

## ***Attorney-General (SA) v Pennington [2019] SASC 180 (25 October 2019) – South Australian Supreme Court***

‘Aboriginal and Torres Strait Islander people’ – ‘Appreciable risk’ – ‘Childhood abuse’ – ‘Conditions’ – ‘Cultural obligations’ – ‘Extended supervision order’ – ‘Extensive criminal history’ – ‘Forensic evidence’ – ‘Past domestic violence’ – ‘People affected by substance misuse’ – ‘Perpetrator interventions’ – ‘Physical violence and harm’ – ‘Traditional lands’ – ‘Unacceptable risk and best interests’

Charges: 1 x aggravated recklessly causing serious harm

Case type: Application by the Attorney-General (SA) for an Extended Supervision Order (ESO) pursuant to s 7 of the Criminal Law (High Risk Offenders) Act 2015 (SA) (the HRO Act) in respect of the respondent for a 3-year term.

Facts: The male respondent was found guilty at trial of aggravated recklessly causing serious harm against his former domestic partner and was ultimately sentenced to 5 years’ imprisonment ([5]). The respondent had a significant history of serious criminal offending, especially violent offending against women ([6]). His history included offences of non-consensual sexual penetration, armed robbery, aggravated unlawful wounding, possession of a weapon with intent to cause injury and fear, and unlawful assault causing bodily harm in circumstances of aggravation and breaching protective bail conditions. It was against this background and while subject to a suspended sentence, that the respondent was sentenced to the offending in question. The circumstances of that offending were that the respondent, while in an intoxicated state, stabbed the victim in the back and fled the house without rendering her assistance. The victim may have died within hours had she not been airlifted to Adelaide ([10]).

The applicant filed an application for an ESO under the terms of the HRO Act. An Interim Supervision Order was made pursuant to s 9 pending the determination of the application for an ESO, which was enlivened upon the respondent’s release from custody in September 2018. Further, a psychiatric report pursuant to s 7(3) of the HRO Act was provided ([11]-[13]).

Issue: The applicant sought an ESO in respect of the respondent for a period of 3 years on the basis that he is a high risk offender who would present an appreciable risk to the community’s safety if not supervised under such an order. The main issue for the Court, however, was the nature of the terms and conditions of the ESO, especially those relating to whether or not the respondent is restrained from leaving South Australia without permission ([3]).

The respondent accepted that he was a high risk offender pursuant to s 5 of the HRO Act, and did not oppose the making of an ESO provided that the order included the following conditions ([14]):

- > The respondent may depart from South Australia with the intention of living in another State, and if he chooses to do so, he will not be subject to the order unless he returns to South Australia during the period of the order.
- > The order will take effect if the respondent returns to South Australia.

The applicant submitted that the terms of the ESO as proposed by the respondent were beyond the scope of the Court's jurisdiction, would render it impossible to effectively supervise him when he is absent from South Australia, and would not protect the community's safety in an effective manner ([29]).

Held: The respondent was born in the dry community of Tjuntjuntjara in Western Australia ([15]), which is described as 'relatively stable and safe' and as 'one of the remotest communities in Australia' ([21]). The respondent's daughter, grandson and elderly, ill father also lived in that community. His father's family originally came from the A?angu Pitjantjatjara Yankunytjatjara (APY) Lands in the remote north-west of South Australia. The respondent proposed that he would move between the Tjuntjuntjara community and Kurrawang, where he has other relatives. He also expressed an intention to live in Esperance ([15]-[16]).

The respondent submitted that given that Tjuntjuntjara is a dry community and he has family support and access to traditional healers, he could participate in men's business and would therefore unlikely reoffend ([17]). In his opinion, an ESO in the terms proposed by the applicant would require him to stay in South Australia, rendering it difficult to visit the APY Lands ([18]). Further, it was submitted that if he was prevented from living on or near his traditional lands, both on the APY Lands and in Western Australia, this would negatively affect him and increase his likelihood to reoffend, as he would be deprived of the opportunity to play a meaningful role in his culture and lore ([19]). While it was undoubtedly in the respondent's best interests that he be permitted to return to his homeland, Kelly J noted that the question was not 'simple', and required an analysis of the relevant provisions of the HRO Act ([26]-[28]).

Her Honour placed great reliance on the psychiatric report ([35]), which noted that the respondent was at high risk of further violent offending, due to his significant history of violent and sexual offending, his limited (and only very recent) insight into that behaviour, and his tendencies to minimise his behaviour and blame circumstances and victims for his past behaviour ([36]). It was also noted that the respondent was at a heightened risk of sexual offending due to his issues with childhood abuse and increased risk of violence ([37]). If the respondent returned to his traditional lands in South Australia, he would be at a greater risk of reoffending due to potential personal conflicts with other community members and the difficulties in accessing adequate supervision in remote communities. There would also be a real risk of the respondent resuming alcohol abuse without adequate supervision and therapy ([43]). Her Honour further considered therapies appropriate to the respondent's personality type, and concluded that he would benefit from a combination of traditional western psychological therapy and support provided by traditional healers ([44]-[46]). The further the respondent travels from Adelaide, the more difficult it would be for him to access the necessary therapy ([47]).

The psychiatric report also raised the issue of the respondent's desire to return to his traditional lands to fulfil his cultural obligations and identified some risk factors involved if he were to return ([48]). Importantly, the majority of the respondent's offending occurred when he was living on his traditional lands and when he was under the influence of alcohol ([49]). Even though Tjuntjuntjara is a dry community, other communities in which the respondent had expressed a desire to visit are not ([50]). Under the terms of the order proposed by the respondent, there would be no practical way for the Court to satisfy itself that the community is protected should he choose to visit or reside in South Australia ([53]), as South Australian supervisory authorities have no practical way of determining if he was to re-enter the APY Lands ([52]).

Her Honour held that an ESO for a 12-month term would adequately protect the community and enable the respondent to continue with appropriate rehabilitation and therapy ([55]). Her Honour also found that the respondent was a high risk offender who posed an appreciable risk to the community's safety if not supervised under the order, and that it would be outside the scope of the Court's jurisdiction to make an ESO in the terms requested by the respondent, and would render his effective supervision impossible when he is absent from South Australia ([33]).