CITATION:	*The Queen v KMD & Ors (No 5)* [2022] NTSC 69
PARTIES:	THE QUEEN v KMD and CHIEF EXECUTIVE OFFICER DEPARTMENT OF HEALTH and CHIEF EXECUTIVE OFFICER DEPARTMENT OF CORRECTIONAL SERVICES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21319440
DELIVERED:	2 September 2022
HEARING DATES:	15 November 2021, 16 March 2022
ADDITIONAL WRITTEN SUBMISSIONS:	23 March, 1 April, 8 April 2022
JUDGMENT OF:	Brownhill J

CATCHWORDS:

CRIMINAL LAW – Mental impairment – Part IIA of the *Criminal Code 1983* (NT) – Periodic review under s 43ZH(2) of the *Criminal Code* – Court

not satisfied on current evidence of 'serious risk' posed by supervised person if released on a non-custodial supervision order – Further reports ordered pursuant to s 43ZN(2)(a)(i) regarding option of non-custodial supervision – Periodic Review not complete within s 43ZH until these reports have been received.

CRIMINAL LAW – Mental impairment – Part IIA of the *Criminal Code* – Periodic review under s 43ZH(2) of the *Criminal Code* – Supervised person had been found not guilty by a jury because of her mental impairment – Power of court conducting periodic review limited to s 43ZH considerations – Not permissible to revisit the jury's decision.

CRIMINAL LAW – Mental impairment – Part IIA of the *Criminal Code* – Periodic review under s 43ZH(2) of the *Criminal Code* – Supervised person submitted that the assessing psychiatrists were biased or acted on flawed factual assumptions – Submission not found to be substantiated.

CRIMINAL LAW – Mental impairment – Part IIA of the *Criminal Code* – Periodic review under s 43ZH(2) of the *Criminal Code* – Supervised person submitted Part IIA of the *Criminal Code* is invalid on the grounds it is repugnant to the *Constitution* or otherwise unlawful – Submissions rejected.

Australian Constitution

Criminal Code Act 1983 (NT) s 43A, s 43ZG, s 43ZH, s 43ZI, s 43 ZK, s 43ZL, s 43ZM, s 43ZN, s 43ZO.

Juries Act 1962 (NT) s 6

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *McGarry v The Queen* (2001) 207 CLR 121; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; *The Queen v KMD* [2015] NTSC 31; *The Queen v KMD (No 2)* [2017] NTSC 18; *The Queen v KMD (No 3)* [2017] NTSC 95; *The Queen v KMD (No 4)* [2021] NTSC 27; *The Queen v RK* [2019] NTSC 67, referred to.

NOM v Director of Public Prosecutions (Vic) (2014) 36 VR 618; *Nigro v Secretary, Department of Justice* (2013) 41 VR 359; *NJE v Secretary, Department of Justice* (2008) 21 VR 526, distinguished.

REPRESENTATION:

Counsel:

Crown:	N Papas QC, L Payne
Supervised Person:	N Vadasz until 20 December 2021, then self-represented
CEO Department of Health:	R Brebner
CEO Department of Correctional Services:	R Brebner

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Supervised Person:	-
CEO Department of Health:	Solicitor for the Northern Territory
CEO Department of Correctional Services:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v KMD & Ors (No 5) [2022] NTSC 69
No. 21319440

BETWEEN:

THE QUEEN
Crown

AND:

KMD
Supervised Person

AND:

CHIEF EXECUTIVE OFFICER DEPARTMENT OF HEALTH

AND:

CHIEF EXECUTIVE OFFICER DEPARTMENT OF CORRECTIONAL SERVICES

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 2 September 2022)

Introduction

[1] KMD is subject to a custodial supervision order made under Part IIA of the *Criminal Code Act 1983* (NT) ('*Criminal Code*'). Section 43ZH of the *Criminal Code* permits the Court to conduct periodic reviews to determine whether a supervised person may be released from a

supervision order. The last periodic review in this matter culminated in a decision of this Court delivered on 10 March 2021 to continue the custodial supervision order.[1] This Court has undertaken other periodic reviews[2] and confirmed the orders remanding KMD in custody made by Riley CJ on 4 July and 23 September 2014, which were declared to be a custodial supervision order on 3 June 2015.[3]

The original proceedings

[2] KMD was charged with eight offences arising out of events that took place on 7 May 2013. What occurred is set out in the decision of Riley CJ in *R v KMD* (at [8]-[23]). For convenience, I will repeat those findings here.

[3] KMD and RL had been in a relationship and their son ('R') was born on 16 September 2006. They separated in 2007 and there was a custody dispute concerning R. In February 2013, an order was made in the Family Court that RL have the sole custody of R and KMD was granted access. RL lived at Virginia with his mother, Mrs L, and R. KMD had entered into a new relationship with JC and there was a child of that relationship.

[4] Sometime before 7 May 2013, KMD had obtained a Smith & Wesson Model 29, 44 Magnum revolver. On 7 May 2013, she went to RL's

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1 *The Queen v KMD (No 4)* [2021] NTSC 27 ('*R v KMD (No 4)*').

2 See *The Queen v KMD (No 3)* [2017] NTSC 95 ('*R v KMD (No 3)*'); *The Queen v KMD (No 2)* [2017] NTSC 18.

3 *The Queen v KMD* [2015] NTSC 31 ('*R v KMD*').

home 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 R 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.

[5] When Mrs L returned from the shops, she discovered KMD hiding under a bed in R'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 & 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. 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 R. 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).

[6] 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 R 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 RL 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 RL's car and immediately called out that KMD had a gun.

[7] RL ran across the road and then turned, put his hands in the air, and sought to discuss matters with KMD. 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 KMD attempted unlawfully to kill RL (count 3).

[8] Mrs L remained in the vehicle. She moved her car backwards and forwards to keep it between KMD and RL. 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 was an alternative charge on count 4 available under the *Criminal Code*.

[9] 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 I. He told Mr I in concise and

urgent terms what was happening. As he did so, KMD fired the handgun at the vehicle, causing the rear window to shatter. RL got in the car and Mr I drove off at speed, pursued by KMD. Mr I'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.

[10] During the chase, KMD pulled her vehicle alongside the passenger side of Mr I'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 I who thought he had been shot. He kept driving. The vehicles continued inbound with one independent witness describing them as jostling for position.

[11] Some distance along the highway, Mr I 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.

[12] 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.

[13] The jury found that she recklessly endangered serious harm to Mr I (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).

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

[15] KMD drove with R to the home she occupied with JC. She refused to explain to JC why she had R with her contrary to the provisions of the Court order. She advised JC 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.

[16] 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).

[17] On 1 May 2014, pursuant to ss 43T and 43R of the *Criminal Code*, KMD was declared by the Court to be unfit to stand trial and not likely to become so fit within a 12 month period, on the basis of reports from three psychiatrists who concluded she suffered from a delusional disorder.[4] She was found to suffer from delusions that there were threats to her life from a wide range of people and that R was being sexually assaulted and was in danger of further sexual assault by RL and other people. KMD raised her concerns about sexual assault of R with police and with the Family Court. The allegation was investigated. No further action was taken.

[18] On 4 July 2014, following a special hearing conducted over five days pursuant to Part IIA, Div 4 of the *Criminal Code*, a jury found KMD not guilty of the eight charged offences referred to in the above recitation of the facts by reason of mental impairment. In other words, the jury found that KMD had done the conduct the subject of the

4 *R v KMD* at [1]-[2].

charged offences, but she was not criminally responsible for the conduct.

[19] Pursuant to s 43ZG of the *Criminal Code*, Riley CJ determined that the period of imprisonment that would have been the appropriate sentence to impose on KMD if she had been found guilty of the offences was 16 years imprisonment commencing on 7 May 2013.[5]

Periodic review and the overarching issue before the Court

[20] On this periodic review, the Court is obliged by s 43ZH(2) to either: (a) vary the custodial supervision order to a non-custodial supervision order; or (b) confirm the custodial supervision order or vary its conditions. The choice between those two main options turns on whether the Court is satisfied on the evidence available that the safety of KMD or the public will be seriously at risk if KMD is released on a non-custodial supervision order. In making that determination, 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 (s 43ZM). The Court is also required to take into account the matters set out in s 43ZN(1), which include whether KMD is likely to, or would if released be likely to, endanger herself or another person because of her mental impairment, condition or disability; the need to protect people from danger; the nature of the mental impairment,

5 *R v KMD* at [35].

condition or disability; the relationship between it and the offending conduct; whether there are adequate resources available for KMD's treatment and support in the community; and whether KMD is complying or likely to comply with the conditions of the supervision order.

The custodial supervision order

[21] By the custodial supervision order, KMD is committed to safe custody, care and supervision at Darwin Correctional Centre, and for any physical or mental illness, she must be cared for and treated by the Department of Health, which treatment may not be without her consent, except in a situation of emergency or with the approval of this Court or the Mental Health Review Tribunal.

[22] KMD is detained in Sector 4 of the Darwin Correctional Centre, being the section that houses female prisoners.

Reports under s 43ZK

[23] Section 43ZK of the *Criminal Code* requires 'the appropriate person'[6] to prepare and submit, at intervals of no longer than 12 months, a report to the Court on the treatment and management of the supervised person's mental impairment, condition or disability.

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6 In this matter, the appropriate persons are the CEO of the Department of Health and the CEO of the Department of Correctional Services (s 43A, *Criminal Code*). I will refer to them in these reasons as 'the CEOs'.

[24] Reports dated 30 July 2021 (‘Exhibit SO46’), 1 March 2022 (‘Exhibit SO47’) and 9 March 2022 (‘Exhibit SO48’) were received from Dr Mrigendra Das. Dr Das is a Consultant Forensic Psychiatrist and forms part of the Forensic Mental Health Team (‘FMHT’) within the Top End Mental Health Service (‘TEMHS’), a work division within the Department of Health. He has been assigned as KMD’s treating psychiatrist since December 2016 and has been providing the Court with reports pursuant to s 43ZK since April 2017. Dr Das gave oral evidence at the hearing on 15 November 2021, where he was cross-examined by counsel engaged by KMD. Dr Das also gave oral evidence at the resumed hearing on 16 March 2022, where he was cross-examined by KMD (after she had discharged her counsel).

Other evidence received

[25] Three letters were received from Mission Australia about their Community Wellbeing & Healing Program (‘Exhibit SO49’). Exhibit SO48 contains Dr Das’s opinions about these services. These matters are addressed in paragraphs [52] to [55] below.

[26] An affidavit made by the General Manager of the Darwin Correctional Precinct on 1 March 2022 was read into evidence. It stated that, on 29 October 2021, KMD was the victim of an act of violence against her by another female prisoner (‘EM’). EM walked past KMD and hit the bottom of a cup which KMD was drinking from at the time, causing a cut to KMD’s lip. KMD was seen by medical staff as a precaution, but

did not (it appears) receive any medical treatment for the cut. This was put by KMD as an example of the acts of violence and hostility faced by her in custody, and is referred to further in paragraph [81] below.

Submissions received

[27] The CEOs relied on the written submissions filed on their behalf on 15 January 2021 and put to Hiley J in *R v KMD (No 4)*, supplemented with oral submissions which referred to the evidence before the Court on this periodic review.

[28] 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.

[29] Some of the documents attached to KMD's written submissions were effectively relied on by KMD as evidence to establish facts. In response to an objection to the receipt of that material on the basis of relevance, on 16 March 2022, I decided I would rule on whether those documents were relevant in the course of my determination on the periodic review.

[30] Essentially, for the reasons set out in paragraph [138] below, I rule that the following documents are irrelevant and consequently inadmissible in this proceeding: (a) Appendix K – Examples of the NTA's denial of natural justice to KMD; (b) the following documents in the bundle

headed ‘4C’: (i) letter from KMD to the Commissioner of NT Correctional Services; (ii) document headed ‘9A’; (iii) all prisoner or Superintendent consent and request forms and notes; (iv) KMD’s assignment essays and statements of results; (v) the letter from the Ombudsman’s office to KMD; (c) the following documents from the third set of submissions: (i) Addendum to Form 13, Notification and Clinical Details Supporting Involuntary Admission; (ii) NT Police Case Summary – Case 5672597; (iii) Appendix K – Examples of the NTA’s denial of natural justice to KMD; (iv) Informed Consent Form for Prisoners; (v) Letter from Solicitor for the Northern Territory to the Anti-Discrimination Commission and; (d) all documents attached to the fourth set of submissions. As regards the 20 photographs of KMD’s home property, they are relevant and received (Exhibit SO51), only to found the inference, referred to in paragraph [80] below, that the property was valuable and its loss to KMD was a significant financial loss.

Diagnosis and treatment

[31] A report from Dr Das dated 29 July 2020 (‘Exhibit SO45’) was received and considered by Hiley J in the last review of KMD’s custodial supervision order.[7] In Exhibit SO45, Dr Das noted KMD’s ongoing refusal to acknowledge that she has any mental condition and to engage with the FMHT or receive any treatment for her mental

7 *R v KMD (No 4)* at [4]-[13], [15]-[16].

condition. Dr Das's opinion was that KMD suffers from a delusional disorder of a continuous nature falling under the rubric of 'schizophrenia spectrum disorder', presenting with a 'well systematised persecutory delusional system' associated with 'psychosocial impairment, irritable and dysphoric mood'. The core belief in that delusional system is that her son was sexually abused by his father. Dr Das assessed the risk to the safety of KMD or the public if she were released on a non-custodial supervision order, concluding that she is likely to act on her delusional system of her son being abused and her perception that she is subject to victimisation and persecution by her former partner, his associates, government agencies and officials, and if she did so act, is likely to engage in violence of a similar kind to that which she engaged in in May 2013, with catastrophic consequences such as serious injury or death to a person. Dr Das expressed the opinion that KMD's care, treatment and risk management can only be provided in a secure facility.

[32] In Exhibit SO46, Dr Das stated that, since his last report, KMD has consistently refused to meet with any members of the FMHT, despite numerous attempts. She has had no formal psychological intervention from members of the FMHT. Consequently, the FMHT has not been able to conduct a mental state review of KMD and there is little information to report on her progress over the past year.

[33] In his oral evidence, Dr Das referred to his observations of KMD during a hearing in the Northern Territory Civil and Administrative Tribunal ('NTCAT') on 16 June 2021. KMD gave evidence and represented herself in a proceeding she commenced challenging a decision of NT Correctional Services and the Batchelor Institute of Indigenous Education which denied her participation in a course. Dr Das said KMD's presentation during that hearing disclosed 'ample evidence' of her delusional belief system still being present.

Delusional belief system

[34] In Exhibit SO46, Dr Das recorded that the central feature of KMD's delusional disorder is a well-systematised persecutory delusional system associated with a belief that she has been persecuted, which is a reaction to her delusional belief. He referred to her belief that her son was sexually abused, and her perception that she is subject to victimisation and persecution by her ex-partner, his associates, government agencies and officials.

[35] In cross-examination, Dr Das agreed that he did not clinically assess KMD prior to writing the first report he prepared in relation to her dated 5 April 2017 ('Exhibit SO37'). He was referred to Exhibit SO37 in which he recorded that KMD's presentation indicated that she continued to harbour her belief system about her son being abused and her ex-partner being part of the conspiracy, and that she had been victimised and incarcerated as a cover-up and multiple agencies were

involved in that. In Exhibit SO37, Dr Das had recorded things said to him by KMD in a five minute conversation with her, and in which she had indicated that she would not see anyone from the FMHT as she did not feel the need. Amongst other things, she had said that she had been wrongly convicted and had an unfair trial when she should have been 'offered a plea bargain'. In cross-examination, Dr Das was asked whether he understands KMD's delusional belief to include that she was arrested and went through the judicial process as part of a cover-up. He said he did not know because he has never discussed that with her. He said that what he had written was that she believes her child was abused and as a result of her acting on that, she has now become a victim of the system. He was unable to say whether KMD's belief is that she was victimised before or after her arrest, but referred to her 'overall general belief system' that she has been victimised. Asked what he meant by KMD's 'presentation', he referred to what she had said to her psychologist, professionals and Correctional officers since being in custody. Dr Das identified the various earlier reports by psychiatrists referred to in Exhibit SO37 as the source of that information. He could not offer any greater specificity about KMD's delusional belief system as she had never spoken to him about it.

[36] In cross-examination, Dr Das stated that he considers KMD to continue to hold the core delusion that her son had been sexually abused, notwithstanding that the report of Drs Kini and Ventura of 20 April

2015 (Exhibit SO13) confirmed Dr Walton's observation that KMD no longer believed her son was continuing to be abused.[8] Dr Das said there was no way to confirm she did not hold those views, and referred to what KMD said during the hearing in the NTCAT in June 2021, disclosing KMD's 'fear that something is going on', namely, 'a huge conspiracy'. He said this was evidence that her belief system has not dissipated. Dr Das said that delusional systems may change over time.

Core belief in the delusional system – son sexually abused

[37] KMD filed a subpoena seeking the video footage of the interview of her son at the Sexual Assault Referral Centre ('SARC') on 15 January 2013. This was dealt with by Hiley J in *R v KMD (No 4)* at [17] to [18], [23] to [24], [26] to [29] and [31]. At [29], Hiley J recorded that counsel for the Director of Public Prosecutions and the CEOs indicated that extensive enquiries had been made but no video footage or transcript of the interview was able to be located in the possession of those bodies. At [31], Hiley J recorded his *ex tempore* decision dismissing KMD's summons on the basis that there was no evidence that any of the parties or the Court ever had possession of the interview footage or transcript.

[38] In this review hearing, KMD indicated that she wished to take issue with Hiley J's findings that there was no such interview. She wished to take issue with the opinions that she has a mental illness on the basis

8 See paragraphs [84] and [110] below.

that she believes her son was sexually abused, when her expectation was the video would show that her son did make disclosures of being sexually abused. She said it would also show that she was falsely accused of coaching her son to make those disclosures.

[39] In response to KMD's subpoena to the Commissioner of Police, video footage of the interview of KMD's son at the SARC on 15 January 2013 was produced to the Court. KMD was provided with the capacity to view it and it was provided to the parties. It was viewed by Dr Das. In summary and general terms, in the SARC interview, KMD's son made disclosures of sexual conduct against him by his father and also said things that could indicate that his mother told him to make the disclosures. In Exhibit SO48, Dr Das opined that KMD's diagnosis of delusional disorder is not based on a fact that sexual abuse of her son did not occur, and that in delusional disorders and similar illnesses, delusional beliefs are often based on elements of true occurrences. Rather, the diagnosis is based on KMD's belief system, associated symptomatology and resultant aggression. Dr Das also gave oral evidence to this effect in cross-examination before the SARC interview video was located. He said that, as documented in the early psychiatric reports, KMD had a delusional belief system centred around the abuse of R, which was a well-woven story. This opinion is consistent with the content of Dr Smith's report, Dr Ellis's report and Dr Ventura's report set out in paragraphs [93] to [95] and [110] to [113] below. Ultimately,

because neither the existence of the SARC interview nor its general content were in dispute by any party and because Dr Das had stated in his report that the SARC interview did not alter his diagnosis, no party pressed for its receipt and I decided not to receive it into evidence.

[40] As regards KMD's concerns about the confidentiality of the footage of the SARC interview, on 18 August 2022, I made an order that the footage and its content not be published or provided to any person other than KMD, without the leave of the Court.

Risk assessment

[41] Dr Das's risk assessment remained unchanged from that expressed in Exhibit SO45, which was based (in large part) on a Historical Clinical Risk Management Guide (HCR-20) assessment ('2017 HCR-20') carried out in April 2017 by Dr Das, Mr Re Acacio (a psychologist within the FMHT) and Ms De Garr (a registered mental health nurse and KMD's then case manager).[9] The 2017 HCR-20 contained 51 criteria, 26 relating to 'history' matters, 17 relating to 'recent' matters, and 8 relating to 'future' matters. From the commentary for some of the entries, it appears that 'recent' referred to the past 18 months, while 'history' referred to a time prior to that. 'Future' was obviously a prediction, and was based on the matters referred to in 'history' and 'recent'. Each criteria was marked either 'present', 'possibly or partly present', 'not present' or 'omitted'.

9 Attached to Exhibit SO37.

[42] Of the 51 criteria in KMD's assessment, 28 were marked as present or possibly or partly present, 10 were marked as not present and 11 were marked as omitted. Of the 28 criteria marked as present or possibly or partly present, the commentary indicated the following:

Basis for score	**History**	**Recent**	**Future**
The index offending	2		
KMD's mental condition	2	2	
KMD's lack of insight and failure to accept treatment	1	7	4
KMD's interactions with correctional staff	1	4	1
The view KMD should not be released			2
KMD's relationship difficulties with RL & JC	2		
Totals	**8**	**13**	**7**

[43] Essentially, the 2017 HCR-20 risk assessment was founded on KMD's actions on 7 May 2013, her mental condition, her lack of insight that she has a mental condition and consequent refusal of treatment (specifically, medication and engagement with FMHT), and reports of irritable, hostile and entitled behaviour towards correctional staff in the 18 month period prior to completion of the assessment and report in 2017.

[44] As regards more recent behaviour towards correctional staff, the only evidence before the Court on this hearing about KMD's recent interactions with correctional staff is contained in Exhibit SO46, in

which Dr Das stated that, on 22 July 2021, the correctional officer in charge of the women's sector of the prison said that KMD operated on the basis of being persecuted by the system, 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 is being unfairly detained. In cross-examination, Dr Das agreed that KMD had no history of violence prior to the original offending on 7 May 2013, and no allegation of violence thereafter.

[45] 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.

[46] In Exhibit SO46, based on the 2017 HCR-20, Dr Das expressed the opinion that the risk is that KMD would engage in acts of violence similar to those of the original offending, potentially involving a weapon and potentially involving bystanders as well as KMD's ex-partner and people associated with him. He said the likelihood of KMD

committing violent acts is low, but the results could be potentially catastrophic, namely, serious injury or death to a person. Dr Das also expressed the opinion that there is a concomitant risk of harm to KMD, not from herself directly, but from the response of other people if she were to commit a violent act.

[47] In cross-examination, Dr Das said that the HCR-20 risk assessment tool originated in Canada, but has been used and validated across many different cultures around the world. He said there is no training module for the use of the tool in relation to Aboriginal people, and specific training is unnecessary for its use across every sub-population.

Likelihood of future violence if circumstances precipitating offending unlikely to arise again

[48] Counsel for KMD sought to put to Dr Das the particular and confined circumstances of the original offending, with a view to establishing that similar circumstances will not arise again, with the consequence that the risk of future violent offending by KMD is negligible.

[49] 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, and used a weapon, and people got hurt and could have been killed. Dr Das did not accept there to be a difference in the likelihood of repetition between a person who ran amok and shot at random people in the street and a person in KMD's situation who was concerned that her ex-partner was sexually abusing

her son, went with a loaded gun to see her son after he was placed in his father's care, events escalated and she shot at her ex-partner, his mother and a bystander who helped her ex-partner. Dr Das said the fundamental point in risk assessment is that the person has a mental illness associated with a delusional belief system, and with personality disorganisation and behaviour disinhibition, they act on the belief system, with 'aggression'. Asked if he considered that KMD was at risk of shooting randomly at others, Dr Das said he did not know, but she could because her belief system is that the government is involved and she could act on it.

[50] KMD submitted that, in assessing risk under s 43ZN(1)(a) of the *Criminal Code*, the Court should give considerable weight to the degree of likelihood of the risk of harm to self or others materialising, as distinct from the magnitude of potential harm that might result if the risk eventuated.[10] There is no doubt that there must be a balancing of the nature of the harm that might result if the risk eventuates and the likelihood of its occurrence[11] against the fundamental value which society accords to individual liberty.[12] It must be borne in mind that

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10 Citing *NOM v Director of Public Prosecutions (Vic)* (2014) 36 VR 618 at [57]-[58]; *Nigro v Secretary, Department of Justice* (2013) 41 VR 359 at [113]; *NJE v Secretary, Department of Justice* (2008) 21 VR 526 at [37]. I note that the latter two cases involved serious sex offender legislation, where the provision provided that the Court could make a supervision order if satisfied that the offender posed 'an unacceptable risk' of committing a further sexual offence. I note that the former was comprehensively addressed by Hiley J in *KMD (No 4)* at [53]-[57] and contrasted that case with KMD's case at [58]-[60].

11 *R v KMD* at [39] per Riley CJ.

12 See the cases cited in footnote 10.

some level of risk will, almost always, be present.[13] It is apparent from Dr Das's answers, set out in paragraph [49] above, that his assessment of risk focuses largely upon the magnitude of the harm that might result, with very little weight given to the likelihood of the risk eventuating.

[51] KMD also submitted that, to the extent that her offending acts were done in a state of emotional 'overwhelm' or trauma, the risk of her doing such acts again was extremely low because she is unlikely to face that level of trauma again in the future. I accept that KMD, or any person in her current circumstances for that matter, is unlikely to experience stress or trauma to the degree that KMD was experiencing in the months before May 2013. That is not, in any way, to justify or excuse KMD's conduct, but it is relevant to the assessment of risk.

Mission Australia support for KMD in the community

[52] Exhibit SO49 reported that KMD was a participant in the Mission Australia Wellbeing & Healing Program, which assists participants to manage their daily activities and to live independently in the community. Under that program, Mission Australia staff had been supporting KMD through initially weekly face-to-face visits and phone calls and then phone calls three times per week for around one and a half hours. Under Mission Australia's Pre & Post Release Support Service ('PPRSS') program, KMD was assessed as to her needs and

13 *R v KMD* at [39] per Riley CJ.

supports during a 90 minute assessment interview, and a support plan was prepared which identified engagement with Mission Australia's Tenancy Support program to ensure accommodation, community reintegration support, connection to outreach services, monitoring and reporting on progress and reassessment of the support plan where required, and support for employment and education opportunities. If KMD were to be released, the program would support her with links to other relevant services. In terms of finding accommodation, KMD was referred to the Salvation Army, the Bakhita Centre, NAAJA, YISSA and the YWCA, as well as private rental companies.

[53] KMD proposed that, with this Mission Australia support, she could be safely and effectively managed in the community. Mission Australia was not provided with any of the psychiatrists' reports before this Court. KMD said they were aware of the opinions of Dr Das regarding his diagnosis of her mental condition and need for treatment and of the opinion that she needs to be kept in a secure facility. Their assessment of KMD was as to whether they could communicate and work with her in a post-release setting. No representative of Mission Australia attended at Court to give any oral evidence, despite being asked to do so, and no specific support plan for KMD was provided to the Court.

[54] In Exhibit SO48, Dr Das said that the custodial setting provided suitable risk management and risk mitigation for KMD because it is restrictive and KMD is unlikely to be able to act on her delusional

belief system. Dr Das said that for her to progress to a non-custodial setting, she would need to engage with the clinicians and her case manager from the FMHT so as to obtain active treatment (including medication and psychological therapies) and case management. If that were to occur, and her risk profile was assessed to be at an extent where she could be safely managed in the community, that would require an appropriate level of relational, procedural and physical security, including 24 hour supervision. She would also need to be supervised by a psychiatric clinical team with the ability to manage forensic rehabilitation, namely the FMHT, and regular mental state reviews and risk assessments. Dr Das said he had significant concerns about Mission Australia's ability to manage forensic rehabilitation for a person with a very significant risk profile.

[55] In his oral evidence, Dr Das explained that physical security refers to people being unable to abscond, relational security refers to the people supervising being able to understand and manage risk, and procedural security refers to the necessary conditions and restrictions that would apply to the person so their risks can be managed (such as a curfew or alcohol or drug restrictions). Dr Das also said that transition into the community requires development of a comprehensive plan to put the necessary measures in place and prepare the person for them. In cross-examination, Dr Das said that there is no reason why Mission Australia could not be involved in providing support for KMD in the community,

but there must be a transition phase involving a 'step-down' approach between a custodial environment and non-custodial environment.

Necessity for engagement – risk assessment

[56] In Exhibit SO46, Dr Das stated it has not been possible to revise the 2017 HCR-20 risk assessment because of KMD's refusal to engage with the FMHT. He also stated that early warning signs that KMD might commit a violent act would be difficult to detect because of her ongoing guardedness and unwillingness to have her mental state and thought processes monitored by the FMHT. Dr Das said the continuation of his opinions about these risks 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. In evidence-in-chief, Dr Das said that the first step to recommendation of a change to KMD's environment would be therapeutic engagement with key members of her medical team from FMHT, namely, talking to them and revealing her mental state, so that they are able to make a more dynamic risk assessment.

[57] In cross-examination, Dr Das was asked what therapy or counselling had been offered to KMD in the past 12 months. He said that 'we can only offer something to her if she's willing to talk to us' and she has consistently refused 'to see us'. Dr Das agreed that KMD may identify him as someone who wants to have her compulsorily medicated, but said there were other members of the clinical team who have tried to

speak to KMD and she has refused, including the FMHT case manager. Again asked what treatment Dr Das had directed be made available to KMD in the past 12 months, Dr Das said that for treatment to be offered to her or for her to accept treatment, she has to talk and engage with him or members of his clinical team. He said if she completely refuses to see him or his team, 'how can we offer treatment or how can she engage?'. Dr Das's evidence was that 'engagement' requires a patient to talk transparently and openly with members of the clinical team, rather than to selectively avoid certain people or certain topics. He said 'engagement' would require KMD to talk with a psychiatrist. Later in cross-examination, Dr Das indicated there are three psychiatrists in the FMHT. He said that members of the FMHT had approached KMD, without him, around three to four times in the past 12 months, and she had refused to see them. That had included the case manager, a nurse and a social worker. Referred to KMD's past engagement with Mr Acacio, a psychologist within the FMHT, and asked whether further counselling with Mr Acacio had been offered to KMD, he said that it would need to be discussed with KMD and she has refused to speak to any members of the FMHT when approached. Dr Das agreed that Mr Acacio had not been asked if he might be able to provide psychological treatment to KMD because Dr Das considers such treatment unlikely to succeed in the absence of medication. Dr Das said he did not consider the lack of engagement to be a function of

the identity of the consultant psychiatrist, and he considered it to be unlikely that KMD would engage with a psychiatrist in the FMHT other than himself because she has refused to engage with many different members of the FMHT and has never really engaged with any of them. In Exhibit SO47, Dr Das noted that KMD had, since the first tranche of this periodic review hearing, asked to have sessions with Mr Acacio and the FMHT offered a 'telehealth' meeting between Mr Acacio and KMD to discuss the matter. At the time of writing Exhibit SO47, KMD had not confirmed that she wanted the meeting to go ahead. This was not raised again in the later tranche of this hearing.

[58] In cross-examination, Dr Das agreed 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.

[59] In cross-examination, Dr Das indicated that engagement by KMD with the FMHT giving them access to her mental state would enable them to make more informed decisions about her risk profile. He said that without that engagement, he can only assess risk on the basis of the information they do have, and are unable to make more informed decisions about her risk and care without more information. Dr Das said he has consulted amongst his FMHT, including Dr Kini, about

KMD's situation, but had not consulted with peers more broadly than that.

Necessity for treatment of condition - medication

[60] In Exhibit SO46, Dr Das opined that KMD requires treatment including psychotropic medication, psychological treatment and psychosocial rehabilitation, all with the objective of addressing KMD's persecutory delusional system. Dr Das considered that without effective treatment of her mental condition, which requires her cooperation and engagement in a treatment process, KMD's risk profile will not change. In evidence-in-chief, 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', that is, the risks associated with their condition can be managed through a process of 'step down to less secure conditions' and eventual release. In cross-examination, Dr Das said that he had no confidence that any form of treatment other than antipsychotic medication would treat KMD's condition or reduce the risks associated with that condition in a non-custodial setting. He later added that it is his view that KMD should not be released from custody without undergoing a course of medication. He said that anti-psychotic medication treats the core belief system. While the delusional system may not disappear, the medication can act on the associated factors that bear on risk, such as the strength with which a delusion is held, the level of conviction, the emotional tone with which it is held,

and the distress it causes the patient, all of which affect whether the patient will act on their delusion.

[61] In cross-examination, Dr Das agreed with the general proposition that about 60 to 70 percent of people with a psychotic illness treated with antipsychotic medication respond to the first trial. He said that medication is a valid treatment which is well-evidenced in literature to improve the condition, which may be a response that resolves the psychotic symptoms, or at least 'softens' the strength of the delusional system.

[62] 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.

Engagement without medication

[63] In cross-examination, Dr Das said that engagement with KMD would require her discussing with the FMHT her mental state, her 'inner mental world', and treatment options. He said she could have a good level of engagement, even if she were to refuse medication. Such

engagement would include engaging in a therapeutic process with a psychologist and, if she wished, an Aboriginal mental health worker. He said engagement of this kind was essential for a different assessment of risk and consideration of its management. He said medication would be an important part of her treatment, which would be incomplete without it, but medication is not a necessary requirement of a reassessment of risk. In cross-examination, he agreed that, ultimately, KMD would 'require' medication and any dialogue she entered with the FMHT would ultimately come to a discussion about medication. Asked then what the point of engagement would be, Dr Das said that was for KMD to decide. In further cross-examination, Dr Das indicated that, if KMD were to engage with the FMHT as he described, even if she did not take medication, he expected that it would be possible to make an informed reassessment of risk in approximately 12 months, depending on how often that engagement occurred.

Potential deterioration of condition

Initial evidence about deterioration

[64] In evidence-in-chief, Dr Das opined that people with psychotic illnesses such as delusional disorder never improve without treatment and their delusional system can linger on for years, which leads to it becoming resistant to treatment. He said the condition 'usually gets worse'.

[65] KMD argued that the opinion of Drs Kini and Ventura from 10 November 2014 ('Exhibit SO1') was that, without medication, she would suffer deterioration of her condition. She argued that it must follow from the fact that she had not suffered any deterioration in her mental condition since that time, that she did not have a mental illness. In Exhibit SO1, Drs Kini and Ventura opined that without treatment, KMD was highly likely to suffer serious mental deterioration. That opinion was based on the decline in her condition which led to her offending in 2013 and the scientific literature which disclosed that untreated psychosis is associated with 'poorer outcome in positive and negative symptoms and relapse rate'.

[66] In cross-examination at the first tranche of this periodic review hearing, it was put to Dr Das that there had not been any deterioration of KMD's mental state since her arrest in May 2013. He answered as follows:

> I don't think I can answer that question. There could have been. I do believe that she has had a decline in her mental state. She has continued to persist with her delusional ideas. I wouldn't agree that there hasn't been a deterioration. I do think there has and I think with passing time she has become more entrenched in her, it would appear she had become more entrenched in the belief system [and] resistance to treatment. …

[67] Asked what the evidence of the deterioration was, he said:

> Well, she continues not to accept treatment. She continues to resist treatment and this picture has continued through the many years. She remains in a contained environment within a custodial setting. I certainly can say this, it hasn't improved. Put all the information

> available that we've seen I … am quite concerned that I think there's a decline in her mental state. And the difficult situation here is that she's not allowing us to assess her and that causes a huge problem in terms of assessment. But in my experience, many years of experience as a psychiatrist having seen similar people, would indicate there's a decline because we are entrenched in that same position with her just not engaging and it's becoming even more difficult every time. So I do think there's a decline. …[t]he fact is there is a decline because you've got a lady who's untreated for so many years.

[68] Asked again about deterioration, Dr Das said there was support for his opinion that KMD's condition had deteriorated in the fact that, at the beginning she was prepared to speak to doctors and clinicians, whereas now she 'has just completely closed off'. He said he suspects that this showed a deterioration in her mental state. He agreed there had been no reports of overt signs of psychosis, but he did not consider that to be a necessary sign of deterioration. Ultimately, while he said he suspected there had been a deterioration, based on the decline in her engagement with the FMHT, he agreed that he had no objective evidence available to him to indicate a deterioration in KMD's mental state.

Dr Parker's evidence

[69] Following this evidence, KMD sought to have Dr Robert Parker called so that she could cross-examine him about the issue of deterioration of mental illness, which included his opinions about brain dopamine, and about his recitation of what KMD had said to him or others. As to the issue of deterioration, KMD wished to use this evidence to argue that, according to Dr Parker's opinion, her mental illness would necessarily deteriorate without medication and if her mental state had not

deteriorated since 2013, it must follow that she did not have a mental illness.

[70] Dr Parker prepared three reports for the Court in 2015 (Exhibits SO18, SO19 and SO27) and a report in 2017 (Exhibit SO33). At those times, Dr Parker was a psychiatrist and the Director of Psychiatry in the TEMHS. Dr Parker gave oral evidence in Court on 21 February 2017. Dr Parker's evidence was considered by Hiley J in *R v KMD (No 3)* at [6], [44], [57], [70], [94]-[96], [99]. In short, Exhibit SO18 was concerned with a request that Dr Parker's forensic psychiatric assessment interviews of KMD be audio recorded. Exhibit SO19 recorded Dr Parker's observations, assessment and opinions regarding whether KMD had a mental illness, its nature, his recommendations for treatment and his recommendations for her management in light of his assessment of the risks she posed to persons in the community. In Exhibit SO19, Dr Parker opined that KMD suffered from symptoms of schizophrenia or delusional disorder[14], which manifested in delusional ideations and her acting on them. In Dr Parker's opinion, the development of the condition in KMD (who had previously had no indication of mental illness) was explained by a vulnerability to 'excessive brain dopamine activity', which can result in the later development of mental illness with an appropriate stimulus such as life

14 Dr Parker said he believed KMD had schizophrenia within the criteria in the Diagnostic and Statistical Manual ('DSM') IV, whereas on the criteria in DSM-5 her diagnosis was more consistent with a 'delusional disorder'.

stress. Dr Parker identified cumulative stressors including the relationship with RL, indications from R that he may have been sexually abused, information from various sources such as the internet and the SARC about sexual abuse of children, and a chance conversation with a stranger at a hotel, all of which intensified her belief that R was being abused and led her to load the weapon and go to R's home to assure his safety. At the time of his interviews with KMD in September and October 2015, Dr Parker observed that KMD still appeared to believe that R had been sexually abused, but the ideation was not as complex as in 2013, and she no longer appeared to Dr Parker to believe that R was being abused by a paedophile ring as part of a conspiracy. In Exhibit SO27, Dr Parker observed that in his observation in 2015, KMD's ideations and delusions had settled somewhat from the situation in May 2013, and were less complex, bizarre and intense, which was consistent with the reduction in stressors operating in KMD's life in 2015.

[71] In Exhibit SO33, Dr Parker noted the commencement and cessation of cognitive behaviour therapy with KMD, which she discontinued because she would never release her belief that R had been sexually abused. He also noted KMD's refusal to take medication other than one trial of a depot antipsychotic medication. Dr Parker recorded that, in April 2016, KMD appeared to experience further persecutory ideation that she was being exposed to poisonous gas in the prison, which was

associated with her being verbally abusive, belligerent and quarrelsome (which was out of character),[15] and which Dr Parker said was contemporaneous with stressors in KMD's life, including the death of her grandmother and JC deciding to move interstate. Dr Parker opined this could be another example of KMD's potential to produce excessive brain dopamine when experiencing stressful events. Dr Parker cited three scientific literature examples indicating 'possible brain deterioration and increased disability from mental illness' in the context of no medication or non-compliance with medication for schizophrenia.

[72] KMD's application to call Dr Parker was opposed by counsel on behalf of the CEOs on the basis that Dr Parker's evidence about these matters was before Hiley J and Dr Parker was cross-examined by KMD's counsel at the time.

[73] Because Dr Parker had not had any involvement with KMD since 2016, and Dr Das was the psychiatrist responsible for KMD's care and had provided reports to the Court for the periodic review, I refused KMD's application to call Dr Parker and granted KMD leave to cross-examine Dr Das, but only about the issue of deterioration and her proposition that it must follow that absence of evidence of deterioration indicated she did not have a mental illness. I refused any broader leave because

15 See paragraph [115] below.

the issue of her dopamine vulnerability was thoroughly canvassed by Hiley J and Dr Parker's reports did not purport to replicate what he had been told by KMD – it did not distinguish between what he had been told by KMD and what he had read about what she had said in other psychiatric reports.

Dr Das's opinion about deterioration

[74] In Exhibit SO47, Dr Das opined that deterioration in a delusional disorder is not a necessary characteristic for its diagnosis, and that delusional disorder is generally a stable condition characterised by a central delusional system, which may be associated with behaviours including acting on the delusions (including aggressive behaviour), referential thinking, changes in mood, functional impairment and a significant lack of insight. Dr Das said that the absence of a deterioration in symptoms or lack of evidence of deterioration does not mean that KMD does not suffer from a delusional disorder.

[75] KMD argued that: (a) the psychiatric reports (particularly the early ones) opined that, without medication, her condition did deteriorate to the point where she committed the offending behaviour and would deteriorate further; (b) there is an absence of evidence that her condition has deteriorated over the past nine years; so (c) she cannot have a delusional disorder. She argued that, in the face of this logic, the psychiatrists (particularly Dr Das) now say that deterioration is not a necessary feature of the condition, thereby seeking to maintain the

diagnosis in the face of the illogical inconsistency between the two positions. The opinions that KMD's condition had deteriorated to the point where she committed the offending behaviour are sustainable on the basis that, on 7 May 2013, she acted as she did. The opinions that KMD's condition would deteriorate further were expectations on the basis of what was then known about what would happen in the future. KMD's explanations, rationalisations and thought processes, as disclosed in her submissions to this Court referred to in these reasons, reveal ongoing beliefs that police were delinquent in their duties or corrupt and acting to protect themselves when they failed to properly investigate her son's disclosures of sexual abuse; for the special hearing, witnesses fabricated evidence used against her for their own personal interests; numerous psychiatrists have lied to the Court in pursuit of their own professional gains; different lawyers retained by her at various times acted against her interests and negligently; she was denied a fair trial; the jury and the Court in the special hearing acted without being provided all of the relevant evidence, including from her, an opportunity she was denied; and she is the victim of an unconstitutional and unlawful legislative scheme, directed to involuntary treatment of people by toxic drugs, which has sanctioned her unlawful detention for an unjustifiably lengthy period, when her actions on 7 May 2013 were the justifiable responses of a traumatised and grieving mother with concerns about the welfare of her son. These

beliefs have been articulated by KMD, in one form or another, for many years, and appear to be well-entrenched in KMD's views. Whether their presence indicates deterioration or stability in her diagnosed mental condition are both arguable, but they support the expert evidence before this Court of the ongoing presence of a delusional belief system consistent with that described by the early psychiatrists who did examine her, and those that followed.

[76] For that reason, whether the condition has deteriorated over time or not can be seen to be of little moment in determining whether or not KMD has a mental condition. Ultimately, Dr Das agreed there was no evidence of a deterioration in KMD's condition and, in the absence of such evidence, it is not open to find that there has been deterioration.

Risk of self-harm

[77] In Exhibit SO46, Dr Das noted that KMD has never expressed ideas of self-harm but persons with her diagnosis are at higher risk of self-harm than the general population. In examination-in-chief, Dr Das said there had been no observed symptoms of depression in KMD, and no expression of intent or plans to harm herself, so her risk of self-harm appears to be low. Dr Das noted that 10% of people with KMD's condition do harm themselves seriously, leading to death, and observed that there is always that risk to be considered.

Risk of absconding

[78] In Exhibit SO46, Dr Das expressed the opinion that there is a risk that KMD would abscond if placed in a non-custodial setting, given her refusal of treatment and her perception that she is being wrongfully detained. With respect, these propositions do not sufficiently support the opinion. It does not follow, nor is it suggested, that a person who refuses medication because of beliefs about the harmful effects of drugs will abscond from non-custodial accommodation. Similarly, it does not follow, nor is it suggested, that a person who believes they are wrongfully detained in prison will abscond from non-custodial accommodation – they will not be in prison, so their belief that they should not be will be satisfied. Furthermore, for the period that she had day release to the Cottages (referred to below), KMD did not attempt to abscond.

Conduct in a custodial setting

[79] In Exhibit SO46, Dr Das acknowledged that KMD's conduct in a custodial setting has not involved any acts or threats of violence or self-harm to any person, including the victims of the original offending. He opined that this is not an indication of reduction in her risk profile. Further, her lack of engagement in a therapeutic process has made it impossible to test her behaviour and risk outside of a custodial setting.

[80] Since KMD has been in custody, she has lost contact with her other son (not R) and has lost her home property, which was a significant and valuable rural property. In cross-examination, Dr Das agreed he was not aware of any overt reactions by KMD to those situations. He also agreed that prison is a stressful environment and said that, to his knowledge, he was not aware of any overt reactions by KMD to the prison environment.

[81] KMD sought access to the CCTV footage of an assault upon her by the prisoner, EM, on 29 October 2021, with which she hoped to tackle Dr Das's opinion about the inability to assess KMD's risk profile by considering her non-violent behaviour in the 'stable' environment of custody, by demonstrating that being in custody is a stressful environment in which violent behaviour is commonplace. The CCTV footage of the broader incident did not include EM's act towards KMD. The affidavit referred to in paragraph [26] above evidences the conduct towards KMD.

[82] Dr Das agreed that KMD has not engaged in any violent conduct whilst in prison. He acknowledged that prisons are difficult environments and there can be a lot of unprovoked aggressive behaviour. He acknowledged that it is to KMD's credit that she has not reacted aggressively to any such behaviour. However, her failure to be angry, aggressive or act violently in prison is not indicative of an absence of mental illness. He said that the risk in a non-custodial environment

arises because the risk of violent behaviour is most likely towards those that fall within the delusional belief system, with whom she is not coming into contact whilst in prison. Dr Das agreed he was not saying that KMD can control her delusional system and be selective about who is within it or not. I understood his evidence to be that those at risk are those who KMD experiences to be, for whatever reason, part of, or in conflict with KMD because of, her delusional belief system.

[83] Consistently with that evidence, that KMD has not violently acted on her delusional belief system whilst in prison, even though that system encompasses the things referred to in paragraph [75] above, including that she is unlawfully detained, is relevant to the assessment of risk.

Insight into offending behaviour

[84] In his first report (Exhibit SO6), Dr Walton[16] said KMD conceded her behaviour on 7 May 2013 was 'extreme' and she acknowledged wrongdoing, but said she did not have a choice because she was protecting her child. He said that, at that stage, there was a striking lack of remorse and she justified her behaviour on the basis that it seemed to have effected the cessation of the sexual abuse of R.

[85] In his report, Dr Smith said that KMD failed to perceive the seriousness of her offending behaviour because she believed her actions had a

16 Dr Walton was a consultant psychiatrist engaged by lawyers acting on KMD's behalf to assess whether she may be unfit to stand trial or able to claim the defence of mental impairment. He examined KMD on 11 July 2013 and subsequently and produced nine reports provided to the Court (Exhibits SO6, SO7, SO8, SO9, SO10, SO11, SO14, SO31, SO32).

cause that was based in reality. He also said she answered questions about her thinking and behaviour as if the behaviour was reasonable, and that others either could not or would not understand the relevant facts.

[86] In his report (Exhibit SO39), Dr Ellis[17] said KMD was, in the interview with him, likely attempting to give an account which paints, in her eyes at least, her actions as the rational product of a mother estranged from her son feeling emotional. He said she saw herself as the only person who had her son's safety in mind.

[87] In oral submissions, KMD put to the Court that she knows that she did the wrong thing and committed a crime and was aware of that when she did it.

[88] In cross-examination, Dr Das was asked by KMD's then counsel whether KMD's conduct in going to RL's house to see her son after she had been denied access to him was as consistent with the actions of a grieving mother as they were with the actions of someone acting under a delusional belief system. Dr Das said that KMD's actions included taking the gun to the house, resisting Mrs L's attempts to disarm her and pointing the gun at her whilst they were driving to KMD's son's school. He said those actions, and what followed, were extreme and

17 See paragraph [110] below.

very aggressive. He considered KMD's actions to be the most shocking event he had seen arising from a psychotic illness.

[89] Dr Das was referred to what Dr Walton said (see paragraph [84] above). Dr Das agreed that, unless a person has insight into their behaviour, they cannot really engage in treatment, although insight is not necessary for treatment in the form of medication. Later in cross-examination, Dr Das disagreed that the statement made by KMD to Dr Walton acknowledging the wrongfulness of her conduct would indicate an improvement in delusional thinking. He also pointed to the fact that that statement was made many years ago.

[90] KMD argued, by reference to the DSM, that if a single event with a marked stressor which would be markedly stressful to almost anyone in similar circumstances in the individual's culture is a reason to explain a person's conduct, then it is not the result of mental illness. KMD argued that she could not be diagnosed with a mental illness because the SARC interview with her son was the single event with a marked stressor. She argued that none of the psychiatrists had referred to the SARC interview in their reports. The SARC interview occurred some three months prior to the day of the incident. KMD's written submissions included a list of emotions, behaviours and characteristics shown when a person is experiencing grief. Some of those were highlighted by KMD, including anxiety, feelings of panic, compulsion, shock and weariness. These were things KMD said she was

experiencing following the SARC interview, which explain her actions on 7 May 2013 which she described as 'a one-off, highly out of character incident'. She also submitted that it is unreasonable to 'confabulate' from her actions on 7 May 2013 that she is a risk of harm to others and herself. By these submissions, KMD maintains that her actions on that day were essentially a 'normal' response to a highly stressful event.

Can the psychiatric evidence be accepted?

[91] In *R v KMD (No 4)*, Hiley J observed (at [42][18]) that a diagnosis of delusional disorder has been expressed by each of nine psychiatrists whose reports have been received by the Court since the report of Dr Walton dated 23 July 2013 (Exhibit SO6).[19]

[92] On various bases, KMD sought to challenge the opinions of those psychiatrists that she has a delusional disorder, including Dr Das. Generally speaking, those bases were that the psychiatrists were not objective and impartial, the factual assumptions underlying the opinions are flawed, and there was no longitudinal clinical observation of KMD.

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18 See also *R v KMD (No 4)* at [3] and Attachment A.

19 On the basis of the exhibits and Dr Smith's report received by the Court, it appears that there are only eight psychiatrists who have provided reports to the Court. The other expert who has provided or contributed to reports is Mr Re Acacio, a psychologist in the FMHT. He treated KMD with cognitive behavioural therapy in 2016-2017.

Are the psychiatrists objective and impartial?

[93] Dr Kevin Smith was a Consultant Psychiatrist who prepared a report at the request of KMD's then lawyer dated 18 November 2013 regarding the availability to KMD of a defence of mental impairment. Dr Smith's report has not been tendered on any of the Part IIA review proceedings, but it is on the Court's file and has been referred to both by Riley CJ in *R v KMD* (at [27]) and Hiley J in *R v KMD (No 4)* (at [40], [42]). It has also been referred to in many of the psychiatrists' reports that have been received in the Part IIA review proceedings as one of the documents they have considered. Dr Smith's report states he interviewed KMD on 6, 12 and 14 November 2013, for a total of approximately six hours. His report lists the documents with which he was provided, essentially comprising the Police precis report (a summary of the alleged facts comprising the events on 7 May 2013) and a summary of some statements in the brief of evidence prepared by KMD's then lawyer. They included statements from KMD's best friend, the principal of R's school and a woman known to KMD ('CC').

[94] Dr Smith's report set out the content of his conversations with KMD. The report said KMD told Dr Smith that R was being sexually abused by his father (RL) and by a friend of his father's called Dave, which abuse was photographed by a man called Mick, and that Mrs L knew about it. KMD told Dr Smith that R had told her that RL and Mrs L have sex and that Mick takes the photos, something KMD believed.

KMD told Dr Smith that a possible reason that no action was taken by police after her reports of R's disclosures of sexual abuse by RL and the SARC interview was that there were paedophiles in the police and the Family Court system who were 'Illuminati' and Freemasons who protected each other. Dr Smith's report contains the following:

> When I asked [KMD] if there was anything else she considered important, [she] said 'I got a death threat 2 weeks before'. She explained 'I went to the Beachfront Hotel with a friend. An elderly gent with white hair came and sat with her. I went to eat my entrée. He was making comments that were not pleasing to a woman. Then he asked her what I did. I felt he was a sergeant in the way he'd approached me. I said 'I hunt paedophiles'. He said 'I know your boss'. I said 'which one?' and he didn't respond. Then he asked where security was and I told him on the front lawn. He lifted up his sleeve – there was a tattoo of a young girl with a birth flag and a death flag that had no date on it. He said 'this is you'. I said 'I'm not afraid of dying.' It was a subtle threat.
>
> … he had a ring on his finger but he said his wife had died. It had a Freemasonry scale symbol on it. I told my girlfriend it was remarkable, because that was what I'd read – they harass you and then you get a death threat. My friend has given a statement, but she hasn't mentioned that. Her boyfriend is a Police officer. Maybe that's why. It's surprising. She was upset at the time… [A]fter the threat I rang the sex crimes unit. I told them about the threat. They asked why I was ringing them. I said 'I've reported my child. There seems to be paedophile activity'. I'd been reading about Police paedophiles. Perhaps the death threat had come through Freemasonry.'
>
> When asked to explain again why she had rung the 'sex crimes unit' regarding her alleged death threat [KMD] explained 'I was letting them know. There was something about a Police officer having sex with a 6 year old boy, and I was wondering if that was my child. How many 6 year old boys are there? And my son said something about a Police officer doing something naughty with him.'
>
> … She responded by saying 'I'm not paranoid. I'm just a reasonable person trying to find out what's happened to my son.

It's gone from that to suddenly I'm 'coaching' him… I'm not paranoid. I'm not saying it was definitely the Freemasons. I only thought it was a possibility.'

[95] On the basis of the above and other things KMD said to him, Dr Smith's report stated his conclusion that KMD's delusional system had developed as follows:

> [RL]'s alleged 'cognitive impairment' was sinister because it led to him being over-protected by a mother whose aggressive manipulations he was unable to perceive or resist. His cognitive impairment led to him becoming a potentially dangerous person because it removed the normal capacity to experience remorse for any aggression he might carry out. All of this was known to [RL] and his mother, but they systematically avoided warning [KMD], who was only able to experience [RL]'s mother as entirely manipulative and rejecting. [RL] was intent on destroying everything precious to her, and he was even pleased to see her 'cut open' to have her baby. She sincerely believes that he was willing to damage her home, put bleach in her baby's feeds and risk drowning him in a bath. Then when her son was aged 3 [KMD] almost autochthonously formed the belief that he was making a vividly articulate allegation of sexual abuse by his father. She also believes he was then able to control the interview situation and divert the attention of the Police when this allegation was investigated. [KMD] also believes that her son made disclosures that were considered reality-based in a play therapy session, and later when an investigation was carried out by SARC, and that [RL]'s mother knew of the sexual abuse of her son.
>
> This matter went to the Courts but [KMD]'s concerns were not reflected in any of the decisions made by the Court, and she believes this was because a Freemasonry brotherhood would not allow one of their own to be convicted, even if a child was knowingly being sexually abused. [KMD] experienced herself as being able to understand more and more about what was going on; she re-interpreted comments that had been made in the past, and by constantly interrogating her son she believed that she was finding out from him about more people who had either sexually abused him or taken photographs of the abuse taking place. When [RL] was exonerated regarding her allegations [KMD] searched the internet and concluded with certainty that she was now confronted with a Freemason's paedophile ring involving Judges, senior Police, [RL], and his friends. She believed from her son that

> [RL] was having sexual intercourse with his mother, and she believed that friends of hers were refusing to support her concerns because their partners were connected to the Police, and therefore to the ring. She believes that [RL] knew that she would lose custody of her son when she pursued her concerns about him being sexually abused, and that the reason she was being blamed for any harm to her son was that [RL] was projecting his own activities and mental problems onto her. Finally, in April 2013, in the phase after a Recovery Order was made for her son, she believed that certain things a casual acquaintance said and did at a hotel were proof that a death-threat was being made against her by Freemasons on behalf of the sex crimes unit. She contacted the unit because she believed it necessary to make them aware that she knew, and she interpreted the shocked silence of a receptionist as proof of her beliefs.

[96] KMD submitted[20] that Dr Smith was a 'Police psychologist' who was given information by police about items she had found on the internet and stored on her laptop. She reached that conclusion on the basis that it was Dr Smith who raised Freemasons with her, not the other way around, and she had been told by another prisoner that Dr Smith was a 'police psychiatrist' who made false reports and Riley CJ had found Dr Smith to be 'mistaken' in the content of one of his reports to the Court. KMD also submitted that after she raised 'this', Dr Smith resigned, tried to be re-employed, was dismissed and transferred interstate. She added:

> There is no consequence to psychiatrists who make political and unethical reports for the courts that are harmful and malicious in their opining, when they have the knowledge, information and evidence available to them that is inconsistent with and contrary to what they are reporting to the courts. In short, they are knowingly lying.

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20 See a note typed by KMD on the Mental Health Review Tribunal transcript (Exhibit SO50).

[97] There is no foundation for the submission that Dr Smith was a 'police psychologist', or that he had been provided by police with material from KMD's laptop. His report states he took an extremely detailed history from KMD and quoted her exact words. It also states KMD sometimes pointed to the page he was writing on and wanted to be sure he had recorded all of what she had to say. It is apparent Dr Smith had CC's statement, which described her conversation with KMD in which KMD mentioned that the Police Commissioner was a Freemason Illuminati, Freemasons are Satanists and paedophiles, and the Police Commissioner had sexually assaulted her son. Even if Dr Smith did raise Freemasons with KMD (which is not apparent on the face of the report and I do not accept), CC's statement is the logical source of his having done so, as KMD submitted, somewhat inconsistently with the submission that he got the information from what Police had found on her laptop.

[98] In relation to Dr Miach's report of 11 March 2016 (Exhibit SO29), which made reference to KMD's account of the meeting with the man with the 'girlie tattoo', KMD submitted that she did not describe what Dr Miach reported and that he had twisted facts and included his own, with the intention of making KMD seem ridiculous and not believable.

[99] In a similar vein, KMD submitted that the Court should place little weight on Dr Das's opinions as he was not objective or impartial in the formation of his opinions. The reasons given were threefold. First,

because Dr Das is a 'servant of the CEOs' which, she said, meant that he and the other psychiatrists 'take direction from and are briefed by' the CEOs. Dr Das and some of the other psychiatrists who have written reports about KMD are or were employed by the Department of Health. I do not accept that that fact means they lack objectivity and impartiality. Generally speaking, they are or were Fellows of the Royal Australian and New Zealand College of Psychiatrists. Their engagement is as a professional physician and to perform their treating and reporting functions with their professional skills and expertise. While their performance of administrative functions may be directed by the constraints of their employment, I do not accept that, in the performance of their diagnosing, treating and reporting functions, they act at the direction of the CEOs. Two of the relevant psychiatrists, Dr Smith and Dr Walton, were Consultant Psychiatrists engaged and briefed by lawyers acting on KMD's behalf.

[100] Secondly, KMD submitted that Dr Das did not follow professional guidelines requiring caution in drawing opinions about a patient in the absence of direct observations and interactions with the patient. She said Dr Das had not observed or interacted with her and yet was advocating for her 'indefinite detention and neuroleptic drug treatment'. I consider that, in expressing his opinions about KMD's diagnosis, required treatment (including medication) and risk, Dr Das has acted professionally and appropriately on the basis of his extensive

qualifications and experience as a forensic psychiatrist. I do not accept that he is partial or biased in his views. His opinions are founded largely on the interactions of KMD with other psychiatrists, but they are also based on his own (albeit brief) interactions with KMD, and on information provided to him by other members of the FMHT and correctional staff and there is nothing inappropriate in that. Dr Das acknowledged that, in forming opinions about KMD's mental state and risk, it would be preferable to engage with her. However, that is not possible because KMD has elected not to have that engagement. Dr Das is left with the other sources of information available to him. That does not detract significantly from the weight to be given to his opinions.

[101] Thirdly, KMD submitted that Dr Das has ignored the 'contextual evidence' which she says demonstrates that what are said to be her delusional beliefs are either not delusional (e.g. that her son was being sexually abused by his father – as evidenced by the SARC interview video footage) or are not and never were her beliefs (e.g. that police did not act on her son's disclosures of sexual abuse because there was a Masonic paedophile ring in Darwin that included police and judges and protected its own). Dr Das's opinion as to the impact of the disclosures of sexual abuse made by R in the SARC interview is set out in paragraph [39] above, to the effect that the truth of the core belief in the delusional system would not affect the diagnosis. The 'contextual evidence' about a belief as to a Masonic paedophile ring has been

referred to in paragraphs [94] to [97] above, and is further addressed in paragraphs [109] to [114] below.

Do psychiatrists want to drug people?

[102] KMD argued that Part IIA of the *Criminal Code* requires assessments by psychiatrists and it is common knowledge that psychiatrists diagnose people with a mental illness and treat them with neuroleptic medication. KMD argued, by reference to various texts and articles, that: (a) the intended effect of neuroleptic drugs is to cause damage to the brain, including the frontal lobes responsible for the characteristics that make us human, equivalent to a lobotomy, which enables patients to be controlled; and (b) the known, serious and permanent side effects (including breast cancer, tardive dyskinesia and dementia) from such drugs are deliberately hidden by psychiatrists, researchers and drug manufacturers.

[103] In cross-examination, Dr Das denied that persons in custody under Part IIA are necessarily required to take medication before they can be released, saying every case is different and the need for medication depends on the patient and their condition. Dr Das denied that the fundamental principle of psychiatric treatment is to treat with medications that disable normal brain function.

[104] In cross-examination by KMD, Dr Das agreed that medications for delusional disorders operate upon the abnormal hyperactivity of the

dopamine neurotransmitters in the brain by suppressing dopamine activity. Dr Das denied that, consequently, the medications cause brain damage. Dr Das denied that because the medications have the same effects on people regardless of a diagnosis of mental illness, namely, to inhibit passion and willpower, they will deteriorate KMD's mind. Dr Das disagreed that the effect of antipsychotic medications on the brain was the same as surgical brain mutilation or a lobotomy. Dr Das denied that the medications he considered appropriate for KMD could be described as chemical restraints and that the desired effect of them is to elicit in KMD such a state of docility that she would effectively be restrained. Dr Das explained that medication treatment in people with delusional disorder can help with addressing delusional thoughts and mood regulation, and reducing impulsivity and propensities to act aggressively. He also said there is evidence that it has positive effects on cognitive function, memory, focus and the ability to do day to day things.

[105] In cross-examining Dr Das, KMD put to him that his intention is to drug her to the point where she cannot think properly and will be in a helpless state, under his complete control, and this learned helplessness and submissiveness will be amplified by brain damage, so that she becomes more dutiful to the psychiatrists and 'the demoralising principles of bio psychiatry'. He denied any such intention.

[106] It is not necessary to determine whether medications prescribed to treat delusional disorder conditions are harmful, or whether KMD should be treated with such medications against her will. The relevant facts are that Dr Das considers medication to be an appropriate and necessary part of KMD's treatment, and most likely a pre-requisite for a sufficient reduction in her risk profile to permit her release, and KMD refuses such treatment and is highly unlikely to agree to it in the future.

Were the early psychiatric opinions drawn on flawed factual assumptions?

[107] As set out in paragraphs [31] and [34] to [36] above, Dr Das and the other psychiatrists have referred to KMD having a delusional belief system in which the core belief is that her son was sexually abused by his father.

[108] As the extracts from Dr Smith's report set out in paragraphs [93] to [95] above show, his diagnosis that KMD was suffering a delusional disorder were based on his understanding of a delusional system that extended well beyond that core belief.

[109] KMD submitted that the only belief she has ever had is that she believed her son was being abused, and she has never told any psychiatrist that she held beliefs about judges, Freemasons, the Commissioner of Police and police being associated with a paedophile ring. KMD submitted that Drs Smith, Ellis and Ventura obtained the information about paedophile rings from information given by CC to

police about a conversation KMD had had with CC. KMD said CC had misinterpreted the conversation which occurred just after the SARC interview where KMD told CC she had done an internet search about paedophile rings in Darwin and those three things had come up. KMD said she had done that search after a counsellor at the SARC told her that Police were investigating paedophile rings in Darwin and Alice Springs. She also said that CC had been having an affair with a police detective who was involved in her 'matters' (who was also a friend of RL) and CC sent an email to the investigating officer saying KMD was accusing these authorities of being paedophiles and from then on it was KMD who was being investigated and acted against by the police.

[110] The submission that she never said those things to psychiatrists and never held those beliefs is inconsistent with the careful way Dr Smith's report described what KMD said to him during their interviews.

[111] It is also inconsistent with the report of Dr Andrew Ellis dated 30 April 2014 (Exhibit SO39). Dr Ellis was a Forensic Psychiatrist from Sydney engaged at the request of Riley CJ to prepare a report about KMD. He interviewed KMD via audio-visual link for 2 hours and 20 minutes. His report states that KMD described to him a long-standing belief that her son was sexually abused by his father, and that his father facilitated sexual abuse by a paedophile ring that involved photographing of anal sexual intercourse. She described a long-standing belief that RL had influential connections with the police and had plotted to kill her, and

that he had a cognitive impairment and drug addiction that caused violent intentions. KMD told Dr Ellis that she looked up things on the internet about paedophiles, the Freemasons and the Illuminati but did not come to any specific conclusions about that. She believed that comments she had made to previous psychiatrists had overplayed bizarre aspects of her story, such as a belief in Freemasons and the Illuminati being involved in a cover up of police paedophiles. KMD told Dr Ellis about the death threat by the man with the tattoo who was wearing a Freemason's sigil on his ring, and that she believed the man had tracked her down in relation to the allegations she had made about RL abusing her son. She told Dr Ellis that it was at that point she began carrying the gun with her at all times, to protect herself from this threat. She also said RL had made plans to have her killed and that she could not go to police about it because of RL's influential connections with them. KMD also told Dr Ellis that she only fired four shots from the gun during the incident so one bullet was missing from the evidence, which may indicate a conspiracy. Dr Ellis reported that, when pressed for details of how she came to certainty regarding her beliefs, KMD would retract or minimalise her original statements. He said that KMD clearly expressed a belief that her son had been sexually abused and was still in danger, and that her own life was threatened by a conspiracy. He said the belief had arisen on the basis of flimsy evidence and appears to have been elaborated on and extended with

further persecutory ideation. He said the beliefs were preoccupying and drive behaviour and on this basis they were considered delusions.

[112] KMD's submission is also inconsistent with the report of Dr Antonella Ventura dated 31 July 2014 (Exhibit SO5). Dr Ventura was a Consultant Forensic Psychiatrist temporarily appointed to the FMHT who interviewed KMD via audio-visual link for 1 hour and 45 minutes and prepared a report for the Court. Her report set out what KMD told her, including: (a) that she knew her son was sexually abused by 'Dave' because two other children with Dave were abused; (b) one of the other boys with Dave was also involved in abusing her son; (c) at four years old, KMD's son said these exact words to her: that he 'was forced into sexual acts against his will'; (d) KMD believed the abuse of her son was organised sexual abuse; (e) KMD was convinced there were a number of people involved in the sexual abuse of her son and that it was being filmed or photographed; (f) KMD's son said that one of the abusers looked like a policeman and after she investigated the matter on the internet, KMD believed this was related to police protection of a paedophile ring in Western Australia run by a Masonic sect; (g) when out for dinner with a friend, an unknown man approached KMD and showed her a tattoo which pictured a female figure with no dates on it, which meant she was this girl and she was going to be killed; (h) the man had a ring with a Freemasonry symbol on it; (i) she believed this event was linked to the paedophile ring involved with the sexual abuse

of her son; and (j) during the incident the subject of the charges, KMD saw confirmation that RL was guilty of sexually abusing her son from the fact that he ran away when she approached him with the gun. Dr Ventura's report stated that KMD:

> continues to express paranoid delusions specifically about the ongoing sexual abuse of her son…, or her ex-partner [RL] demonstrating his guilt by running away from a firing gun. She admitted to beliefs consistent with delusions about a paedophile ring related to the Freemasons. She expressed persecutory delusions about her life being in danger and being threatened by the Freemasons.
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> …
>
> Her judgement continued to be impaired as she believed that she acted in a rational way by pursuing [RL] with a weapon.

[113] Specifically as to the belief about involvement of the Freemasons, Dr Ventura's report stated she obtained that information directly from her interview with KMD.

[114] KMD also submitted that, by reporting these matters as things KMD told them about her beliefs, the psychiatrists have behaved immorally and unethically and have lied to the Court. I do not accept that. There is no foundation for it and the submission that three professionals, including one engaged by KMD's lawyers and the other engaged on behalf of the Court, have fabricated evidence to support their professional opinions is unsustainable.

[115] KMD tendered (Ex SO50) the transcript of the hearing of the Mental Health Review Tribunal on 4 July 2016.[21] KMD tendered that transcript to show that there was other 'contextual evidence' 'ignored' by the psychiatrists which showed she had never held the bizarre beliefs attributed to her. In that transcript, KMD's then counsel is recorded as describing a history (based on her reading of the prosecution file) in which, after KMD raised R's disclosures of sexual abuse by RL with police, the investigating police officer wrote a report saying he did not consider a prosecution was possible and he believed KMD had, to some degree, coached her son to make the disclosures. Counsel said the SARC staff told police they 'believed the child'. She said the investigating police officer was disciplined for writing that report, which was then put before the Family Court by RL and KMD's access to her son was removed. KMD's counsel put to Dr Miach that the

21 That hearing was conducted to determine whether KMD should be involuntarily detained and treated with medication in the mental health facility at the Royal Darwin Hospital. The application was brought by a Consultant Psychiatrist, Dr Tony Miach, from the FMHT on the basis of concerns that KMD's mental illness had deteriorated after he took the view that she suffered an olfactory hallucination, had complained about being poisoned, had refused to engage with the FMHT and had been uncharacteristically belligerent and combative in the period leading up to the application. KMD had complained that she could smell gas in her cell and that she was being gassed. KMD's position was that she was not the only prisoner to complain about smelling gas. KMD had also complained that she was being poisoned by the prison food. KMD's position was that prison food was nutritionally poor and she had simply expressed, like many prisoners did, that the food was 'poison'. KMD had explained her irritable behaviour was a consequence of new stressors in her life (her partner and child considering moving interstate, and the trialling of her transitioning to the Cottages outside of the Darwin Correctional Centre). The Tribunal held that the criteria for involuntary treatment in the *Mental Health and Related Services Act 1998* was not satisfied. The Tribunal referred to evidence before it that other prisoners had also complained about smelling gas in the area of KMD's cell and was not satisfied that KMD had suffered an olfactory hallucination. The Tribunal also accepted KMD's explanations that she considered and commonly referred to the prison diet as poison (i.e. of poor nutritional value) and her mood decline was a consequence of her growing frustration at her predicament (being in prison) and the arrangements relating to her day release to the Cottages (referred to below). The Tribunal's reasons are Exhibit SO34.

investigating police officer had been disciplined in relation to ‘administrative matters such as discontinuing files of this nature’. Dr Miach said he was not aware. KMD’s counsel asked Dr Miach if he was aware that KMD was seen by a psychologist who did a report to the Family Court and it was on the basis of that report that custody of R was given to KMD’s former partner. KMD’s counsel asked Dr Miach if he was aware that that psychologist no longer works with the Family Court ‘again probably for disciplinary reasons’. Dr Miach said he was not aware. Asked if he was aware that the SARC staff told police that they believed R, Dr Miach said he was not, but said the psychiatrist’s report had said the son had been coached into making those allegations.

[116] That description of history and those questions by KMD’s counsel, even if they had been put to a witness in this Court rather than some other legal forum, are not evidence because they were not adopted or accepted by the witness as true. They comprise no more than assertions that the investigating police officer did not properly investigate the allegations, and that there may be some issue about the reliability of a psychologist’s report on which the Family Court acted. Even if these things were established in this Court by evidence, the consequence goes no further than that the allegation of sexual abuse of R by his father may be true but remains unsubstantiated. I do not consider that to have any significant bearing on the psychiatric opinions that KMD has a delusional disorder founded on a delusional system with the sexual

abuse of R by his father at its core. It is clear from the reports of Drs Smith, Ellis and Ventura set out in paragraphs [93] to [95] and [110] to [113] above that the delusional system extended well beyond that core belief.

[117] In this hearing, KMD's written submissions included an assertion that police had removed material from the transcript of her interview with Snr Detective Gary Coles in 2013 which was produced to the Court under a subpoena in 2014. This assertion was founded on the assertion that RL had made a statement, contained in the brief of evidence, that the police told him the transcript was 95 pages long, when the transcript produced to the Court was only 90 pages long. One might consider the possibilities that what police reported to RL misstated the number of pages, that RL inadvertently misreported what Police told him, or that printing the transcript in different formats might change the number of pages. Instead, KMD submitted that the only logical conclusion was that police removed from the transcript things she had said in order to, corruptly, justify closing the investigation into sexual abuse of her son.

[118] KMD argued that all psychiatrists and correctional staff with whom she has had interactions which have been reported in the evidence before the Court have proceeded from the discriminatory basis, laid down upon the jury's finding of not guilty by reason of mental impairment, that she suffers from a mental impairment, which has both influenced

those interactions (contrary to her interests) and sought to confirm the basis from which they have proceeded. KMD referred to this as a 'strawman approach'. An example KMD gave of this strawman approach was a description of her in a Department of Health document as 'a 43 year Aboriginal old woman'. She said this was not a typographical error in writing 'a 43 year old Aboriginal woman', but a description deliberately made to permit her to be accommodated at the Cottages leased by Aged Care and Disability Services.

[119] The reliance placed by more recent psychiatric reports upon: (a) what the earlier psychiatric reports disclose about KMD's statements and beliefs; and (b) KMD's reported interactions with correctional staff, is a consequence of the absence of recent disclosures by KMD to members of the FMHT about her beliefs and her mental state. I do not see that reliance on the interactions between KMD and correctional staff to be in any way deliberately for the purpose of confirming that KMD suffers from a mental impairment.

Do the later psychiatric reports repeat those flawed factual assumptions?

[120] I have rejected the submission that the early psychiatric reports proceeded from the flawed factual assumption that KMD held the beliefs reported in them. It follows that I do not accept that the later psychiatric reports repeat flawed factual assumptions.

Were the assessments too short?

[121] KMD argued that she has not been the subject of a full longitudinal assessment, which she has been told takes between six to eight weeks. KMD has not been the subject of a single long-running psychological assessment. She was, however, the subject of assessments by various psychiatrists with whom she engaged over a number of years. I do not think this bears significantly on the reliability of the opinions of the psychiatrists as to her diagnosis.

Is Part IIA repugnant to the *Constitution* or otherwise invalid?

[122] One of the things KMD ultimately sought on this review hearing was a new trial, an ordinary trial outside of Part IIA of the *Criminal Code*.

[123] KMD submitted that Part IIA of the *Criminal Code* is contrary to the rule of law and incompatible with the *Constitution* because it permits indefinite detention. That a statute permits indefinite detention does not make it incompatible with the *Constitution* and invalid.[22]

[124] KMD submitted that Part IIA of the *Criminal Code* lays down an 'axiomatic system of logic', a system in which certain unproved formulas (axioms) are taken as starting points and further formulas (theorems) are proved on the strength of those axioms, even though the axioms may not be true. KMD also submitted, by defining many different types of logical fallacies and giving examples of them by

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22 See *McGarry v The Queen* (2001) 207 CLR 121; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166.

reference to propositions or premises, that numerous logically fallacious arguments have been put forward to sustain the opinions about her having a mental illness and her risk. Generally speaking, this was a means by which KMD sought to press her submissions, as already referred to and addressed elsewhere in these reasons. In particular, KMD argued that psychiatric opinion is based on empirical logic, represents a significant contrast to rationalism and purports to know better than the individual what is best for them. I did not find these arguments persuasive. Part IIA of the *Criminal Code* obliges the Court to order and take into account the results of an examination by a psychiatrist or other appropriate expert[23] (ss 43O(d), 43P(3)(b), (c), 43Y(1)(c), (d), 43ZN(2)(a)) and to receive reports about the supervised person's mental impairment, condition or disability (s 43J(1), (2), 43ZK(2)(b)). KMD argued that the 'axiomatic system of logic' makes Part IIA of the *Criminal Code*, 'unsafe law', which renders it invalid. Various United States authorities in which statutes were declared repugnant to the United States Constitution and invalid by various courts including the United States Supreme Court were referred to.[24]

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23 The term 'expert' is defined to mean a person who holds a qualification or has experience or expertise that is relevant to mental impairment, condition or disability of an accused person or a supervised person (s 43A).

24 For example, *Ham v McClaws* 1 SCL (1 Bay) 93 (1789); *Bowman v Middleton* 1 SCL (1 Bay) 252 (1792); *Marbury v Madison* 5 US 137 (1803).

Reliance was also placed on various English cases in which statutes were said to be void for being repugnant to the common law.[25]

[125] No Australian authority was cited for the propositions that the legislature does not have capacity to make a statute which may operate by axiomatic logic, or a statute which may impair common law rights such as the right to liberty. In any event, I do not accept that Part IIA operates with flawed logic.

[126] KMD also submitted, in reliance on the High Court's decision in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, that Part IIA of the *Criminal Code* is not 'reasonably and appropriately adapted' to its end of impairment of liberty and freedom of movement. That case involved the implied constitutional freedom of expression and the legislative power of the Commonwealth Parliament which is limited to the subject matters set out in s 51 of the *Constitution*. The case has no relevant application to laws about trials of accused persons who may have a mental impairment made by a plenary legislature such as the Legislative Assembly of the Northern Territory.[26]

[127] I do not accept KMD's arguments that Part IIA of the *Criminal Code* is or should be declared invalid.

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25 For example, *Dr Bonham's Case* (1610) 8 Co Rep 113b; *Wood v Mayor and Commonalty of London* (1701) 90 ER 1118; *Day v Savadge* (1614) Hob 85.

26 As to the unqualified legislative power of the Legislative Assembly of the Northern Territory, see *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [170]-[171] per Keane J and the authorities there referred to.

Reopening jury's findings

[128] KMD argued that, because the charges against her were dealt with at a special hearing under Div 4 of Part IIA of the *Criminal Code*, she was denied the opportunity of a fair trial at which the facts and truth of her case could be tested.

[129] The purpose of a special hearing is to determine, on the evidence, whether an accused person: (a) is not guilty of the offence with which they are charged; (b) is not guilty of the offence because of mental impairment; or (c) committed the offence or an alternative offence (s 43V). A special hearing is conducted as nearly as possible as if it were a criminal trial, at which the accused is taken to plead not guilty, the accused may raise any defence they could raise in a criminal trial, the rules of evidence apply, and the accused person may give evidence (s 43W). If the jury finds the accused not guilty, they must be discharged as occurs in a criminal trial (s 43X). It cannot be accepted, therefore, that simply because her matter proceeded by way of a special hearing under Part IIA, KMD was denied a fair trial, and the opportunity to be found not guilty of the charges in the ordinary way. She submitted that she was denied the opportunity to give evidence at the special hearing, but provided no information about how that denial occurred or any evidence of it.

[130] KMD submitted that, when Part IIA of the *Criminal Code* is wrongly invoked (as she said occurred in her case), it creates a 'vicious circle

fallacy argument: an *ad verecundiam* false dilemma' which the supervised person can never meet, resulting in their ongoing indefinite detention. KMD defined a vicious circle argument as reasoning in which a premise is used to prove another premise, which is used to prove another premise, which is used to prove another premise, which continues until the second last premise is used to prove the original premise. KMD defined an *ad verecundiam* fallacy as an argument that appeals to 'awe' which seeks to secure acceptance of the conclusion on the grounds of its endorsement by persons whose views are held in general respect. KMD defined a 'false dilemma' essentially as a simple choice, such as between black or white. KMD gave various examples of what she identified as this reasoning which ultimately led to Riley CJ's decision to place her under a custodial supervision order under Part IIA. KMD referred to various premises in this reasoning, including her lawyers' decision to pursue a mental impairment defence contrary to her instructions, Dr Smith's opinion that she was delusional which then incited 'groupthink' on the part of the other psychiatrists, the reliance by the psychiatrists on the unsubstantiation of her belief about the sexual abuse of her son (which was a consequence of the failure of police to properly investigate his disclosures) and CC's 'malicious statement'. Again, this argument was not persuasive, particularly given what I have concluded about the early psychiatrists' reports above.

[131] KMD argued that she was not unfit to stand trial within the meaning of s 43J of the *Criminal Code*. KMD submitted that Part IIA was wrongly invoked in her case and this Court should judicially review the initial decision to declare her unfit to stand trial because that decision was flawed on various judicial review grounds, principally related to *Wednesbury* unreasonableness.[27] She submitted orally that her lawyers coerced her into a mental impairment defence, which she was not told about until the cusp of the special hearing which commenced on 30 June 2014, and which she said was contrary to the instructions she gave her lawyers to prepare for an ordinary trial. She also said that, despite having a right to give evidence if she wished (s 43W(2)(e)), she was denied that opportunity. Notwithstanding KMD's submission, there is no evidence before this Court to establish that KMD's lawyers acted improperly in 2013 and 2014 in providing to the Court the reports of Dr Walton and Dr Smith or in submitting to the jury at the special hearing that a verdict of not guilty by reason of mental impairment was appropriate on the evidence. KMD's written submissions refer to a file note made by her then solicitor about a conference on 4 March 2014 with KMD and counsel. That document was not put into evidence in this proceeding. KMD also provided a memorandum, drafted by a person not identified, on a date not identified, apparently briefing a person not identified, to advise 'on the merit' of appealing the Supreme

27 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Court's decision that KMD was 'unfit to plead'. The memorandum refers to various documents said to support KMD's claims that her lawyers acted contrary to her instructions. The most prominent of those is a draft affidavit by KMD. None of the documents are in evidence in this Court. While the extracts from the file note and the memorandum suggest that KMD did not want to pursue a defence of mental impairment, and instructed her lawyers not to, they do not indicate evidence of any impropriety on the part of KMD's then legal representatives, particularly noting that such evidence would have to be considered in light of s 43ZO of the *Criminal Code*, which gives legal counsel an independent discretion to act as they reasonably believe to be in the best interests of the accused if the accused is unable to instruct them on questions relevant to an investigation or proceedings under Part IIA. A question relevant would have been whether KMD was or might be found to be unfit to stand trial or not guilty by reason of mental impairment. It appears that KMD's lawyers believed they were acting in accordance with s 43ZO.

[132] There is an express right of appeal from a finding of not guilty by reason of mental impairment in the *Criminal Code*, but it only applies if 'the defence of mental impairment was not raised by' the accused person (s 406(2)). There is no express right of appeal if the defence of mental impairment was raised by the accused person. That appears to be a deliberate decision on the part of the legislature. In addition to

s 406(2), there is an express right of appeal from a finding that an accused person committed the offence charged or an alternative offence at a special hearing (s 43X(3)(c)), the general right of an accused person to appeal is limited to a person found guilty and only extends to right to appeal against the finding of guilt, any special finding or the sentenced passed on the finding of guilt (s 410), and the general right of the Crown to appeal does not include an appeal from a finding of not guilty by reason of mental impairment (s 414(1)). The Court of Criminal Appeal has power on an appeal within those provisions to quash a finding of guilt and substitute a finding of not guilty by reason of mental impairment (s 412A). There is also an express right to appeal against a supervision order in the same manner as an appeal against a sentence, but the Court's only powers are to confirm the supervision order or quash it and make another supervision order in substitution for it (ss 43AB, 406(3)). The availability of a right of appeal from a decision is commonly a basis on which to refuse relief in a judicial review proceeding on discretionary grounds. In any event, this is not a judicial review proceeding.

[133] I also note that a declaration that an accused person is unfit to stand trial is not a necessary precursor to a finding of not guilty by reason of mental impairment (s 43C). The defence of mental impairment can be raised by either party or the Court on its own initiative (s 43F). If it is so raised during an ordinary trial, the jury must consider it (s 43G).

Consequently, even if KMD had entered pleas of not guilty and the matter had proceeded to trial in the ordinary way, the issue of mental impairment would potentially have arisen, and the matter would potentially have resolved as it did with the same outcome.

[134] In *R v KMD (No 4)*, Hiley J held (at [42]) that s 6 of the *Juries Act 1962* (NT), read with Part IIA of the *Criminal Code*, precluded the Court on a periodic review from substituting its views with the functions and duties of the jury at a special hearing.[28] I agree with that view.

[135] This proceeding comprises a periodic review of the supervision order to which KMD is subject and the Court's powers are confined to those set out in paragraph [20] above.

[136] This makes untenable in this proceeding KMD's arguments about flaws in the determination that she was unfit to stand trial and the 2014 special hearing and the jury's finding that she was not guilty by reason of mental impairment.

Relevance of harm suffered by KMD

[137] KMD submitted that, by the jury's finding of not guilty by reason of mental impairment and being subject to the custodial supervision order, she has suffered numerous forms of harm in addition to the deprivation

28 Section 6 of the *Juries Act* provides that where, under a law in force in the Northern Territory, an offence prosecuted in the Court is required to be tried with a jury, the jury shall consist of 12 jurors chosen and returned in accordance with the *Juries Act*.

of her liberty, including harm to her reputation, disruption of her relationships, discrimination and financial loss, including the loss of her property.

[138] Part IIA does not require the Court to take into account harm suffered by a supervised person as a consequence of being a supervised person. It is difficult to see how such harm could be a relevant factor when such harms are the obvious potential consequences, for all people subject to Part IIA, of a finding of not guilty by reason of impairment and being subject to a supervision order. Even if such harm was a relevant consideration on a periodic review, I do not see how past harm (as distinct from ongoing or future harm) can be relevant to the exercise of the Court's powers in s 43ZH.

Conclusions – mental condition and risk

[139] On the basis of all of the evidence before me and referred to above, I find 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, if KMD were released from custody, she would endanger herself because of her mental condition, save for the risk that she might suffer harm at the hands of others if the risk referred to in paragraph (c) below were to eventuate. I find that

this risk is dependent on, but lower than, the risk referred to in (c) below.

(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 some physical harm. Her actions were dangerous to those people and to others in the community.

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

(iv) KMD refuses treatment of her condition via medication. She also refuses to be seen, examined or engaged with by the FMHT.

[140] As regards the degree of risk, there are two components: one is the magnitude of the harm to other persons if the risk were to eventuate;

the other is the degree of likelihood of the risk eventuating.[29] The magnitude of the harm is substantial because of the potential for acts of serious aggression and violence of a high order. However, the likelihood that KMD would act on her delusional beliefs in this way is, on the expert evidence before this Court, low. She has no history of violence prior to 7 May 2013 or since, despite being detained in a prison where the restrictions on personal liberty and freedoms is stressful and frustrating at times, and acts of violence amongst prisoners is not uncommon. She does not suffer from any cognitive deficits or an intellectual disability affecting her abilities to reason, problem solve, plan or learn from experience.

[141] 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

29 See paragraph [50] above.

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.

[142] 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.[30]

[143] 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 autonomy must be kept to the minimum consistent with protecting the safety of the community. Given the serious intrusions into the liberty of the

30 See *R v RK* [2019] NTSC 67 at [7] per Blokland J and the authorities there cited.

supervised person of a custodial supervision order, the principle in *Briginshaw v Briginshaw* (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.[31]

[144] 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.

Is there a way forward?

[145] Although not the subject of evidence, it is irrefutable that there is treatment available to KMD in the community in the form of medication and psychiatric or psychological engagement. It is sufficiently clear that KMD would not take medication or avail herself of psychiatric engagement in the community. It is possible that she might avail herself of psychological engagement in the community.[32]

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31 Ibid at [5].

32 KMD engaged in cognitive behavioural therapy with a psychologist, Mr Re Acacio, in the past, and more recently indicated a desire to re-engage with him, and submitted that a psychologist rather than a psychiatrist should have assessed her initially because psychiatrists are intent upon medicating people.

[146] 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.

[147] 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 consideration to taking it. If, for reasons including her delusional belief system at the heart of her mental condition[33], 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

33 In their written submissions, the CEOs put that KMD's refusal to accept medical advice to trial medication can be seen as a product of her mental condition.

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)).

[148] I cannot countenance such a course, at least without giving careful consideration to alternative options.

[149] Management of risk of people in custody under Part IIA who are to be released into the community is generally done by a 'step-down' approach under which they transition between the two, starting with greater levels of constraints on movement and freedoms and with a gradual decrease of those constraints, with their compliance and attitudes to the constraints being closely monitored over time. Commonly, this step-down approach sees the supervised person spend time in places outside of custody, initially for short periods, with those periods gradually extending until they are residing in a non-custodial setting. This is generally done in accordance with a documented transition plan developed by correctional staff in conjunction with the supervised person and members of their support team.

[150] KMD's custodial supervision order was varied in December 2015 in pursuit of such a 'step-down' approach, in which she was given day release from the prison to attend and stay at the 'Cottages' in the prison grounds. KMD attended the Cottages for several months, but decided

not to continue,[34] as the Cottages are a forensic disability unit housing men.[35] I note that during that time, she did not make any attempts to abscond or offend.

[151] I cannot presently see why a transition plan could not be prepared under which KMD could gradually transition to life in the community. Ideally, KMD would transition, under such a plan, to accommodation of her choosing as part of the Mission Australia program(s) referred to above, with all of the supports they offer in place.

[152] The CEOs have submitted that KMD has not put forward a detailed plan for her release, or any form of transition plan. Given that KMD is in custody, not legally represented and suffers from a mental condition which precludes her interactions with the FMHT, that is hardly surprising. In accordance with these reasons, I cannot presently see why the CEOs and relevant staff (both within and outside of the FMHT) cannot work with KMD and others who are supporting or will support her (such as Mission Australia, NAAJA, the YWCA or YISSA) to develop, formulate, document and implement a plan.

[153] It can be seen from the above that I am giving consideration to making an order releasing KMD from custody. The Court must not make such an order unless, in addition to the reports under s 43ZK referred to

34 *R v KMD (No 3)* at [42].

35 See Exhibits SO30, SO31, SO32 and SO33.

above, the Court has obtained and considered two reports, each being prepared by a person who is a psychiatrist or other expert (s 43ZN(2)(a)(i)). The Court must also be satisfied that the victims of the offending, the next of kin of the supervised person and (relevantly here) the Aboriginal community were given notice of the proceedings (s 43ZN(2)(b)). The Court could give leave to such persons to appear in the proceedings if they have a proper interest in the matter (s 43ZI(5)). Reports from victims or their next of kin may be received (s 43ZL).

[154] As to the two reports in s 43ZN(2)(a)(i), s 43ZN does not specify what matters are to be addressed in the reports. In the present context, those reports should address the specific means by which KMD and the risk that she might act on her delusional belief system in a seriously aggressive or violent way in the community might be managed on a non-custodial supervision order, and how she could transition from custody to living in the community. I also consider it appropriate that neither expert should have authored reports in this matter to date. This will provide the Court with a fresh perspective, which will be informed by these reasons and other materials on the Court's files. Given the plethora of psychiatric evidence before the Court, my preliminary view is that it is appropriate that one of the experts be a psychologist and the other be an occupational therapist or social worker or other expert experienced in managing and supporting people with mental health conditions in the community. I will hear the parties further about that.

[155] I will also hear the parties as to the mechanisms by which those reports are obtained and the appropriate orders to facilitate the further determination of this periodic review.

Disposition

[156] In light of the above conclusions, this periodic review is not complete within s 43ZH of the *Criminal Code*. I will make orders for the pursuit of its completion after hearing from the parties.
