SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Fardon* [2018] QCA 251
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (appellant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	Appeal No 9441 of 2018 SC No 5346 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 193 (Jackson J)
DELIVERED ON:	3 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2018
JUDGES:	Holmes CJ and Gotterson JA and Henry J
ORDERS:	**1. Appeal allowed.** **2. Leave for the appellant to adduce further evidence granted.** **3. The Court being satisfied pursuant to s 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act) that there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order, a judge of the Trial Division will conduct a s 13 hearing of the application for a further supervision order.** **4. The respondent undergo examination by two psychiatrists, namely Dr Elizabeth McVie and Dr Scott Harden, who are to prepare independent reports.** **5. The duration of the supervision order made 4 October 2013, expressed as lasting "until 3 October 2018", is varied to "until disposition of the s 13 hearing".** **6. Liberty to apply.**
CATCHWORDS:	APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – GENERAL PRINCIPLES – where the respondent is subject to a soon to expire supervision order – where the

applicant applied for a further supervision order – where that application was dismissed at the preliminary hearing – where the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) imposes a threshold test at the preliminary hearing – where the Act requires satisfaction at the preliminary hearing that there are reasonable grounds for believing a prisoner is a serious danger to the community – where the test at final hearing is whether a court is satisfied the prisoner is a serious danger to the community – whether the satisfaction of the preliminary hearing test was conflated with the final hearing test at first instance – whether the Court of Appeal, in applying the preliminary hearing test afresh, is satisfied that test has been met

Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld)
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 8, s 13
Police Powers and Responsibilities and Other Legislation Amendment Act 2018 (Qld)

Attorney-General (Qld) v Fardon [2018] QSC 193, cited
Attorney-General (Qld) v Nemo [2018] QSC 202, cited
George v Rockett (1990) 170 CLR 104; [1990] HCA 26, cited
Prior v Mole (2017) 91 ALJR 441; (2017) 343 ALR 1; [2017] HCA 10, cited

COUNSEL: P J Dunning QC SG, with J B Rolls, for the appellant
D O'Gorman SC, with R Reed, for the respondent

SOLICITORS: Crown Law for the appellant
Patrick Thomas Murphy for the respondent

[1] **THE COURT:** On 17 April 1967 in the Grafton District Court, when the respondent was 19, he was convicted of attempting to carnally know a girl under 10 and sentenced to a good behaviour bond.[1] On 8 October 1980 in the Brisbane Supreme Court, when aged 32, he was convicted of rape, indecent dealing with a girl under 14 and unlawful wounding committed in 1978, and sentenced to 13 years imprisonment.[2] After being released on parole during that term of imprisonment, the respondent absconded, and, on 3 October 1988, committed the offences of rape, carnal knowledge against the order of nature and assault occasioning bodily harm.[3] On 30 June 1989 in the Townsville Supreme Court, when aged 40, he was convicted of those offences and sentenced to 14 years imprisonment.[4] He was not released on parole during that term of imprisonment.

[2] On 6 June 2003, 24 days before the expiration of the respondent's term of imprisonment, the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") came into force. The Act introduced a regime by which prisoners serving a term of imprisonment for a serious sexual offence, who are a serious danger to the

1 AR Vol 6 p 38.
2 AR Vol 6 p 345.
3 AR Vol 6 p 39.
4 AR Vol 6 p 346.

community, may be subjected to a continuing detention order or a supervision order of the Supreme Court beyond the expiration of their term of imprisonment.

[3] On 27 June 2003, three days before the respondent had served his full 14 years imprisonment, the Supreme Court made an interim detention order in respect of the respondent, then aged 54.[5] He has been the continued subject of detention and supervision orders by the Supreme Court in the more than 15 years since then. The supervision order to which he is presently subject, imposed in 2013 and not contravened since, will expire at midnight on 3 October 2018,[6] three days before he turns 70 and thirty years after he committed his last offence.

[4] In anticipation of that event, the Attorney-General filed an application seeking a further supervision order.[7] The application was dismissed at its preliminary hearing by a Judge of the Trial Division on 27 August 2018. The Attorney-General appeals that decision.

Relevant legislative provisions

[5] The Act requires an applicant for a detention or supervision order to meet a threshold test at a preliminary hearing and, if successful in doing so, to then meet a more onerous test at a final hearing. That two stage process is best explained by dealing with the second stage first.

[6] Division 3 of Part 2 of the Act deals with the circumstances under which the Supreme Court may make a continuing detention order or supervision order (a "Division 3 order"). Section 13 of Division 3 provides:

> "**13. Division 3 orders**
>
> (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).
>
> (2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made.

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5 AR Vol 6 p 31.

6 The current order (AR Vol 6 p 279), made 4 October 2013, is expressed as lasting "until 3 October 2018", which ought be interpreted as meaning "until and including 3 October 2018" because s 13A(3) of the Act provides the period of a supervision order "can not end before 5 years after the making of the order".

7 The orders sought by the application (as amended) were:

1. That pursuant to s 19D(1) and s 8(2)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003*, the respondent, Robert John Fardon, undergo examinations by two psychiatrists named by this Honourable Court, who are to prepare independent reports in accordance with s 11 of the *Dangerous Prisoners (Sexual Offenders) Act 2003*.

2. That pursuant to s 19B and s 19C of the *Dangerous Prisoners (Sexual Offenders) Act 2003*, the respondent, Robert John Fardon, be subject to the requirements of a further supervision order for a period of five years.

> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision. …" (emphasis added)

[7] Section 13(4) lists an array of considerations the court must have regard to in deciding whether a prisoner is a serious danger to the community, including reports, information indicating propensity to commit serious sexual offences in the future, any pattern of offending behaviour, rehabilitative efforts and effects, antecedents, criminal history, risk of committing another serious sexual offence if released and the need to protect the community from that risk.

[8] Section 13 continues:

> "(5) If the court is satisfied as required under subsection (1), the court may order—
>
> (a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (***continuing detention order***); or
>
> (b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (***supervision order***).
>
> (6) In deciding whether to make an order under subsection 5(a) or (b)—
>
> (a) the paramount consideration is to be the need to ensure adequate protection of the community; and
>
> (b) the court must consider whether—
>
> (i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and
>
> (ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.
>
> (7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)."

[9] A s 13 hearing ("a final hearing") cannot occur unless an application by the Attorney-General first meets the Act's threshold requirements at a "preliminary hearing", convened pursuant to s 5(3) of the Act, which provides:

> "On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (***preliminary hearing***) to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order." (emphasis added)

[10] The nature of that decision is repeated in s 8, which provides:

> "**8. Preliminary hearing**

> (1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
>
> (2) If the court is satisfied as required under subsection (1), it may make –
>
> (a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports;
>
> (b) if the court is satisfied the application may not be finally decided until after the prisoner's release day—
>
> (i) an order that the prisoner's release from custody be supervised; or
>
> (ii) an order that the prisoner be detained in custody for the period stated in the order." (emphasis added)

[11] The practical effect of s 8 is to provide a threshold to be met by applicants for Division 3 orders, as a pre-requisite for being able to seek those orders at a final hearing. If the threshold is passed, it allows the application to proceed to a final hearing and, in the meantime, s 8 allows the Court to make orders, including that the prisoner undergo a psychiatric examination. It can be seen that there is limited occasion for any exercise of discretion under s 8. If the court is satisfied that reasonable grounds for the prescribed belief are shown, a hearing date must be set; the discretion is confined to deciding whether orders for psychiatric examination and further supervision or custody pending the final hearing should be made. In contrast, s 13 confers a complete discretion as to whether and which orders are made once the requisite satisfaction for the purposes of that provision is reached.

[12] Another relevant aspect of the Act is that the periods of Division 3 orders are finite.[8] In order to perpetuate further detention or supervision beyond the period of an existing order, the Attorney-General must apply afresh, via the preliminary and final hearing process, for a further detention or supervision order. Section 19B of the Act entitles the Attorney-General to apply for a further supervision order in respect of a released prisoner already subject to a supervision order, as the respondent is. Section 19D(1) imports the application of provisions applicable to applications for Division 3 orders to applications for further supervision orders with necessary changes. The references in ss 8 and 13 to "a Division 3 order" therefore include reference to "a further Division 3 order".

[13] The significance of this is that the Act does not impose a default position by which past satisfaction of the requirement in s 8(1) carries over, so that future applications can avoid the threshold of a preliminary hearing. The starting point imposed by the legislature is that any application for a Division 3 order or a further Division 3 order must satisfy the threshold test of a preliminary hearing. If it cannot satisfy that test the application must fail.

The decision below

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8 Section 13A.

[14] The application below failed for that reason at the preliminary hearing. The learned primary Judge concluded the applicant had not shown there were reasonable grounds for thinking the respondent was a serious danger to the community in the absence of a further supervision order.[9]

Determination of the appeal point

[15] The appellant's grounds of appeal as argued distilled to a single complaint, namely that the learned primary Judge conflated the preliminary hearing test with the final hearing test.

[16] What is the difference between the preliminary and final hearing tests? Altering them slightly, to accommodate the context that the application below was for a further supervision order, the tests to be passed are:

> For a preliminary hearing: the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a further supervision order.
>
> For a final hearing: the court is satisfied the prisoner is a serious danger to the community in the absence of a further supervision order.

[17] The test for a preliminary hearing is not as demanding as the test for a final hearing. Whereas the final hearing test requires satisfaction the prisoner is a serious danger to the community in the absence of a further order, the preliminary hearing test requires satisfaction there are reasonable grounds for believing that to be so.

[18] The distinction between the tests is an important one, all the more so by reason of the likely alteration of the evidentiary picture between the stages at which the tests are to be applied. The Act contemplates that by the time of the final hearing there will likely be evidentiary material before the Court additional to that before the Court at the time of the preliminary hearing. This may include the written submission of a victim[10] and the independent reports of two psychiatrists named by the court to examine the prisoner and report on their assessment of the prisoner's level of risk of committing another serious sexual offence.[11] Thus, the evidence before the Court by the time of the final hearing might be more compelling, one way or the other, than the evidence before the Court at the time of the preliminary hearing.

[19] The fact that without more evidentiary material an application would likely fail to meet the s 13 test is no part of the s 8 test. It is also irrelevant because at the preliminary hearing the Court is not to know the force of any additional evidentiary material which may be put before the court by the time of the application of the s 13 test at the final hearing.

[20] In considering what he described as "the altered section 8 question" (altered in the sense the test's reference to "a Division 3 order" includes reference to "a further division 3 order") the learned primary Judge referred to the observations of Martin J in *Attorney-General (Qld) v Nemo*,[12] including:

> "Section 8 does not require any conclusion that the prisoner is a serious danger to the community. What an applicant must demonstrate in order to obtain an order under section 8 is material

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9 Reasons [78].
10 Per s 9AA.
11 Per ss 8(2)(a), 9, 11.
12 [2018] QSC 202.

> sufficient to satisfy the Court that there are reasonable grounds for believing the prisoner is a serious danger to the community. It is not the time for a Court to embark upon a consideration of the material with a view to forming even a tentative view as to the final conclusion."

[21] The learned primary Judge also quoted Martin's J's adoption in *Nemo* of the reasoning in *Prior v Mole* of Kiefel J, as she then was, and Bell J. *Prior v Mole*[13] was concerned with s 128(1) of the *Police Administration Act* (NT), which empowers police to apprehend without warrant if they have reasonable grounds for believing certain facts regarding intoxicated persons. Their Honours there observed:

> "The principles governing the exercise of a power that is conditioned on the existence of reasonable grounds for belief are not in question. The lawful exercise of the power conferred by s 128(1) required that Constable Blansjaar in fact hold each of the beliefs referred to in subs (1)(a) and (b) and one or more of the beliefs referred to in subs (1)(c) and that the facts and circumstances known to Constable Blansjaar constituted objectively reasonable grounds for those beliefs. Proof of the latter requires that those facts and circumstances be sufficient to induce in the mind of a reasonable person a positive inclination towards acceptance of the subject matter of the belief. This is not to say that it requires proof on the civil standard of the existence of that matter. Facts and circumstances that suffice to establish the reasonable grounds for a belief may include some degree of conjecture."[14] (emphasis added)

[22] In the present matter the learned primary Judge went on to quote the observations of the High Court in *George v Rockett*[15] about the distinction between reasonable grounds to believe and reasonable grounds to suspect:

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."[16]

[23] The learned primary Judge then observed:

> "[59] I confess to some hesitation in attempting the mental gymnastics involved in attempting an "inclination of the mind", but the thrust of the passage is clear enough. Nevertheless, in my view, it is axiomatic that the meaning of the altered s 8 question must be considered in its statutory context.

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13 (2017) 343 ALR 1.
14 (2017) 343 ALR 1, 5.
15 (1990) 170 CLR 104.
16 (1990) 170 CLR 104, 116 (citations omitted).

> [60] That context is directed at the target of the ultimate critical finding under s 13(1), as altered, that a respondent is a "serious danger to the community in the absence of a [further supervision] order", in the way serious danger to the community is defined in s 13(2), and thereby engages the requirement of satisfaction of an "unacceptable risk that the released prisoner will commit a serious sexual offence" to "a high degree of probability" based on "acceptable, cogent evidence", as required under s 13(3).
>
> [61] In deciding whether the released prisoner is a serious danger to the community in that sense, the court must have regard to the relevant factors specified in s 13(4)(aa) to (j).
>
> [62] Even though the altered s 8 question requires satisfaction only that there are reasonable grounds for believing that the respondent is a serious danger to the community in that sense, what must be proved to satisfy that question is informed by what will be required before the court is able to make the ultimate critical finding under s 13(1) as altered." (emphasis added)

[24] The appellant complains his Honour's observations at [60] took into account an irrelevant consideration, namely the standard of proof required pursuant to s 13(3).

[25] His Honour correctly recited the test contained in s 8 throughout his reasons. Further, the mere fact his Honour referred to s 13 is not of itself concerning. Indeed, reference to s 13 is unavoidable in order to ascertain what is meant in s 8 by the phrase "serious danger to the community". The reference to that phrase in the Act's definition schedule refers the reader to s 13(1). Section 13(1)'s reference to that phrase is in turn explained by s 13(2) as meaning:

> "an unacceptable risk that the prisoner will commit a serious sexual offence –
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made".

[26] It follows no concern arises from his Honour's reference in his reasons at [60] to that meaning. The difficulty in that passage is his Honour went further and alluded to the standard of satisfaction, including evidentiary satisfaction, required by s 13(3). That standard is not the standard to be met under the s 8 test. The concern arising is that his Honour's observations about statutory context erroneously gave rise to an interpretation of the s 8 test which requires reference to the evidentiary demands of the s 13 test.

[27] As much is confirmed by his Honour's observation, at [62], that "what must be proved to satisfy" the s 8 question "is informed by what will be required before the court is able to make the ultimate critical finding under s 13(1)". Section 13's relevance to interpreting or informing the s 8 test is confined to its definition of what is meant by the phrase "serious danger to the community", a phrase which is common to both tests. There the overlap ends. The evidentiary demands specified at s 13(3) relate solely to s 13. They are irrelevant to the interpretation of s 8. They do not inform what must be proved to satisfy the s 8 test. His Honour erred in considering that they did.

[28] The appellant has made good her complaint that his Honour erred by taking an irrelevant consideration into account. The appeal should be allowed.

Determination of the application

[29] It is common ground that this Court is in as good a position as the learned primary Judge was to consider the application at a preliminary hearing and should determine the preliminary hearing forthwith.

[30] Before turning to the substantive submissions, the respondent made submissions as to the relevance to the present exercise of recent amendments to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld) by the *Police Powers and Responsibilities and Other Legislation Amendment Act* 2018 (Qld). Those amendments allow the Police Commissioner to make application to a court pursuant to s 13A for a prohibition order in respect of a relevant sexual offender who has engaged in concerning conduct. Such an order may, pursuant to s 13FA require a respondent to wear a tracking device, reside at a particular residence and submit to psychological treatment. The respondent invited the inference that the existence of such provisions informed the assessment of the risk apparently posed to the community by the respondent. However, there are so many variables influencing whether such an application might be made, let alone granted, that the existence of those provisions must inevitably be an irrelevant consideration in the present hearing.

[31] Counsel for the appellant correctly accepted the appellant bears the onus in the application of satisfying this court at the preliminary hearing that there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order.

[32] The appellant submits the reasonable grounds for believing the respondent is a serious danger to the community, in the absence of a further supervision order, are the gravity of the respondent's past violent sexual offending and the fact that but for his detention and supervision he would have been a serious danger to the community over a prolonged period extending into relatively recent times.

[33] The respondent's submissions focus quite understandably upon the indicators in recent times that he is no longer a serious danger to the community. A major indicator relied upon is the conclusion in the report of psychiatrist Dr Michael Beech, the only recent such report before the Court, that the risk of violent sexual reoffending by the respondent is in the low range.[17]

[34] The opinion section of Dr Beech's report includes the following:

> "He has been consistently diagnosed with an antisocial personality disorder, and his criminal behaviour and violent offending in the past has been associated as well with substance misuse and intoxication.
>
> Mr Fardon was first released on supervision in 2006. His releases into the community, up until 2013, have been chequered to say the least…
>
> It is difficult to assess the risk of sexually violent reoffending in a man of Mr Fardon's age who has been on a supervised release order for five years.

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17 AR Vol 2 p 54.

There are a few static (historical) risk factors for further sexual offending, notably the… convictions…the history of violence, and the absence of a stable relationship. On the STATIC 99R, a scale that considers his age and his offending, he has a score of 5, which places him in the group of offenders seen to be at above average risk of reoffending…

The difficulty with this scale is that is does not take into account the nature of his sexual offending (it does not for example separate him from extra familial child sex offenders), it does not consider the changes that have taken place since 1980 (or even 2010), and in my opinion does not adequately take into account his advancing years.

There are a number of dynamic risk domains that tend to predict reoffending. These are grouped around the presence of antisocial attitudes and behaviours, mental disorder and substance use, and sexual deviance.

As noted above, I think that a number of these factors were in play in earlier years. These days though, I think that the antisocial personality disorder (ASPD) and psychopathy have significantly lessened over the years. To be sure, he continues to articulate an anti-authoritarian attitude, persecutory ideation, and hostility to supervision. However, despite these ASPD features, he has not breached the rules and restrictions placed on him this time, nor has he contravened what needs to be seen as a very stringent supervision regime…

The age of three of his victims, and the use of gratuitous or instrumental violence, has given rise to concerns that he has a sexual deviance such as paedophilia or sexual sadism. However, this has not been borne out over many assessments or during psychological therapy. A sexual paraphilia would be a factor in prolonging the risk of reoffending, but there is no evidence that this now exists with Mr Fardon…

Despite his earlier history of significant substance misuse, and the specific role of intoxication in his offending, there is no evidence of an ongoing active vulnerability to substance use. He has remained abstinent from alcohol and drugs, in circumstances where it has to be said they would have been available.

In my opinion, the most relevant dynamic factors for reoffending have now substantially lessened… Mr Fardon has been consistent in expressing his desire to remain out of prison, and I think overall his behaviour over the past five years points to his progress in that direction.

Finally, I think in the absence of an ongoing sexual paraphilia, in the absence of any evidence of an attraction towards children, and in the reduction of ongoing severe psychopathic traits, his age is a significant factor in reducing his risk of reoffending sexually. I have attached … a graph by Hanson, taken from one of their review articles. It demonstrates the significant reduction over time of the risk of reoffending by rapists, and the risk becomes very low after the age of

> 65 years. Other studies would also indicate that in the absence of paraphilia or sexual deviance, the risk of reoffending markedly diminishes with age past 60 years.
>
> For those reasons, despite the STATIC 99R score, I think that the risk of violent sexual reoffending by Mr Fardon has reduced past moderate and into the low range. …"[18] (emphasis added)

[35] Those observations suggest the respondent's aging and his compliant conduct during the term of the present order have influenced the apparently improved outlook in forecast of risk. As to aging, the graph annexed to Dr Beech's report demonstrates a very significant diminution in sexual offending recidivism past the age of 60.

[36] Notwithstanding past non-compliance with supervision orders, the respondent's counsel emphasises he has been compliant with the current order. During the order he has been subjected to very strict supervision and is not known to have breached the rules and restrictions placed on him under the order. He has been subjected to regular testing for use of illicit drugs or alcohol during the order and not produced an adverse result.

[37] The respondent also highlights aspects of a recent report by forensic psychologist Mr Nick Smith, who has specialist experience in the treatment of sex offenders. Mr Smith has had more than 184 sessions with the respondent since mid-2012. Mr Smith's opinions include the following:

> "Overall, Mr Fardon continues to remain stable and appears to be functioning well. He is also making steady progress in adjusting further to the norms of community life, as he moves towards greater levels of independence…
>
> Mr Fardon also remains engaged and compliant in regard to working with his Case Manager and has not demonstrated any risk-salient or offence-paralleling behaviours in the recent period. He remains positively engaged in clinical appointments…
>
> Mr Fardon continues to maintain compliance with the conditions of his management and his Supervision Order, and he remains focused on living his remaining years outside of prison… As a result of Mr Fardon's ongoing progress and positive engagement I would consider that his treatment needs continue to be addressed at present."[19]

[38] Mr Smith did not recently express an opinion as to risk of violent sexual re-offending but evidently considers his treatment of the respondent needs to continue. At the preliminary hearing below the appellant made something of this and as a result the respondent seeks the leave of the court to rely upon a new affidavit from the respondent's solicitor evidencing correspondence from Mr Smith, dated 18 September 2018, in which he states:

> "I am able to confirm that Mr Fardon has clearly expressed to me, on multiple occasions, an intention and willingness to continue to see me for psychological treatment, following the completion of his supervision Order."

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18 AR Vol 2 pp 53-54.

19 AR Vol 2 p 157-159.

[39] The appellant objects to this evidence on the basis it is not fresh and could have been adduced at the preliminary hearing. However, in circumstances where this court is itself now conducting the preliminary hearing and the appellant has been on notice of the evidence for a reasonable time, leave should be given to allow the evidence. The evidence is helpful to the respondent, though not to a materially greater degree than the apparently helpful evidence of the respondent's compliant conduct throughout the current order. It is all evidence which bodes well for the respondent in the imprecise exercise of predicting how he will behave beyond the mandatory clutches of the supervision order. More relevantly to the present exercise, it is evidence which should be taken into account in weighing up the reasonableness of the grounds relied upon by the appellant for believing the respondent is a serious danger to the community in the absence of a further supervision order.

[40] The appellant does not suggest the recent positive indicators highlighted by the respondent are irrelevant. Rather, the appellant emphasises the evidentiary basis for its grounds arises from such a prolonged period of such grave concern that those grounds remain reasonable, notwithstanding the recent positive indicators.

[41] As to the first of the appellant's grounds - the gravity of the respondent's past sexual violent offending - the offending was undoubtedly serious. The 1978 offences involved the respondent raping and injuring a 12 year old girl under threat with a rifle, as well as injuring the girl's sister when she tried to assist. The 1988 offences involved the prolonged violent assault, rape and sodomy of a woman. Giving full force to the gravity of those matters it is plainly relevant that some 30 years have elapsed since the respondent's last offence. That is not to say the fact and gravity of his past offending carries no weight. It also ought be borne in mind the respondent's imprisonment, detention and supervision in the 30 years since his last offending significantly diminished the opportunity for further such offending. While the respondent's past offending underscores the gravity of what is potentially at stake, the real force of the appellant's argument lies in the second ground.

[42] That second ground is the long history of findings by courts, psychiatrists and psychologists as to the level of risk and danger the respondent has presented to the community in the absence of detention or supervision.

[43] Dealing firstly with findings by courts, he was sentenced on 8 October 1980 in the Brisbane Supreme Court, for rape, indecent dealing with a girl under 14 and unlawful wounding committed on 18 December 1978. He was next sentenced to a term of imprisonment for rape, carnal knowledge and assault occasioning bodily harm on 30 June 1989, and remained in custody for the ensuing 14 years. On 6 November 2003 the Supreme Court made a detention order under the Act against him, satisfied that he was a serious danger to the community in the absence of such an order. He was the subject of further continuing detention orders. On 7 November 2006 the Supreme Court made a supervision order under the Act, again having been satisfied the respondent was a serious danger to the community in the absence of a Division 3 order. Further Division 3 orders followed. On 4 October 2013 the Supreme Court again made a supervision order under the Act in respect of the respondent, again being satisfied he was a serious danger to the community in the absence of such an order.

[44] The assessments of psychiatrists and psychologists regarding the respondent's risk of violent sexual offending were conveniently summarised in the report of Dr Beech. Adding Dr Beech's most recent assessment, they are as follows:[20]

Date	Assessor	Risk
2003	James	Substantial
2003	Moyle	High
2004	Nielssen	Relatively low
2006	Grant	Relatively low
2006	Moyle	High
2007	Arthur	Low
2011	Harden	Moderate – High
2012	Beech	Moderate – High
2012	Grant	Moderate – High
2014	Smith	Moderate
2018	Beech	Low

[45] That summary shows that assessments of the respondent's level of dangerousness have been variable. Assessments have previously trended down to low and then back up again. The probability of the respondent's level of dangerousness trending back up again is admittedly diminished by his age. Nonetheless the past variability in the respondent's assessments is a significant consideration, as against the most recent single assessment.

[46] The fact of the Court's findings of dangerousness and the number of expert conclusions that the respondent posed a moderate to high level of risk over such a prolonged period, combined with the respondent's past offending, provide reasonable grounds for believing that the respondent is still a serious danger to the community in the absence of a further supervision order. To draw upon the above quote from *Prior v Mole*, they are facts and circumstances sufficient to induce in the mind of a reasonable person a positive inclination towards acceptance that the respondent is a serious danger to the community in the absence of a further supervision order.

[47] The positive indicators of the past five years are obviously capable of grounding a contrary belief about the respondent's present dangerousness. However, the existence of countervailing evidence supporting a countervailing belief does not per se mean the grounds supporting the belief contended for by the Attorney-General are not reasonable. There may potentially exist reasonable grounds for rival beliefs.

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20 AR Vol 2 p 52, p 54.

[48] It must be remembered we are not here concerned with whether we are satisfied the respondent is in fact a serious danger to the community in the absence of a further supervision order. We are only concerned at this point with whether we are satisfied there are reasonable grounds for believing he is such a danger. It is not to the point that the positive indicators of the last five years might provide reasonable grounds for a rival belief. The nub of the matter is whether the force of those recent indicators so detracts from the force of the historically sourced grounds relied upon by the appellant that those grounds are not presently reasonable grounds. The fact that without more evidentiary material the application would be unlikely to meet the s 13 test or that, as counsel for the appellant acknowledged, the respondent's satisfactory conduct of recent years and the current favourable psychiatric opinion might well prove decisive against any further finding of dangerousness on a final hearing are not to the point for the purposes of this application.

[49] It would be fallacious to reason that the respondent's past offending and prolonged period of past dangerousness should forever be regarded as reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order. However, they are powerful considerations. Although their force has been diminished by the passage of five years of compliant conduct under supervision and the recent assessment of low risk, they remain reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order.

[50] That conclusion of satisfaction of the preliminary hearing test is to say nothing of what conclusion may be reached at a final hearing. However, the appellant having met the standard of satisfaction required to enable the application to at least proceed to a final hearing, it will be necessary for the Court to make an order setting a date for the s 13 hearing and extend the current supervision order until then. Given the history of the matter, the Court will exercise its discretion to order the respondent to undergo examinations by two psychiatrists, who are to prepare independent reports. The parties should provide a draft order in accordance with these reasons, including the proposed date for the s 13 hearing and naming the psychiatrists proposed to undertake the examinations of the respondent.

[51] The orders are:

1. Appeal allowed.
2. Leave for the appellant to adduce further evidence granted.
3. The Court being satisfied pursuant to s 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act) that there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order, a judge of the Trial Division will conduct a s 13 hearing of the application for a further supervision order.
4. The respondent undergo examination by two psychiatrists, namely Dr Elizabeth McVie and Dr Scott Harden, who are to prepare independent reports.
5. Liberty to apply.

The Court will make the further orders required after consideration of the parties' draft order.