:

> I must say I am sceptical of that statement in isolation without knowing what she believes about the multitude of the other delusional beliefs that she held.[72]

[111] The conclusions reached by Riley CJ after considering all of the evidence are set out as follows:

> In my opinion KMD does, presently, present a danger to other people who might already be or may become caught up in her deluded beliefs

72 *KMD No 1* at [55]-[59].

> regarding the well-being of her son. I accord significant weight to the opinion of Dr Walton and have given his opinion that the risk is low anxious consideration. However, it seems to me that the risk that KMD poses to others is of a higher order. There is no dispute that she has experienced delusional beliefs since some time after the birth of her son. Those beliefs intensified over time and expanded to encompass a wider group of people than at the start. On 7 May 2013 the intensity of the beliefs led to the extremely violent events that I have described. Since that date KMD has been in custody and under constant supervision. She has not been subjected to any meaningful treatment. The only indications that there has been an improvement in her mental state are that there have been no further incidents of violence or threatened violence and her statement that she does not consider her son to be under present threat of sexual abuse. As to the former, I note that she has been within the prison system and under constant supervision. Possible triggers for intensifying her beliefs are not present in that environment. As to the latter, there has been no investigation of whether the claim is genuine and, if so, whether it signifies that she would not seek to visit violence upon the immediate victims of her actions on 7 May 2013 or others who were the subject of her deluded beliefs. As presently informed it seems to me that much will depend upon the environment in which she finds herself. The psychiatrists agree that she continues to suffer under the same deluded beliefs as existed at 7 May 2013.
>
> In my opinion an order for custodial supervision must be made because, if KMD is not in custody, she is likely to be a danger to those people whom she incorrectly believes were a danger to her son and may still be a danger to her son. The level of risk of similar conduct is difficult to assess but the consequences of such conduct are extreme. She has demonstrated the lengths to which she will go because of her deluded beliefs. I am not satisfied that the danger has abated.[73]

[112] For these reasons, Riley CJ imposed a custodial supervision order. It is clear from the above that KMD had a "strained relationship" with, at least, Dr Kini which made impossible assessment of KMD's mental condition and assertion that she no longer held beliefs that her son was being abused. Dr Ventura was also sceptical of statements made by KMD in the absence of being able to test her statements.

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73 *KMD (No 1)* at [60]-[61].

KMD No 2

[113] On 12 May 2016, Hiley J commenced conducting a review under s 43ZH of the *Criminal Code*. At that time, KMD was seeking an order that she be released on a non-custodial supervision order or, alternatively, that the custodial supervision order be varied to allow her to reside outside the Holtz Correctional Facility. The Chief Executive Officers of the Department of Health and the Department of the Attorney- General and Justice and the Director of Public Prosecutions contended that the Court should confirm the custodial supervision order. They also contended that the Court had jurisdiction to "mandate pharmacological treatment to KMD" and that the custodial supervision order should be amended to provide for KMD to be medicated without her consent. The Court's power to allow KMD to be medicated without her consent was addressed by Hiley J in *The Queen V KMD (No 2)*.[74]

[114] The background to *KMD No 2* was that there was medical opinion to the effect that KMD's mental condition, described as a delusional disorder or schizophrenia, might be alleviated if KMD was treated with antipsychotic medication. KMD was refusing to undergo such medical treatment, partly, Hiley J said, because of "unfortunate experiences" that followed administration of a single dose of antipsychotic medication in September 2014 when KMD was admitted to hospital.

74 [2017] NTSC 18.

[115] KMD was involuntarily admitted under the provisions of the *Mental Health and Related Services Act 1998* (NT) for short periods in June and July 2016. Subsequently, on 18 July 2016, the Mental Health Review Tribunal revoked KMD's admission as an involuntary patient and ordered that she be discharged. This led to the application that any future non-custodial order provide for KMD to be medicated without her consent. In *KMD No 2*, Hiley J found that the Court does not have power under Part IIA of the *Criminal Code* to make such an order.

KMD No 3

[116] After *KMD No 2*, the review before Hiley J continued in order to determine whether a custodial or non-custodial supervision order was appropriate, resulting in the decision in *KMD No 3*. For the purpose of the review, Hiley J received evidence from multiple psychiatrists and a clinical psychologist who had spent considerable time considerable time engaging in cognitive behavioural therapy with KMD. All of those who provided expert reports or evidence to the Court agreed that KMD was suffering from a delusional disorder. The only person who did not agree was KMD. Dr Walton continued to maintain reservations as to whether the correct diagnosis was schizophrenia, but all of the other experts were of the opinion that a differential diagnosis of schizophrenia was appropriate. All the experts agreed that she had a psychotic illness. One psychiatrist, Dr Das, described KMD's disorder as a "delusional disorder with paranoid features".

[117] All of the medical experts recommended that KMD take antipsychotic medication. Hiley J noted that KMD refused to undergo such treatment for several reasons, as follows:

> KMD refuses to undergo such treatment for several reasons. Firstly, and probably fundamentally, she believes that she does not have a relevant mental illness. Secondly, she experienced side-effects from a single occasion when antipsychotic medication was administered to her in 2014. Thirdly, she has expressed a belief that modern medication is evil.[75]

[118] Hiley J described a process of disengagement with treatment undertaken by KMD while she had been in custody. He noted KMD's refusal to accept antipsychotic medication and her strained relationship with Dr Kini which had caused difficulty for Dr Kini in assessing whether or not KMD really believed that her child was not being further abused. In addition, KMD had refused to meet with another psychiatrist, Dr Das, who had taken over responsibility for her care in December 2016. Hiley J noted that subsequent attempts to have KMD engage with a new case worker and an Aboriginal health worker had proven unsuccessful. KMD had also expressed a level of distrust towards Dr Walton, with whom she had previously had a good relationship, and her own legal advisers.

[119] Hiley J observed that, at that time, KMD did not accept that she had a mental illness or had been suffering from a mental illness at the time of her offending conduct in May 2013. KMD believed that she could not benefit

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75 *KMD No 3* at [48].

from counselling or treatment, particularly treatment with antipsychotic medication. In a report dated 2 April 2017, Dr Das said:

> Ms KMD's presentation has indicated she continues to harbour her belief system about her son being abused and her ex-partner being part of the conspiracy, and that she has been victimised and incarcerated as a cover up and multiple agencies are involved in this.

[120] Hiley J went on to say:

> KMD has told others, including prison staff, that a paedophile ring was responsible for this situation. She has also told her lawyers that she no longer fears that her son is in grave danger because he is now old enough to protect himself. In light of this lawyers have submitted that therefore removes the likelihood of her reoffending.
>
> I do not accept that necessarily removes the likelihood of reoffending. It seems to be another example of her lack of insight and her tendency to say things that might assist her aim; that is to obtain a complete release into the community without supervision. Also, as I have said, she continues to hold a belief that her son was sexually abused by a paedophile ring.[76]

[121] There was, Hiley J said, evidence that KMD became angry with therapists who she considers do not agree with her beliefs. KMD frequently complained that medical practitioners misunderstood or misquoted her.

[122] Based on these circumstances, Hiley J expressed great concern about KMD's insight into her condition, its origins and the need for treatment. Hiley J also stated[77] that it was clear that as a result of KMD's refusal to engage or cooperate with medical practitioners it had become more difficult for people to assess her condition and provide her with counselling. Hiley J concluded

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76 *KMD No 3* at [66]-[67].

77 *KMD No 3* at [73].

that KMD was not willing to participate in assessments or counselling except on her terms, and she was not prepared to follow advice about treatment of her condition. Hiley J also concluded that KMD's mental state had deteriorated since the custodial supervision order was made in 2015.

[123] In concluding that the custodial supervision order should be confirmed, Hiley J said:

> I consider that there is no relevant improvement in KMD's condition since the time when she was placed under the Custodial Supervision Order. Rather her condition is probably worse on account of her lack of insight and her refusal to accept professional advice. I consider that her lack of insight and her refusal to trust and engage with mental health practitioners is a product of her mental illness.
>
> The risk that she poses to the safety of the public remains serious if she is not in a custodial setting. Although the likelihood of her committing further acts of violence remains difficult to predict, if that were to occur, the outcome could be "catastrophic". The magnitude and severity of the consequences in the event of such an incident would be high. Applying the approach and language used in another Victorian case to which I was referred, Attorney – General v David, the risk is significantly more than "trifling" or "negative". The risk of catastrophic harm occurring to a member of the public is not insignificant.
>
> Counsel for KMD submitted that, in effect, KMD is being imprisoned and punished for refusing to take antipsychotic medication. Whilst that might be her perception, it is not the case. She is in a custodial correctional facility because she is a serious risk to the community. But for her mental impairment, she would have been convicted and sentenced to about 16 years imprisonment in such a facility.
>
> Until she accepts the diagnosis, which is the diagnosis of every expert, including Doctor Walton, that she does have a mental illness, and until she accepts advice and recommendations of mental health practitioners and undertakes counselling and assessment, it is likely that her mental illness will deteriorate and a risk to the safety of the public will remain or get worse.

> I am satisfied on the evidence available that the safety of the public will be seriously at risk if KMD is released on a Non-custodial Supervision Order. I confirmed the existing Custodial Supervision Order.[78]

KMD No 4

[124] The second periodic review of KMD's custodial supervision order was also undertaken by Hiley J and commenced on 9 November 2020. KMD had refused to engage with her psychiatrist, Dr Das, or other members of the Forensic Mental Health Team (FMHT). While KMD had been engaging constructively in programs within prison and successfully completing college courses through correspondence, she continued to hold her core belief that her son had been sexually abused by his father. While KMD was polite and cooperative in custody, and displayed no evidence of positive psychotic symptoms, she continued to refuse to acknowledge that she had a mental illness and refused to engage with medical practitioners.

[125] The diagnosis of a delusional disorder and KMD's risk profile remained unchanged. KMD continued to lack insight into her illness. As such, Hiley J said, there was no prospect of KMD's risks being better managed and assessed if she were to be released on a non-custodial supervision order. Hiley J was satisfied that the safety of KMD or the public would be seriously at risk if she were to be released on a non-custodial supervision order and, accordingly, his Honour confirmed the custodial supervision order.

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78 *KMD No 3* at [127]-[131].

The first primary judgment – *KMD No 5*

[126] For the purpose of conducting the periodic review of KMD's custodial supervision order, the primary Judge received three reports, dated 30 July 2021, 1 March 2022 and 9 March 2022 from Dr Das. Dr Das had been assigned as KMD's treating psychiatrist since December 2016. The primary Judge also received letters from Mission Australia about a program offered by that organisation and an affidavit from the General Manager of the Darwin Correctional Precinct detailing an incident when KMD had been the victim of a minor act of violence by another prisoner on 29 October 2021.

[127] The primary Judge also received submissions from the parties. The responsible persons relied primarily on the written submission provided to Hiley J in *KMD No 4*, supplemented by oral submissions. KMD filed voluminous submissions, as detailed by the primary Judge:

> KMD provided to the Court five sets of written submissions and supporting documents on 16 March, 23 March, 1 April, 8 April and 27 June 2022. The first set was in five parts (headed 'Overview', 'Applied Logic', 'The NTA *ad verecundiam* false dilemma vicious circle', 'Extent of Injury' and 'The Grief Process') totalling 328 pages. Attached to those submissions were various documents including copies of extracts from Hansard relating to the Bill that introduced Part IIA into the *Criminal Code*, extracts from a book called Toxic Psychiatry, extracts from an Ombudsman's Investigation Report into the Alice Springs Correctional Centre called Women in Prison II, articles regarding unfitness to stand trial and numerous items of correspondence, forms and photographs, totalling a further 234 pages. The second set comprised various documents including newspaper articles, extracts from Toxic Psychiatry, extracts from some of the psychiatrists' reports received in this matter, extracts from some of the decisions of the Court in this matter and correspondence and forms. The third set comprised a five page letter from KMD to the Court, essentially correcting some errors in the first set of submissions, as well as copies of various authorities and

> articles KMD intended to include with the first set. The fourth set comprised a 10 page letter from KMD to the Court and copies of a letter written by KMD to NAAJA and a number of prisoner notes or prisoner request forms, relating to KMD's issues with her use of a laptop provided by Community Corrections and to KMD's concerns about preservation of the confidentiality of the footage of the SARC interview referred to in paragraphs [37] to [40] below. The fifth set comprised a 2 page letter from KMD setting out some corrections to the first set of submissions and various documents including extracts from articles.[79]

[128] KMD was represented by a legal practitioner during part of the review before the primary Judge. At some point she discharged her counsel. This occurred before she cross-examined Dr Das. I infer from the above description of the material submitted by KMD that she prepared those submissions personally.

[129] The primary Judge noted that in his report dated 29 July 2020, which was before Hiley J in *KMD No 4*, Dr Das referred to KMD's ongoing refusal to acknowledge that she has a mental illness and to engage with medical practitioners or accept treatment for that illness. Dr Das had expressed the opinion that KMD suffered from a "delusional disorder of a continuous nature", presenting with a "well systemised persecutory delusional system" associated with "psychological impairment, irritable and dysphoric mood". The core belief in that delusional system was that KMD's son was sexually abused by his father. The primary Judge noted that in this report Dr Das assessed the risk to the safety of KMD or the public if KMD were released on a non-custodial supervision order, concluding that KMD was likely to act

79 *KMD No 5* at [28].

on her delusional system of her son being abused and her perception that she was subject to victimisation and persecution by her former partner, his associates, government agencies and officials, and, if she did so act, was likely to engage in violence of a similar kind to that which she engaged in in May 2013.

[130] In his report dated 30 July 2021, Dr Das stated that, since his last report, KMD had consistently refused to meet any members of the FMHT, and consequently the FMHT had been unable to conduct a mental state review of KMD. Dr Das did, however, give evidence that from his observations of KMD during a hearing in the Northern Territory Civil and Administrative Tribunal in June 2021 in which KMD represented herself, KMD's presentation disclosed "ample evidence" of her delusional belief system still being present.

[131] Dr Das's risk assessment remained unchanged from the previous review. Dr Das said that the risk flows from the fact that KMD had a mental illness associated with a delusional system in response to which she got upset, aggressive, acted violently, used a weapon and where people were hurt and could have been killed.

[132] Dr Das related that the correctional officer in charge of the women's sector of the prison had told him on 22 July 2021 that KMD operated in custody on the basis that she was being persecuted by the system, that she had significant difficulties with authority figures and interpreted most of her

dealings with correctional staff in a conspiratorial way, with a belief system that she was being unfairly detained. The primary Judge went on to say:

> Two things may be noted. First, the information is consistent with KMD's submission that she should not be treated as if she were a prisoner serving a sentence of imprisonment after being found guilty of committing offences; because she was not found guilty, she is only detained in the prison because there is no secure facility for people held in custody under Part IIA of the *Criminal Code*, and she should not be detained because she is not a risk to the safety of the community. Secondly, and more importantly, there is no mention of irritable, hostile or aggressive behaviour and other evidence establishes KMD has not engaged in any violent behaviour since 7 May 2013.[80]

[133] Dr Das gave evidence before the primary judge of concerted efforts made by the members of the FMHT over the previous 12 months to approach KMD, and that she had refused to see any of them this included the case manager, a nurse and a social worker. In the absence of engagement by KMD with the FMHT, Dr Das said that it was not possible to revise the earlier risk assessment which had been undertaken utilising a risk assessment tool, the HCR-20.

[134] Dr Das said that the continuation of his opinions about the risk presented by KMD from his previous assessments was founded on the absence of further clinical information, given the inability to interview KMD and engage in a therapeutic relationship with her. Dr Das stated that the first step to recommendation of a change to KMD's environment would be therapeutic engagement with key members of the medical team from FMHT, including

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80 *KMD No 5* at [45].

talking to them and revealing her mental state, so that they were able to make a more dynamic risk assessment. Engagement on the part of KMD would require KMD to talk transparently and openly with a psychiatrist and with members of the clinical team.

[135] Dr Das agreed to that, in the absence of engagement by KMD with the FMHT, he anticipated coming back to court year after year and saying that KMD's risk had not changed, a situation he referred to as "an impasse". Dr Das agreed it was possible that this impasse might occur indefinitely.

[136] In his report dated 30 July 2021, Dr Das stated that KMD required treatment including psychotropic medication, psychological treatment and psychosocial rehabilitation, all with the objective of addressing her persecutory delusional system. Dr Das believed that without effective treatment, which would require her cooperation and engagement in the treatment process, KMD's risk profile would not change. Dr Das said that KMD's prognosis would be very good if she were to engage in treatment because people with her condition get better and are "supervisable".

[137] The primary Judge said, with regard to KMD's opposition to accepting medication:

> KMD is opposed to medication on the basis that, as reported in various texts and articles, neuroleptic and psychotropic drug treatment has harmful effects on the brain, substantially increases the risk of stroke and heart attack, increases the risk of breast cancer and can cause permanent dyskinesia from brain damage. She said such medications would not give her more insight into her offending

> because the reason for her offending was rational, it was a one-off event and does not define her as a person for the rest of her life.[81]

[138] In his evidence, Dr Das stated that people with psychotic illnesses such as delusional disorders never improve without treatment and their delusional system can linger on for years, leading to it becoming resistant to treatment. He said that the condition "usually gets worse". Dr Das opined that the decision made by KMD to cease engaging with doctors and clinicians could be a sign of deterioration in her mental state. In circumstances where she had refused to engage with him, Dr Das agreed that he had no objective evidence available to him to indicate a deterioration in KMD's mental state. Dr Das stated, however, that deterioration in a delusional disorder is not a necessary characteristic for its diagnosis.

[139] The primary Judge stated that whether KMD's condition had deteriorated over time was "of little moment" in determining whether KMD had a mental condition, but in the absence of evidence of a deterioration it was not open to find that her condition had deteriorated.

[140] In the proceedings before the primary Judge, KMD continued to argue that her actions on 13 May 2013 were not the product of mental illness and that she should not have been diagnosed with a mental illness. She argued that her conduct was a "normal" reaction to a highly stressful event.

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81 *KMD No 5* at [62].

[141] In the proceeding before the primary Judge, KMD argued that the psychiatric evidence should not be accepted because the psychiatrists were not objective or impartial, the factual assumptions underlying their opinions were flawed and there was no longitudinal clinical observation of KMD. These submissions were rejected by the primary Judge.

[142] As part of her submissions on these issues, KMD stated that multiple psychiatrists had lied to the Court about what she had said to them and that they had behaved immorally and unethically. The primary Judge did not accept these assertions, stating there was no foundation for them.

[143] Based on all of the evidence before the Court, the primary Judge found that:

(a) KMD has a mental condition, namely a delusional disorder, whereby she holds a system of delusional beliefs on which she does and may act.

(b) There is no risk that KMD would harm herself if she were released from custody.

(c) There is a risk that, if KMD were released from custody, she would endanger other persons because of her mental condition. That risk exists because:

(i) KMD's delusional disorder involves well-entrenched delusional beliefs about wrongs done to her and injustices she has suffered.

(ii) On 7 May 2013, KMD acted on her delusional belief system with serious aggression and violence towards a number of other people, causing physical harm to some and endangering others.

(iii) KMD denies that any of her beliefs are delusional or that she has a mental illness. KMD lacks insight into the degree of aggression, violence and danger to others in her conduct on 7 May 2013.

(iv) KMD refuses treatment by medication and refuses to engage with the FMHT.[82]

[144] The primary Judge acknowledged that the magnitude of potential harm to others if KMD acted on her delusional beliefs was "substantial", but her Honour assessed the likelihood of KMD doing so as low. The primary Judge went on to say:

> As set out in paragraphs [43] to [44] above, the expert psychiatric assessment of risk is essentially founded on what KMD did over nine years ago, her lack of insight into her condition and consequent refusal of treatment, and the inability to update the 2017 risk assessment because of KMD's refusal to expose her thoughts and beliefs to the FMHT. That refusal is founded upon the valid concern that what she might say might be used against her to support a decision to continue her detention. Little more can be gleaned from what KMD might say about her thoughts and beliefs than the nature of them (how bizarre or otherwise they are) and the strength with which she holds them. She is extremely unlikely to say she would act aggressively or violently on them in the future. She might indicate that her past actions were justified, because of her beliefs. She has already said as much in this Court. It is difficult therefore to see how that kind of engagement, in her present custodial setting, would assist in assessing the likelihood that she would, in the future, act aggressively or violently in response to her delusional belief system.
>
> The evidential weight of the current assessment of the risk that KMD would act on her delusional belief system in a seriously aggressive or violent way in the community in the future is therefore concerning. Section 43ZH(2) requires the Court to vary the supervision order to a non-custodial supervision order unless satisfied that the safety of KMD or the public *will be seriously at risk* if she is released on a non-custodial supervision order. To continue the custodial supervision order, the risk must be serious and it is not sufficient to simply find some risk; the inquiry is focussed on whether there is an actual serious risk.
>
> That is particularly so when the Court must take into account the need to protect people from danger, but must also apply the principle that restrictions on a supervised person's freedom and personal

82 *KMD No* 5 at [139].

> autonomy must be kept to the minimum consistent with protecting the safety of the community. Given the serious intrusions into the liberty of the supervised person of a custodial supervision order, the principle in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 applies and the requisite degree of proof (the balance of probabilities) is enhanced so that matters to be proven should be firmly established.
>
> On the basis of the evidence presently before me, I consider the degree of likelihood that KMD would act on her delusional belief system in a violent way in the community to be low, but real rather than fanciful. In the circumstances, whether the safety of KMD or the public will be seriously at risk if she is released on a non-custodial supervision order depends significantly upon the terms of any such order and the mechanisms in place to support KMD to live in the community in compliance with such terms.[83]

[145] The primary Judge went on to find that while treatment was available to KMD in the community in the form of medication and psychiatric engagement, KMD would not accept such treatment. The primary Judge hypothesised that KMD may engage with a psychologist in the community.

[146] Having made these findings the primary Judge said:

> It is not sufficiently clear to me why the only way to adequately address the risk is for KMD to be detained in a physically secure environment. I cannot presently see why the risk could not be appropriately addressed by ensuring KMD has supports available to her, including accommodation, conditions as to her movements, supervision by Community Corrections, and a process for monitoring and regularly assessing KMD's mental wellbeing and state of mind (including her levels of stress, anxiety, fixation, irritability, hostility and general coping capacities) to ensure she is provided support and assistance directed to preventing any acts of serious aggression or violence in pursuit of her delusional beliefs.
>
> I find unacceptable the proposition that KMD cannot be released from custody until her risk profile changes, which cannot occur until she engages with the FMHT by exposing to them her belief system and thinking, and she accepts medication or at least gives

83 *KMD No 5* at [141]-[144].

> consideration to taking it. If, for reasons including her delusional belief system at the heart of her mental condition33, she refuses to so engage for the remainder of her life, she would be held in custody until she dies. I say that because the major review of KMD's supervision orders provided for by s 43ZG of the *Criminal Code*, which is not due to occur until three months prior to 7 May 2029, turns on essentially the same criteria as in s 43ZN(2), namely, whether the safety of the supervised person or the public will (or is likely to) be seriously at risk if the supervised person is released (s 43ZG(5)).
>
> I cannot countenance such a course, at least without giving careful consideration to alternative options.[84]

The second primary judgment – *KMD No 6*

[147] Under the provisions of s 43ZN(2) of the *Criminal Code*, the primary Judge could not make an order that KMD, as a supervised person, be released from custody unless the primary Judge received and considered two reports prepared by separate psychiatrists or other experts, and also considered the earlier reports prepared for the initial determination of whether KMD should be subject to a custodial supervision order and the reports prepared for the subsequent reviews of the original order.

[148] The two reports which were received were prepared by Professor Ogloff and Ms Janet Guy. Distinguished Professor James Ogloff AM is a registered psychologist in Australia with endorsements in clinical and forensic psychology. As described by the primary Judge, he works as a clinical and forensic psychologist and has worked in various clinical and forensic settings, including prisons, youth detention centres, community mental health clinics, and forensic psychiatric clinics and hospitals since 1982. He

84 *KMD No 5* at [146]-[148].

holds a Bachelor degree in psychology, a Masters degree in clinical psychology, a Juris Doctor degree in law and a Doctorate (PhD) in forensic psychology and law.

[149] Professor Ogloff is a Fellow of the Australian, Canadian, American and International psychology associations, and a Fellow of the Australian Professional Psychology Association Colleges of Forensic and Clinical Psychologists. He is a Professor of Forensic Behavioural Science and Dean of the School of Health Sciences at Swinburne University of Technology. He is also the Strategic Adviser, Research, Education and Innovation at the Victorian Institute of Forensic Mental Health (Forensicare). From 2001 to July 2022, he was the Executive Director, Psychological Services and Research at Forensicare. From 2004 to 2021, he was the Director of the Centre of Forensic Behavioural Science. Professor Ogloff has conducted risk assessments since 1986, regularly publishes scholarly work on risk assessment, and is a pioneer in the assessment of risk among women offenders and psychiatric patients. Professor Ogloff is familiar with the Darwin Correctional Centre and forensic mental health services in the Northern Territory.

[150] The second report was prepared by Ms Janet Guy. As described by the primary judge, Ms Guy is a clinical social worker engaged by KMD and her family to provide a report in the proceedings. Ms Guy holds a Bachelor degree in Social Work and an Associate Diploma in Social Welfare. From 2019 to 2023 she worked as a social worker for various non-government

organisations and the Aboriginal and Torres Strait Islander Health Service in Queensland. She has worked with Aboriginal people who have suffered trauma, mental health disorders and physical health problems, providing support, advocacy and skills to "get through difficult times".

[151] Before 2019, Ms Guy worked for more than 20 years as a social worker for Queensland Health, in both mental health and alcohol and drug contexts. In those roles she provided counselling, education, support and advocacy to mental health consumers. Ms Guy facilitated various programs, including programmes addressing grief and loss, anger management and cognitive behavioural therapy, including with Queensland Community Corrections.

[152] KMD refused to be interviewed by Professor Ogloff for the purpose of preparation of his report. Professor Ogloff considered that his inability to directly assess KMD and KMD's limited direct clinical contact with mental health professionals over many years put him at a "considerable disadvantage" in completing his report. Professor Ogloff stated that as a consequence he approached the issues in his report with considerable caution and he placed greatest weight on the assessments done with KMD directly. He nevertheless considered himself to be able, based on a documentary review, to comment on KMD's diagnosis, the course of her illness and the appropriateness of risk assessments which had been undertaken.

[153] Professor Ogloff's opinion, as described by the primary Judge, was that KMD suffered from a delusional disorder, persecutory type, with continuing symptoms. He considered KMD's delusional beliefs to have persisted over many years. He did not believe that KMD had demonstrated symptoms consistent with a diagnosis of schizophrenia.

[154] Professor Ogloff opined that the nature and strength of KMD's delusional symptoms are uncertain, but it was most unlikely that they would have abated, with her lack of insight and paranoia about being assessed by psychiatrists providing some evidence of persistent delusional thinking. Professor Ogloff's stated in his report dated 28 November 2022:

> Given the lack of access to (KMD) and other direct clinical observation information, it is premature to devise a suitable plan for (KMD's) transition to the community. By their very nature, to be effective, transition plans must address (1) appropriate care and treatment to meet a patient's needs, (2) the static and dynamic factors contributing to a person's risk for violence, and (3) a consideration of the suitability of transition accommodation options to meet the patient's clinical and public safety risk needs. To be effective, it is also important that the patient is actively involved in the development and any transition plan. Without such engagement, there can be little confidence that the patient will adhere to the plan. If the patient does not adhere to the plan, their clinical and public safety needs may not be met. In the case of (KMD), she has rejected treatment efforts and sees no need for intervention as she does not believe she has a mental illness.

[155] With regard to an assessment of KMD's risk of future violence, Professor Ogloff noted that KMD had been managed in prison for nine years and had been relatively stable. He observed that KMD had not engaged with forensic mental health professional services and states a clear lack of willingness to do so in the future. Professor Ogloff went on to say:

> Her risks have been managed well in the present, and she has been removed from the matters that underpin her delusions. Also, she is away from the stressors that can trigger behavioural manifestations of her delusional disorder.
>
> It is unfortunate indeed that there is no secure forensic mental health facility in the Northern Territory since a therapeutic, yet secure environment can be conducive to therapeutic engagement and progress.
>
> In addition to taking into account empirically supported risk factors, such as those included in the HCR-20 v3, any comprehensive assessment of risk for violence must carefully consider individuals 'past incidents of violence. In so doing, clinicians attempt to obtain a clear understanding of the factors that led up to the violent incident and the factors that were present at the time the event occurred. In the case of (KMD) this is a daunting task. As noted previously in this report, (KMD) continues to believe she had to act to protect her son and others from harm by (RL), his mother, and others. In the file material available, she expressed the view that the actions were required under the circumstances. Taken together, this almost entire lack of information regarding (KMD's) current belief system makes it impossible to determine the extent to which the factors that were in play leading up to, during and following the offences are still present. Without this information, it is not possible to identify the risk factors which should be managed into the future.

[156] Professor Ogloff stated that the lack of access to KMD by mental health professionals had led to the situation that any formulation of her case is lacking, treatment plans are lacking, and appropriate interventions have been non-existent. In forensic mental health, Professor Ogloff stated, therapeutic security exists when forensic mental health clinicians form a therapeutic relationship with the patient that includes a comprehensive understanding of the nature and course of the patient's mental illness as well as the factors that contributed to the offending behaviour. Clinicians use this relational security to learn and work the patient to gain insight into the relationship between the mental illness and offending, and to identify possible triggers to

an elevated risk for violence. Those risks are then ameliorated before untoward behaviour occurs.

[157] Professor Ogloff stated that forensic mental health care is highly specialised and the skills necessary to manage the risk of violence among people with mental illness is not shared with general mental health professionals. Generalist clinicians may not have the awareness, competency and capability in risk assessment and management, specialist forensic assessment, treatment planning and delivery as someone trained in forensic mental health care. Professor Ogloff did not believe that KMD could be safely managed outside of a custodial setting, and certainly not by non-governmental agencies.

[158] Professor Ogloff noted that research and clinical experience shows that people with psychotic illnesses are at a greater risk of violence than people who do not have such disorders. He also stated that additional evidence exists to confirm a relationship between psychotic delusions and violence, particularly when the delusions include persecutory themes and engender anger in the patient. Professor Ogloff went on to state:

> Simply stated, without concrete evidence of positive change in both mental health and offending risk factors, there can be no assurance that such changes have occurred. These matters do not typically resolve themselves, particularly when, as is the case with (KMD) there is evidence that the mental illness persists.

[159] Both Dr Das, the FMHT psychiatrist, and Ms Yvonne Roberts, a registered mental health nurse with 17 years' experience in mental health care,

expressed their concurrence with the report prepared by Professor Ogloff. They also expressed their disagreement with the report of Janet Guy, to which we will now refer.

[160] Ms Guy prepared a report dated 21 December 2022. Her report was based on face-to-face contact with KMD at the prison and 24 teleconference contacts amounting to approximately 50 hours of interaction with KMD. Clearly, KMD chose to engage with Ms Guy. In her report, Ms Guy stated that:

a) following conversations with family members of KMD she was able to report that there are strong family ties and connections and a great deal of support for KMD's release;
b) KMD had been of good behaviour in prison, and had undertaken jobs such as gardening and English reading and writing tutoring two other prisoners;
c) on the two occasions that KMD had been granted supervised day release there had been no behavioural issues;
d) given the significant amount of time which had passed since KMD was placed in custody with limited access to rehabilitation, consideration must be given to the next phase of the rehabilitation which should include a return to a more community focused lifestyle outside of prison where she can return to meaningful employment, engage in meaningful relationships and be encouraged to adopt a positive lifestyle.

[161] Ms Guy stated that she had found that KMD had the ability to learn from past wrongs and was able to articulate and form opinions that are within normal reasoning. KMD had, she said, engaged in various courses whilst incarcerated with a view to enhancing her administration abilities and increasing her chances to obtain meaningful employment upon release. This showed that KMD had "learning abilities and foresight for the future".

[162] KMD told Ms Guy that she has learned from her jail experience. Ms Guy stated that her conversations with KMD showed that KMD had "a desire to tell her story, so that she can move on, at the present moment she feels that she has not been heard, and these sessions (with Ms Guy) have provided an opportunity for her to begin the process of healing in her journey to recovery and moving forward". Ms Guy stated that KMD felt that her past conversations with both psychiatrists and legal representatives had been misinterpreted and misunderstood. Ms Guy stated that KMD had told her that she accepted that she had done the wrong thing and was remorseful for her behaviour. Ms Guy went on to say that she believed that KMD would follow directions contained in a Transition Plan and adhere to guidelines imposed by the Court.

[163] Ms Guy expressed the belief that KMD may fall within the diagnostic criteria for Post- Traumatic Stress Disorder or Acute Stress Disorder. Ms Guy referred to self-reported symptoms suffered by KMD which would support such diagnoses. Ms Guy went so far as to say that "on the day (KMD) offended, it could be said that she acted on sane automatism". Ms Guy did take into account "the possibility" that KMD has a delusional disorder, but believed that KMD could be managed in the community.

[164] Ms Guy also noted that KMD's "cultural heritage" had not been taken into consideration, referring to a 1995 report titled "Ways Forward. National Aboriginal and Torres Strait Islander Mental Health Policy National Consultancy Report" by P Swan and B Raphael which, Ms Guy said,

supports the view that "Aboriginal mental health inevitably relates to colonialisation, history, racism and social factors, and inequality".

[165] Ms Guy conducted a social work assessment, which she described in the following terms:

> In the assessment phase of the social work process, multidimensional information on the client and his or her situation is gathered and assessed. Based on this assessment a plan will be devised to assist the client to overcome the challenges and issues.
>
> A social work assessment helps look into different aspects such as the client's mental health, education, occupation, strengths, finances etc.., this can also include family and support networks (which I have included in this Report).

[166] Having conducted that assessment, Ms Guy opined that KMD would not pose a threat to the general public or herself if released from prison. She also believed that KMD would be likely to comply with all directions imposed by the Court, and follow directions from any agency post release. Ms Guy stated that ongoing counselling with KMD as she transitions back to community life would ensure and provide insight into how KMD is functioning and her mental health. Video conferencing or face-to-face appointments could also be arranged with KMD and family members to provide a sound background into how KMD is functioning. Ms Guy reported that KMD had stated she had no intention of contacting her son or any other victim of the incident on 7 May 2013.

[167] The primary Judge noted that in cross-examination, Ms Guy did not believe that any team managing KMD's mental health in the community needed to

include a psychiatrist or a psychologist, and that the team could include family members and North Australian Aboriginal Justice Agency (NAAJA) Throughcare staff. Even though Ms Guy lives in Queensland, she believed that she was able to monitor any transition plan by coming to the Northern Territory when necessary, and providing support and strategies to KMD, her family, NAAJA Throughcare staff and other stakeholders.[85]

[168] The primary Judge found that Ms Guy had the expertise, experience and necessary therapeutic relationship with KMD to engage with KMD, recognise if she is expressing beliefs not grounded in reality, discuss and, if necessary, challenge those beliefs with KMD, assist her to manage her thoughts and emotions, and identify when such beliefs may involve an elevation of risk to the safety of members of the community such that some intervention or escalation is required.

[169] The primary judge referred to KMD having expressed remorse to Ms Guy and in KMD's written submissions. The primary Judge assessed KMD's expressions of remorse as genuine.

[170] When making an order under Part II A of the *Criminal Code*, the Court must have regard to the matters set out in s 43ZN(1):

> (1) In determining whether to make an order under this Part, the court must have regard to the following matters:
>
> (a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself

85 *KMD No 6* at [121]-[122].

or herself or another person because of his or her mental impairment, condition or disability;

(b) the need to protect people from danger;

(c) the nature of the mental impairment, condition or disability;

(d) the relationship between the mental impairment, condition or disability and the offending conduct;

(e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

(f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;

(g) any other matters the court considers relevant.

[171] The primary Judge maintained her finding in *KMD No 5* that the likelihood that KMD would act upon her delusional beliefs and endanger members of the public is low, but real rather than fanciful.[86]

[172] Her Honour then went on to say, concerning whether in making orders regarding KMD there was a need to protect people from danger:

> The next matter is the need to protect people from danger (s 43ZN(1)(b)). This matter brings into consideration both the likelihood of endangering people identified in s 43ZN(1)(a) and the magnitude of the risk of harm to people. Where the likelihood of endangering people is low but real, the greater the potential seriousness of the harm posed to people by KMD's release, the greater the need to protect members of the public.
>
> Essentially, Professor Ogloff and Dr Das assessed the risk of harm to others by reference to the acts committed by KMD on 7 May 2013, on the basis that past behaviour is a reasonable predictor of, if not future behaviour, at least the capacity for future behaviour. I accept that the seriousness of the acts of violence towards the victims engaged in by KMD on that day, which went as far as firing a gun six times at three different people, striking two of them, makes the magnitude of the risk of harm to others high.

86 *KMD No 6* at [151].

> A low but real likelihood of a risk of high magnitude occurring means that there is a need to protect people from danger.[87]

[173] The primary Judge reiterated her findings in *KMD No 5* that KMD suffers from a delusional disorder, whereby she holds a system of delusional beliefs on which she has acted, and may act: s 43ZN(1)(c).[88]

[174] Regarding the relationship between KMD's mental condition and the offending conduct (s 43ZN(1)(d)), the primary Judge found that on 7 May 2013 KMD acted on her delusional belief system, with serious aggression and violence towards three other people, firing six shots from a gun at, or towards those people, causing two of them physical harm.[89]

[175] The primary Judge stated that none of the parties to the proceedings has suggested that treatment and support for KMD were not available in the community: s 43ZN(1)(e).[90]

[176] Turning to whether KMD is likely to comply with the conditions of a non-custodial supervision order (s 43ZN(1)(f)), the primary judge said:

> In Exhibit SO53, Professor Ogloff opined that KMD would not comply with any conditions of a NCSO that required her to engage with the FMHT or manage her mental illness. In written and oral submissions, KMD confirmed that she does not wish to engage with psychiatrists or forensic mental health practitioners, whether from the FMHT or of her choosing. Her reasons for that have been referred to above. However, she has engaged in counselling with Ms Guy and has said she intends to continue to do so.

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87 *KMD No 6* at [154]-[156].

88 *KMD No 6* at [158].

89 *KMD No 6* at [159].

90 *KMD No 6* at [160].

> Ultimately, whether KMD is likely to comply with the conditions of a NCSO depends on what those conditions are, noting her firm position in relation to psychiatric treatment, including medication. Motivated by her desire to remain out of custody, I consider KMD to be likely to comply with the conditions of a NCSO, other than any conditions requiring her to receive psychiatric treatment, medication or to engage directly with members of the FMHT.[91]

[177] Where a custodial supervision order is reviewed, the Court must vary the order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order: s 43H (2)(a). If the Court is satisfied that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order, the Court must confirm the order or vary the conditions of the order: s 43ZH(2)(b).

[178] In determining that her Honour, the primary Judge, was not satisfied that the safety of the public would be seriously at risk if a non-custodial order was made, the primary Judge took into account:

a) Ms Guy had not observed any symptoms of mental illness in KMD across the course of her 50 hours of counselling sessions with her.
b) Her Honour's findings that the victims of the offending on 7 May 2013 had suffered significant and long lasting adverse psychological and emotional consequences and held a genuine concerns for their personal safety if KMD were released on a non-custodial supervision order.

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91 *KMD No 6* at [[161]-[162].

c) Her Honour's finding that KMD's next of kin (her mother) was of the view that KMD's conduct on 7 May 2013 did not have any adverse impact on KMD's next of kin or other members of her family.

d) Her Honours finding that KMD's family would provide her with many of the things considered important in the rehabilitation of offenders and reduction of risk of reoffending in the ordinary criminal context, including employment, stable housing, financial means, connection to culture and close familial bonds with people who live law-abiding lives.

e) The opinions of Professor Ogloff, Dr Das and Ms Roberts that KMD presents a high risk of harming another person if released without forensic mental health treatment.

f) The limitations of the risk assessment tool used in this case.

g) Her Honour's doubts about the weight attributed to, or relevance of, material relied on or not relied on by Professor Ogloff in his application of the risk assessment tool, including whether statements taken by Professor Ogloff to be justifications of the offending conduct made by KMD were justifications or were simply explanations for her conduct, doubt about whether there was evidence, as believed by Professor Ogloff, that KMD's relationship with a former partner, JC, had been conflictual, the lack of weight given by Professor Ogloff to the value of the counselling with Ms Guy and Professor Ogloff's opinion regarding the lack of evidence of progress by KMD in custody.

h) Her Honour's personal doubts about the validity of the risk assessment tool used by Professor Ogloff.

i) Professor Ogloff's opinions about the requirements for risk management for forensic mental health patients.

j) KMD's submission that forensic mental health treatment is unnecessary in her case.

k) Her Honour's finding that the counselling in which KMD had engaged with Ms Guy had "elements of a forensic approach to it".

l) Her Honour's finding that Ms Guy had the capacity to address and mitigate risk through her engagement and counselling with KMD.

m) Her Honour's finding that KMD's family had capacity to address and mitigate risk in their dealings with KMD.

n) The likely rehabilitative and protective benefits to KMD from living in the community.

o) The absence of acts of violence by KMD in custody.

p) The "reflection and learning" KMD had undertaken in custody which would be strong motivation for KMD to maintain her mental health.

q) Her Honour's finding that KMD had expressed some genuine remorse for the effects of her actions on her victims, albeit without an acceptance that she acted on delusional beliefs at the time.[92]

[179] On this basis the primary Judge made a non-custodial supervision order. It is, in our opinion, unnecessary to set out the terms of the order at length. However, it is worth mentioning that the terms of the order effectively relegates the Forensic Mental Health Team to a liaison role with no control over the nature of treatment to be undertaken by KMD. There is also no provision for oversight of KMD's progress in the community by a psychiatrist or a psychologist.

Consideration

[180] Part IIA of the *Criminal Code* addresses mental impairment and unfitness to be tried. It does so in a way that attempts to balance potentially conflicting

92 *KMD No 6* at [166].

principles and values. The provisions addressing unfitness to be tried reflect community values that a person charged with a criminal offence should not be required to go on trial and be at jeopardy of conviction and punishment when they cannot properly understand the nature of the charges, give instructions to a lawyer or otherwise appropriately participate in the trial:[93]

[181] The provisions of Part IIA regarding unfitness to be tried acknowledge the important right of a person to their individual liberty unless that right is removed or reduced by operation of law. If a person is found to be unfit to stand trial, a special hearing must be conducted, the purpose of which is to determine whether the person is not guilty of the offence with which they are charged, are not guilty by reason of mental impairment or committed the offence: s 43V. Special hearings are conducted before a jury, and the jury determines the appropriate verdict. The conducting of a special hearing ensures that a person who would not be found guilty of the charged offence on the available evidence is discharged and no longer subject to the provisions of Part IIA: s 43X(1). Any mental health concerns regarding a person so discharged then fall to be addressed under the provisions of the *Mental Health and Related Services Act 1998* (NT).

[182] The provisions of Part IIA also reflect a legislative concern for the safety of the public. By finding a person not guilty by reason of mental impairment, the jury has determined that the accused person did the acts which form the

93 See s 43J.

basis of the charge, and the accused is not entitled to a verdict of not guilty. A fortiori, a verdict that the person committed the offence is to the same effect. Where a jury at a special hearing finds an accused person to be not guilty because of mental impairment, the finding is taken to be a finding of not guilty because of mental impairment at a criminal trial and the Court must either declare that the accused is liable to supervision under Division 5 of the *Criminal Code* or order that the accused person be released unconditionally.[94]

[183] Where a declaration is made that an accused found not guilty because of mental impairment after a special hearing is liable to supervision, a supervision order under Division 5 must be made. As noted above, a supervision order may be either a custodial supervision order or a non-custodial supervision order. In determining whether to make a custodial supervision order or a non-custodial supervision order, the Court must apply the principle that restrictions on a supervised person's freedom and personal autonomy are kept to the minimum that is consistent with maintaining and protecting the safety of the community.[95]

[184] In determining whether to make a custodial or non-custodial supervision order, the Court must also have regard to the matters set out in s 43ZN (1): see [170] above. It is apparent from the principal set out in s 43ZM and the matters set out in s 43ZN that the Legislature has sought to balance the

94 See s 43X(2).

95 See s 43ZM.

interests of a supervised person to their freedom and personal autonomy with the interests of the community in keeping its members safe. It is important to recollect that these provisions only apply where a jury has effectively found that the supervised person committed the offence with which they were charged.

[185] As part of the process of balancing the interests of a supervised person with the interests of the public, the Legislature has provided that the Court may not make an order under Part IIA releasing a supervised person from custody or significantly reducing the supervision to which a supervised person is subject unless, inter-alia, the Court has obtained and considered two reports prepared by a person who is a psychiatrist or other expert. The requirement that the Court obtain and consider these reports before releasing a supervised person from custody protects both the interests of the supervised person and the interests of the public. The requirement protects the interests of the supervised person by ensuring that expert opinion which may favour the release of the supervised person from custody is placed before the Court. The requirement also protects the interests of the supervised person in not being released from custody where there is, at that time, a serious risk to the safety of the supervised person or the public.

[186] The requirement that the Court obtain and consider these reports protects the interests of the public generally by ensuring that the Court is provided with expert opinion necessary to make an informed determination of the extent of any risk that the supervised person may present to themselves or to the

public if they are released from custody. The requirement that the Court obtain and consider these reports is central to the legislative scheme found in Part IIA for managing persons found unfit to stand trial.

[187] In the present case, this process was effectively rendered nugatory by KMD's refusal to be examined by Professor Ogloff. As Professor Ogloff acknowledged, this refusal made his task considerably more difficult. The fact that Professor Ogloff felt that he was able to prepare a form of report based on the secondary materials available (much of which was relatively old because of KMD's refusal to engage with the FMHT) should not confuse the issue. The purpose of obtaining reports was to enable the Court to be informed of KMD's current mental state and to enable the Court to make an assessment of the risk (if any) that KMD currently posed either to herself or the public. KMD's refusal to be examined by Professor Ogloff made it effectively impossible for the primary judge to make a proper assessment of KMD's current mental state and any risk she may present to the public if she were released from custody. The same may be said regarding KMD's refusal to engage with Dr Das and other members of the FMHT in the years leading up to the review conducted by the primary judge.

[188] KMD demanded that the review conducted by the primary judge be conducted on her own terms. She would only engage with people of her own choosing. By doing so, KMD, whether consciously or otherwise, ensured that the material upon which Professor Ogloff and Dr Das formulated any opinions was dated and second-hand. This was something that KMD herself

relied on when she personally made submissions to the primary judge. A single (but by no means solitary) example of this is found at page 6 of the transcript where the following exchange occurred between KMD and the primary judge, speaking of Dr Das:

> Her Honour: Hasn't Dr Das attempted to speak to you on a number of occasions?
>
> KMD: Regardless of whether he has or not, he hasn't, and clinical practice guidelines state that he…
>
> Her Honour: But if you're preventing him from speaking to you, and he can hardly be said to be unobjective, or otherwise unprofessional in his conduct, for not speaking to you.
>
> KMD: But that doesn't give him a God power, and extraordinary power to just make an opinion, when he doesn't have the evidence to make that opinion. That's the whole reason why that guideline specifically says to practice caution, and one of those things is- one of the empirical logic principles of psychiatry is that they must make their opinions based on their observations. He has never observed me. He is never spoken to me. So his borrowing conclusions from other people, second and third hand.

[189] Professor Ogloff and Dr Das were the only experts who could form a worthwhile psychiatric opinion regarding KMD's mental condition, and in particular whether she continued to suffer from a delusional disorder, whether of a persecutory type or some other type. The primary Judge was satisfied that KMD continued to suffer from a delusional disorder. Most importantly, however, the current intensity of that disorder could not be addressed by expert evidence. We have no doubt that Ms Guy is an experienced social worker, but it could not be suggested that she has the skill or experience in conducting forensic interviewing for the purpose of

determining and diagnosing mental illness that is possessed by either Professor Ogloff or Dr Das. Ms Guy did not have the expertise in risk assessment required to express an opinion on that topic or to monitor KMD's progress on a non-custodial supervision order.

[190] Most importantly, KMD's refusal to engage with Professor Ogloff or Dr Das deprived the primary Judge of crucial evidence upon which the primary judge could formulate a reliable judicial determination of the risk that KMD may present to the public if she were released from custody.

[191] It was KMD's refusal to engage with Dr Das and the FMHT, and then with Professor Ogloff, that created the impasse which clearly troubled the primary Judge: see [146] above. It must be remembered, however, that to the extent that an impasse existed, it was of KMD's making. It is accepted that KMD's mental state does not require a guardian to be appointed to make decisions on her behalf; she is capable of making decisions about what treatment she will or will not accept, and which medical practitioners with whom she will or will not engage. That is her right. Exercising that right, however, does not come without consequences. If KMD's mental condition is such that she can exercise these rights, there is no reason why she should be protected from the consequences.

[192] KMD did not give evidence in the proceeding before the primary Judge. She made many assertions of fact supposedly by way of submissions before the primary judge. Ms Guy also reported assertions of fact that KMD had made

to her, and based many of her opinions on assertions made by KMD. KMD's refusal to engage with Professor Ogloff, and previously with Dr Das and the FMHT, made it impossible for those experts to meaningfully assess and, if need be, challenge those assertions. In the circumstances, the untested assertions of KMD should have been given no weight. Similarly, to the extent that Ms Guy's opinions were based on assertions by KMD, those opinions should have been given no weight.

[193] As we have observed, the review conducted by the primary Judge required a balancing of personal and public interests. KMD's refusal to engage with mental health practitioners skewed the focus of the review away from this balance to a focus on KMD's interests, because the effect of her refusal to engage was to ensure that evidence relevant to the public interest was not contemporary and of questionable weight. The result was that the review conducted by the primary Judge fundamentally miscarried, despite the primary Judge's commendable efforts to do justice to KMD on the limited material available.

[194] In our opinion, it was not reasonably open to the primary judge to find that the safety of the public would not be seriously at risk if KMD were placed on a non-custodial supervision order. Where the review miscarried by reason of KMD's conduct, the position regarding KMD's mental condition and risk assessment had not fundamentally changed since the reviews conducted by Hiley J. In the unusual circumstances that attended the review conducted by the primary Judge, greater weight should have been given to the evidence in

those earlier reviews and to the conclusions reached by Hiley J, based on unchallenged expert testimony.

[195] We would add that we are also satisfied that it was not reasonably open to the primary Judge to formulate a non-custodial supervision order the terms of which did not provide for KMD to be the subject of monitoring and, at least, counselling on a regular basis by a psychiatrist and/or psychologist approved by the FMHT.

[196] In our opinion the appeal should be upheld, primarily on Ground 1, but it follows from our reasons set out above that we would also uphold the other grounds of appeal.

Orders

[197] Having reached the conclusion that the appeal should be upheld, we would make the following orders sought by the CEO:

(1) That the Non-Custodial Supervision Order made on 5 July 2023 be set aside; and

(2) That the previous Custodial Supervision Order be confirmed.
