SUPREME COURT OF QUEENSLAND

CITATION:	*A-G v Fardon* [2003] QSC 331
PARTIES:	**RODNEY JOHN WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	SC No 5346 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	2 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	22, 23, 24 September 2003
JUDGE:	Atkinson J
ORDER:	
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – WHERE MEANING AMBIGUOUS OR UNCERTAIN – PRESUMPTION AS TO LEGISLATIVE INTENT – NOT TO INVADE PERSONAL COMMON LAW RIGHTS – LIBERTY OF SUBJECT – where statute confers power on court to order interim detention of a prisoner pending final hearing as to post-sentence detention in custody – where statute sets out test to be applied before court may make the interim order – where no standard of proof provided – meaning of the words "reasonable grounds for believing the prisoner is a serious danger to the community" EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – SUFFICIENCY – where expert evidence given – where applicant's witnesses cross-examined by respondent – whether evidence of sufficient weight to satisfy court to high degree of probability EVIDENCE – ADMISSIBILITY AND RELEVANCY – OPINION EVIDENCE – EXPERT OPINION – QUALIFICATIONS OF WITNESS – EXPERIENCE OR STUDY IN RELEVANT FIELD – where psychiatrist

required by court to provide assessment of prisoner's risk of committing a serious sexual offence – where psychiatrist lacked experience necessary to make an assessment of that kind

EVIDENCE – ADMISSIBILITY AND RELEVANCY – FACTS RELEVANT TO FACTS IN ISSUE – IN GENERAL – where assessment of risk a prisoner will commit a serious sexual offence is in issue – where evidence prisoner threatened to commit violent, non-sexual offence – where such evidence irrelevant to matter in issue

Dangerous Prisoners (Sexual Offences) Act 2003 (Qld), s8(2)(b)
United Nations Covenant on Civil and Political Rights, Art 9.1-3, cited

Chester v The Queen (1988) 165 CLR 611 at 618, cited
Director of Public Prosecutions v Serratore (1995) 38 NSWLR 137, cited
R v Secretary of State for the Home Department, ex parte Khawaja; ex parte Khera [1983] 1 All ER 765, cited
McGarry v The Queen (2001) 207 CLR 121, cited
MIMA v Al Masri [2003] FCAFC 70, cited
Plaintiff S157/2002 v Commonwealth [2003] HCA 2, cited
Townsend v Townsend [2001] NSWCA 136, cited
Williams v The Queen (1986) 161 CLR 278, cited
Wright v Wright (1948) 77 CLR 191, cited

COUNSEL: Mr RV Hanson QC, with Mr RW Campbell and M Maloney, for the application
Mr SR Southwood QC, with MP Keyzer, for the respondent

SOLICITORS: L Denysiv, Crown Solicitor, for the applicant
Prisoners Legal Service (Brisbane), for the respondent

The legislative scheme

[1] The *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") came into force on 6 June 2003. The Act was introduced to address growing community concern about the unsupervised release of convicted sex offenders who are not rehabilitated.[1] The Act enables the court to order the post-sentence preventive detention or supervision of persons serving sentences for serious sexual offences who pose a serious danger to the community upon release from prison.

[2] Prior to the introduction of the Act, a court could order an offender to indefinite detention pursuant to Part 10 of the *Penalties and Sentences Act* 1992, as part of the sentencing process for certain sex offences carrying a maximum penalty of life imprisonment; or pursuant to s 18 of the *Criminal Law Amendment Act* 1945, for sex offenders declared incapable of controlling their sexual instincts upon

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1 Queensland Parliamentary Debates, Legislative Assembly, 3 June 2003, 2484 (Rodney Welford, Attorney-General and Minister for Justice).

application by the Attorney-General in respect of prisoners currently serving sentence.

[3] The objects of the Act are:

> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
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> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.[2]

[4] The Attorney-General may, under s 5, apply to the court for an order under Division 3 for the continuing detention or supervised release of a prisoner (a "division 3 order"). A "prisoner" is defined as:

> "a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section".[3]

[5] A "serious sexual offence" is an offence of a sexual nature, whether committed in Queensland or outside Queensland, involving violence or against children.[4]

[6] Upon the filing of the application, a return date is to be issued for a preliminary hearing under s 8.[5] The Attorney-General may apply for an order or orders under s 8 that the prisoner undergo psychiatric examinations by two court-appointed psychiatrists for the purpose of providing psychiatric reports (a "risk assessment order") and that the prisoner is to be detained until the date for the hearing of the division 3 order (an "interim detention order").[6]

[7] A copy of the application and any affidavits filed in support are to be given to the prisoner.[7] The prisoner may file affidavits to be relied on for the preliminary hearing.[8] The Act does not confer on the prisoner a right to appear or be heard at the preliminary hearing.[9] Mr Fardon chose to be absent from the preliminary hearing before me. However, he was legally represented by Mr Southwood QC and Mr Keyzer who were able to cross-examine the witnesses relied upon by the applicant.

[8] To make an order at a preliminary hearing, the court must be satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order: see s 8(1). "Serious danger to the community" is defined by reference to s 13 in Division 3 of the Act. Section 13(2) provides:

> "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—

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2 s 3.
3 s 5(6)
4 Schedule.
5 s 5(3).
6 s 5(1).
7 s 5(5).
8 s 6(1).
9 s 44(1) and s 49.

(a) if the prisoner is released from custody; or
(b) if the prisoner is released from custody without a supervision order being made."

[9] Section 13(4) then sets out a list of factors to which the court must have regard in determining whether there is such an unacceptable risk:

"(a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;
(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;
(g) the prisoner's antecedents and criminal history;
(h) the risk that the prisoner will commit another serious sexual offence if released into the community;
(i) the need to protect members of the community from that risk;
(j) any other relevant matter."

[10] If the court is satisfied as required under s 8(1), it must set a date for the hearing of the application for a division 3 order (the "final hearing"). It may also make a risk assessment order and/or an interim detention order.

[11] A risk assessment order authorises the examination of the prisoner by two psychiatrists, named in the order, and the preparation of psychiatric reports.[10] Section 11 provides that the psychiatric reports must indicate the psychiatrist's assessment of the level of risk that the prisoner will commit another serious sexual offence if released from custody or if released without a supervision order; and the reasons for that assessment[11]. In preparing a report, the psychiatrist is to have access to any medical, psychiatric, prison or other relevant report or information in respect of the prisoner.[12] A report must be prepared even if the prisoner does not cooperate or fully cooperate in the examination.[13]

[12] An interim detention order may be made if the prisoner may be released from custody before the final hearing. If an interim detention order is made, the prisoner remains a prisoner.

[13] At the final hearing, if the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order[14], the court may make a continuing

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10 s 9
11 s 11(2).
12 ss 11(3) - (8).
13 s 11(9)
14 s 13(1).

detention order or a supervision order.[15] The paramount consideration in deciding whether to make such an order is the need to ensure adequate protection of the community.[16] The prisoner is accorded a right to appear and be heard at the final hearing.[17]

[14] The standard of proof required on a final hearing is not the criminal standard of beyond reasonable doubt. However the court may make a final order only if it is satisfied –

(a) by acceptable, cogent evidence; and
(b) to a high degree of probability;[18]

that the evidence is of sufficient weight to justify the decision.[19] The evidence on a final hearing consists of affidavits which must be confined to the evidence the person making it could give if giving evidence orally.[20]

[15] A continuing detention order is an order the prisoner be detained indefinitely for control, care or treatment.[21] A person the subject of a continuing detention order continues to be a prisoner.

[16] A supervision order is an order the prisoner be released subject to conditions for a specified period. In making a supervision order the court must impose the conditions listed in s 16(1):

(a) report to a corrective services officer at the place, and within the time, stated in the order and advise the officer of the prisoner's current name and address; and

(b) report to, and receive visits from, a corrective services officer as directed by the court; and

(c) notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least 2 business days before the change happens; and

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

(e) not leave or stay out of Queensland without the permission of a corrective services officer; and

(f) not commit an offence of a sexual nature during the period of the order.

The court may also impose any other condition it thinks appropriate for the protection of the community or the person's rehabilitation, care or treatment.[22]

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15 s 13(5).
16 s 13(6).
17 s 45(1)(a) and s 49.
18 For statutes containing similar tests see *Penalties and Sentences Act* 1992 s 170; *Sentencing Act NT* s 71, s 74; *Sentencing Act* 1991 Vic s 18B, s 18M.
The phrase is used in another context in the conditions which must be met before further evidence can be received on appeal, namely:
(i) the evidence could not have been obtained with reasonable diligence for use at the trial;
(ii) the evidence is such that there must be a high degree of probability that there would be a different verdict; and
(iii) the evidence is credible: *Townsend v Townsend* [2001] NSWCA 136 at [64]
19 s 13(3)
20 s 7(1)
21 s 13(5)(a).

[17] Part 3 of the Act also provides for annual reviews by the court of division 3 orders made in respect of a person and for reviews upon application by the person.

[18] Part 4 of the Act provides a right of appeal against decisions made under the Act. An appeal is by way of rehearing.

The common law and the Act

[19] The right to personal liberty is the most basic and fundamental of the human rights recognised by the common law. This fundamental right was referred to by Mason and Brennan JJ in their joint judgment in *Williams v The Queen*[23] as follows:

> "The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights': *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause': *Commentaries on the Laws of England* (Oxford, 1765), Bk 1, pp 120-121, 130-131. He warned:
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> > 'Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities'.
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> …
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> The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes."

[20] The importance of the right to personal liberty was recognised internationally by the *United Nations Covenant on Civil and Political Rights*, in particular, art 9.1-3 which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
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> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
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> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but released and subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

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22 s 16(2).

23 (1986) 161 CLR 278 at 292

[21] The fundamental importance which the common law attaches to personal liberty was discussed at some length by the Full Court of the Federal Court of Australia in *MIMIA v Al Masri*.[24] As their Honours pointed out[25], even minor deprivations of liberty are viewed seriously by the common law. Their Honours referred to the decision of Walsh J in *Watson v Marshall*[26] where his Honour observed that: "any interference with personal liberty even for a short period is not a trivial wrong".

[22] The fundamental nature of this right is reflected in the rule of statutory construction to prefer a strict construction with favours liberty. As Kirby P (as his Honour then was) said in *Director of Public Prosecutions v Serratore*[27]:

> "Traditionally, in our law, liberty has been regarded as a most precious civic right. Legislation which has the effect of derogating from the right of an individual to enjoy liberty is conventionally accorded (in the case of ambiguity) a strict construction which favours liberty: *Piper v Corrective Services Commission of New South Wales* (1986) 6 NSWLR 352 at 358".[28]

[23] The statutory construction which contains the presumption against the curtailment of fundamental freedoms has been most recently set out by Gleeson CJ in the High Court in *Plaintiff S157/2002 v Commonwealth*[29] where his Honour said:

> "courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment: *Coco v R* (1994) 179 CLR 427 at 437."

[24] These are the principles of the common law which inform both the interpretation of the statute and the disposition of the decision in this matter. It is of fundamental importance to recognise that we live in a society where a core value of the common law, no matter what the popular clamour, is the protection of the liberty of the individual. The common law does not sanction preventive detention.[30] The protection of liberty afforded by the common law applies equally to the most powerful and the least powerful, the most deserving and the least deserving in our society. It can only be removed or curtailed by, and to the extent of, specific statutory provisions to that effect.[31]

The history of the matter

[25] On 17 June 2003, the Attorney-General filed an originating application under s 5 of the Act for an order that the respondent be detained in custody for an indefinite term

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24 [2003] FCAFC 70 at [86]-[95]

25 At [88].

26 (1971) 124 CLR 621 at 632

27 (1995) 38 NSWLR 137 at 142

28 *Coco v The Queen* (1994) 179 CLR 427 at 437-438 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Re Bolton; Ex-parte Beane* (1987) 162 CLR 514 at 523; *R v Cannon Rowe Police Station (Inspector)* (1922) 91 LJKB 98 at 106; *MIMIA v VFAD of 2002* [2002] FCAFC 390 (9 December 2002) at [108]-[111].

29 [2003] HCA 2 (4 February 2003) at [30]

30 *Chester v The Queen* (1988) 165 CLR 611 at 618.

31 *McGarry v The Queen* (2001) 207 CLR 121 at 141-142

for care, control and treatment pursuant to s 13 of the Act (a "continuing detention order").

[26] Upon the filing of an application, the Act provides a preliminary hearing must take place to determine whether there are reasonable grounds for believing the respondent is a serious danger to the community. If so satisfied at a preliminary hearing, the court must set a date for the hearing of the application for the continuing detention order and may order psychiatric reports (a "risk assessment order") and the detention in custody of the respondent pending the final hearing (an "interim detention order"): see s 8. The Attorney-General's originating application sought orders in those terms.

[27] On 27 June 2003, Muir J ordered psychiatric reports and the interim detention of the respondent until 4.00 pm on 4 August 2003, and set the date for the final hearing for 31 July 2003.[32] This date was later extended to 3 October 2003 and a further interim detention order was made by Philippides J to hold the respondent in custody until that date. The final hearing was again extended, however, to 22 September 2003 and then to 27 October 2003. With the interim detention order due to expire on 3 October 2003, the matter was brought before me on 22 September 2003. Mr Fardon is currently being held in custody in the Townsville Correctional Centre pursuant to the interim detention orders made by this court on 27 June 2003 and 31 July 2003.

The application

[28] The Attorney-General sought an interim detention order under s 8(2)(b) of the Act effectively extending the current order for the respondent's custody to the time of the final hearing. A number of affidavits were read in support of the application as well as the reports of Dr Larder and Dr Moyle ordered by Muir J on 27 June 2003. The respondent cross-examined Dr Larder, Dr Moyle and four of the applicant's witnesses, Professor James, Mr Piccinelli, Mr Young and Mr Jacob.

Preliminary orders

[29] The question before the court is whether or not Mr Fardon should be detained in custody as a prisoner pursuant to s 8(2)(b) of the Act until the determination of the application for a division 3 order under s 13 of the Act. That question is to be answered by posing the test set out in s 8(1) of the Act and then exercising the discretion provided by the word "may" in s 8(2). The precondition to the exercise of the discretion to order (or not to order) the detention of the applicant depends on whether 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.

[30] The court is required to be "satisfied". However, unlike the standard of proof required in a final hearing, no standard of proof is prescribed. The evidence may consist of affidavits which contain statements based on information and belief if the

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[32] In Muir J's hearing of the interim detention order, the respondent challenged the application by asserting s 8 of the Act was constitutionally invalid. On 9 July 2003, Muir J delivered judgment that the respondent's challenge to s 8 of the Act was unsuccessful, holding the section was constitutionally valid. On 25 July 2003, the respondent filed a notice of appeal in the Supreme Court of Qld, Court of Appeal against Muir J's judgment. On 23 September 2003, the Court of Appeal delivered judgment dismissing the appeal.

person making any such affidavit states the sources of the information and the grounds for the belief.

[31] The burden of proof not being set out in the Act, it is necessary to have regard to common law principles as to the burden of proof to be implied. As the standard of proof for a final order is the civil standard[33], it does not seem possible for the standard of proof for a preliminary order to be a higher standard. However its preliminary nature does not necessarily mean that the standard should be any lower. As Dixon J said in *Wright v Wright*[34] at 210:

> "[T]he nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue".[35]

I would apply to this the words of Lord Scarman in *R v Secretary of State for the Home Department, ex parte Khawaja; ex parte Khera*[36]

> "The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate to what is at stake."

[32] What is at stake on this hearing is the continued detention in prison of a person not accused of committing any crime for which he is to be punished or tried but detention against the prospect that he may commit crimes in the future. This detention is only until the determination of the final hearing but nevertheless given the jealousy with which the common law guards personal freedom and the fact that the hearing is still some weeks away, nothing less than the test set out in s 13(3) of a high degree of probability is required on the preliminary hearing.

[33] The next element to be considered is the nature of the matter of which the court must be satisfied to the requisite standard, that is, that there are reasonable grounds for believing. This imports both a subjective and an objective element. However, on a preliminary hearing, the court is not required to have the belief set out in the section but only that there exist reasonable grounds for the court which hears the final application to have that belief. As Mr Hanson QC submitted in argument, these proceedings are similar in nature to committal proceedings.[37]

[34] The belief about which the court must be satisfied that there are reasonable grounds to hold is that the prisoner is a serious danger to the community in the absence of a division 3 order. However, "a serious danger to the community" does not have its ordinary meaning. It does not, for example, refer to the prospect of the prisoner committing any serious or violent offence such as murder, manslaughter or armed robbery. The meaning of that phrase in this Act is confined by s 13(2) to whether there is an unacceptable risk that the prisoner, if released from custody or if released

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33 viz *Rejfek and Anor v McElroy and Anor* (1965) 112 CLR 517 at 521-522; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd and Ors* (1992) 67 ALJR 170; 110 ALR 449.

34 (1948) 77 CLR 191.

35 Refer also to the classic statement of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 360-362.

36 [1983] 1 All ER 765 at 784; see *Re Beneficial Finance Corporation Limited & Ors* (1991) 31 FCR 523 at [71] per Burchett J.

37 It should be noted that committal proceedings do not constitute a judicial inquiry but are conducted by a magistrate in the exercise of an executive or ministerial function: *Grassby v The Queen* (1989) 168 CLR 1 at 11.

from custody without a supervision order being made, will commit an offence of a sexual nature involving violence or against children. In making such a decision the court is bound to have regard to the matters set out in s 13(4) of the Act many of which, perhaps necessarily, overlap. I shall have regard to each of them, limited to the evidence before me at the preliminary hearing at which no evidence was led by the respondent. Much of the evidence led on the preliminary hearing before me would be inadmissible on a final hearing.

1. The prisoner's antecedents and criminal history and whether or not there is any pattern of offending behaviour on the part of the prisoner[38]

[35] On 17 March 1967 Mr Fardon was convicted in New South Wales on his own plea of guilty of one count of attempted carnal knowledge of a girl under the age of 10 and was sentenced, on 17 April 1967, to a good behaviour bond operational for three years. The sentencing judge remarked that "the interference was but slight".

[36] Thereafter Mr Fardon engaged in relatively minor criminal offending behaviour. On 30 January 1968, he was convicted on 10 counts of stealing and one count of vagrancy. On 8 April 1974, he was convicted of driving a motor vehicle whilst under the influence of liquor or a drug. On 28 June 1974, he was convicted of break enter and steal and then on 1 December 1975 of stealing. On 24 January 1977, he was convicted of assault occasioning bodily harm on 21 January 1977 and driving a vehicle whilst under the influence of liquor or a drug and being a disqualified driver on 8 April 1975. On 29 August 1985, he was convicted of unlawful use of a motor vehicle in April 1978.

[37] However, he then committed serious sexual offences. On 8 October 1980 Mr Fardon was convicted on his own plea of guilty of one count of unlawful and indecent dealing with a girl under the age of 14 years, one count of rape and one count of unlawfully wounding the girl's sister and sentenced to 12 months imprisonment on the first count, 13 years imprisonment on the second and six months imprisonment on the third, all to be served concurrently. These offences were committed on 18 December 1978. The rape, in particular, was described by the sentencing judge as "brutal" and the circumstances as "somewhat horrific". However the offences, being of a sexual nature, were described as out of character.

[38] After serving some eight years of that sentence, Mr Fardon was released from custody on parole on 14 September 1988 and after only 20 days, on 3 October 1988, committed the further offences of sodomy and unlawful assault to which he pleaded guilty on 22 June 1989, and rape against the same complainant for which he was convicted on 27 June 1989. On 30 June 1989 Mr Fardon was sentenced to 14 years imprisonment on the first count, 14 years imprisonment on the second count, and three years imprisonment on the third count, all to be served concurrently. That term expired on 29 June 2003. The offences were committed upon a woman who went with Fardon to a flat to gain heroin. The sodomy was consensual and the assault was to regain the heroin. The offences were again described as brutal and that he was "a danger to the female part of the community". Both sets of sexual offences were committed against women who were particularly vulnerable, in the first instance because of their youth, and the second instance because of her heroin addiction.

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38 s 13(4)(d), (g).

[39] On 22 August 1989, he was convicted of stealing between 1 September and 31 October 1986.

[40] He has not been convicted of any criminal offences since that time. While it is true that he has been in prison since 1988, this circumstance has served to diminish but not extinguish his capacity to commit further criminal offences. He was involved in breaches of discipline prior to 1990 but has committed no further offences.

2. Any medical, psychiatric, psychological or other assessment relating to the prisoner[39]

[41] Mr Fardon has been assessed on a number of occasions while he has been in custody. On 12 March 1998, David Piccinelli was a temporary sentence management support officer when he interviewed Mr Fardon at the Townsville Correctional Centre with a view to recommending whether or not Mr Fardon should be granted remission of his sentence. Mr Piccinelli deposed that:

> "When asked what his plans were upon release, his level of aggravation increased significantly to the point that I became concerned for my own safety. His voice was loud and he rose from his chair gesturing wildly and said words to the effect, *"I'll kill an officer or I'll kill another crim to stay here. I will not leave prison alive. If you throw me out, I'll kill someone and be back that night, so save my bed*." He went on to say that it was his wish to stay in jail until he died, thereby costing the system as much money as possible. He stated that when he eventually died in prison, "*they could dig a hole up the back and throw him in with a $2 bag of lime*"."

[42] This exchange, while chilling, happened more than five years ago. Since then, Mr Fardon's security classification has not been upgraded from the low classification which he then enjoyed nor had he been involved in any violent activity of any kind. Further this evidence is not relevant to the question of whether or not Mr Fardon represents a serious danger to the community in the sense referred to the Act which does not consider any other offending apart from the risk of the prisoner committing certain types of sexual offences.

[43] A psychologist employed by the Department of Corrective Services ("the Department"), Beryl Buckley, of an interview with Mr Fardon reported on 3 July 2003 that the application to keep him in custody after his release date had made him angry and upset. He was nevertheless "modestly co-operative" throughout the interview.

[44] However, a report by Bruce Young, a psychologist employed by the Department is of more concern. He reported that Mr Fardon refused to attend sentence management reviews on 16 December 1999 and 26 June 2000. On 2 June 2000, a multi-disciplinary approach was adopted with regard to a reintegration and rehabilitation plan for Mr Fardon. He was then referred to the psychiatrist, Professor Basil James for an updated report on farm placement and the benefit of one-to-one counselling.

[45] Professor James had first reported on Mr Fardon in August 1998. He reported that Mr Fardon was not suffering from any psychiatric illness. He seemed to Professor James to have good insight into the nature of the problems which confronted him

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[39] s 14(4)(b).

and those responsible for the rehabilitative process. Professor James was, however, of the view that Mr Fardon's early developmental experiences has led to severe difficulties as part and parcel of his personality structure. Professor James said there was no treatment currently available within the Department for Mr Fardon who, in common with similar inmates, needed a therapeutic environment that fell somewhere between an ordinary prison and a hospital. He recommended that consideration be given to developing such a facility. He referred to the facilities that exist overseas. There is substantial literature on the benefits of a secure therapeutic environment for offenders such as Mr Fardon, but no such facility or programme is available in Queensland. Professor James was of the view that Mr Fardon needed long term psychotherapy.

[46] With regard to Mr Fardon's potential move to a prison farm, on 12 October 1998, Professor James was of the opinion that to transfer Mr Fardon without further and specific goal directed preparation would constitute an unacceptably high risk. He recorded that Mr Fardon himself spoke of the unbearable anxiety and inability to cope which beset him whenever he was in a less structured environment although he expressed a desire to make the adjustment to the wider community.

[47] Professor James recommended the establishment of a multi-disciplinary team with a psychotherapist to develop strategies for the monitoring of Mr Fardon's preparation for release.

[48] On 2 June 2000, Mr Young, in his role as sentence management support officer, sent a memo to Professor James saying that Mr Fardon had refused psychological and rehabilitative intervention and specifically refused to attend therapy sessions with Mr De Groot which had been recommended by Professor James. He sought an updated assessment from Professor James.

[49] Professor James again examined Mr Fardon on 4 August 2000 and reported to the Department on 5 August 2000. He said that he could find no sign of psychiatric illness and that Mr Fardon was "co-operative, pleasant, spontaneous and, in his own way, quite insightful". He said that Mr Fardon demonstrated quite a lot of ambivalence with respect to his future placement. Mr Fardon expressed to him in quite unequivocal terms his assurances that he would never commit a serious offence.

[50] On 12 October 2000, Mr Saville, the acting General Manager of the Townsville Correctional Centre reported on a meeting between a multi-disciplinary team which had considered the management of Mr Fardon. His transfer to the prison outside Brisbane, known as Moreton B, was recommended so that he could have his anxiety disorder treated and his behaviour could be monitored. It is apparent that Mr Fardon refused that transfer.

[51] On 6 February 2001, Mr Young reported to the General Manager of the Townsville Correctional Centre on the lack of success that any rehabilitation strategies had on Mr Fardon. He reported that the team reviewing his reintegration plan had unanimous concerns over his eventual release and community safety. Mr Young referred to a number of facts which were not otherwise in evidence before me and to which I will not refer further.

[52] On 31 July 2001, Professor James reported to Mr Young that Mr Fardon was not suffering from a condition which would enable him to be regulated under the *Mental Health Act* in Queensland. He said that the main problem with Mr Fardon

had been "the distorted personality development consequent upon his early developmental history, prolonged institutionalisation, and intense situationally related anxiety disorder". He said that there had never been, in his opinion, evidence of psychotic disorder, nor any primary organic brain disorder.

[53] On 31 August 2001, Professor James expressed the view that Mr Fardon was not incapable of exercising proper control over his sexual instincts, and therefore, could not be detained under those provisions of the criminal law relevant to that situation.

[54] A report was prepared for the Townsville Regional Community Corrections Board for their meeting on 11 October 2002. The report gave more details of the circumstances of the sexual offences for which Mr Fardon was convicted including an allegation that he absconded whilst released on bail prior to the hearing of offences against him in 1980. It also discusses the fact that Mr Fardon's premature release from prison on a previous occasion had lead to problems. The report also contains details of his horrific childhood where his mother had abandoned him and he was brought up by his alcoholic father with physical violence and without any love or affection. He had been involved in a de facto relationship in 1976 and had two children who were made wards of the State in 1983. Apart from a single visit from his sons in 1993, when the adoptive parents brought them to see their real father, he has had no contact with those children.

[55] The report gave the name and address of persons with whom Mr Fardon planned to reside upon release. The home assessment was considered suitable. The report, however, also noted the failure of the most recent reintegration plan involving New Foundations Ministries which was "aborted due to his foul language, disruption to classes, negativity and predatory behaviour towards female clients". The report did not recommend Mr Fardon's release.

[56] On 10 February 2003, in a report to the Secretary of the Queensland Community Corrections Board, Professor James repeated his view that for the appropriate combination of a therapeutic milieu and the necessary security, specialised units were essential. Such units were, in his opinion, the only means of coping adequately with cases such as that of Mr Fardon. In oral evidence, Professor James gave more details of the success of such programs in the United Kingdom. Dr Moyle referred to similar programs in Canada and the United States.

[57] On 2 June 2003, Professor James reported to the Director of Public Prosecutions on whether or not Mr Fardon fell within s 18(4) and s 18(5) of the *Criminal Law Amendment Act* 1945 which deals with the detention of persons who are incapable of controlling their sexual instincts. Professor James repeated his view that Mr Fardon did not fall within this section of the law. As to the risk that Mr Fardon would commit further offences, Professor James said:

> "Given the nature of Mr Fardon's personality structure, including its intrinsic system of values, and the fact of his very prolonged institutional life, it is my opinion that a substantial risk exists that Mr Fardon will commit further offences, including offences of a sexual nature upon or in relation to a child under the age of 16 years, were he not continue to be housed within a structured and secure environment such as that currently provided by the Correctional Services Department."

[58] When asked what was his assessment of the risk that Mr Fardon would commit a sexual offence as opposed to some other kind of offence once released from prison,

Professor James' evidence was that it was very difficult to answer as Mr Fardon had not been in an environment that put that to the test. However, he believed that there was a 70 to 75 per cent chance that Mr Fardon would re-offend and that the environment outside prison was "festooned with risk".

[59] Professor James said in his oral evidence that Mr Fardon was not "a totally hopeless case". However, he said that Mr Fardon's assurances that he would not re-offend could not be relied upon. He also expressed concern about Mr Fardon's refusal to take medication for anxiety and his refusal to continue with the psychotherapy recommended by Professor James. Professor James had not, however, seen Mr Fardon for two or three years.

3. The reports prepared by the psychiatrists under s 11 and the extent to which the prisoner co-operated in the examinations by the psychiatrists[40]

[60] Reports were prepared by two psychiatrists, Dr Larder and Dr Moyle, pursuant to s 11. Mr Fardon co-operated in the examinations by the psychiatrists. Dr Larder provided reports dated 21 July and 29 July 2003. He said that he did not believe that Mr Fardon was a paedophile. However, he opined that there was:

> "a likelihood on the balance of probabilities that within three months, following release from prison, that this man would commit an act of violence towards an innocent citizen, probably a young woman and that sexual violence would be involved."

[61] However, Dr Larder lacked previous experience in assessing the dangerousness of a prisoner and the potential for future offending of this type. In my view, the opinion expressed was outside his area of expertise and was not one on which I was prepared to rely.

[62] Dr Moyle did however have the appropriate expertise and experience to make a risk assessment. Dr Moyle was cross-examined about his approach to the determination of this question. He used what he called an actuarially informed clinical judgment. The validity of that approach remains to be tested once the psychiatric assessment to be relied upon by the respondent is filed. He did, however, readily concede that any prediction was at best informed speculation.

[63] Dr Moyle's report gives a detailed account of the history told to him by Mr Fardon. This includes details of Mr Fardon's brutalised childhood and his institutional behaviour. Dr Moyle considered Mr Fardon's professed lack of compunction about lying and gives examples of Mr Fardon's duplicity. He reports his discussions with Mr Fardon about his sexual experiences including his offending behaviour. Dr Moyle comments that it is likely that Mr Fardon's pattern of behaviour is not explicitly sexual but rather reflects the style of relating to others that Mr Fardon has used all his life of hostility and violence. Dr Moyle observed that Mr Fardon's presentation was not primarily of sexual offending. He frankly conceded that he would need much longer to understand what was going on in Mr Fardon's mind sexually.

[64] His assessment is that the risk of Mr Fardon committing an offence is greater than 50:50 and that the risk that a sexual offence would be committed if he re-offends is approximately half of that. In oral evidence, Dr Moyle said that there was a 25 to

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[40] s 13(4)(a).

50 per cent chance that Mr Fardon would commit a serious sexual offence upon release.

4. Efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs and whether or not the prisoner's participation in those programs has had a positive effect on the prisoner[41]

[65] Mr Piccinelli's submission to the office of sentence management on 13 March 1998 reported that Mr Fardon had been a well-behaved inmate, a willing and responsible worker and mixed well with inmates and correctional officers. He had attended and participated in the Sexual Offenders' Treatment Program (SOTP) at Moreton Correctional Centre between September 1994 and April 1995 but completed only 26 weeks of the 45 week intervention program. He was expelled from that program but it appears that this was based on his offensive and inappropriate institutional behaviour and not on his response to the program. The facilitator of the program indicated that Mr Fardon's participation in and response to the program for the 24 weeks he was involved before being evicted was good. This was, however, contradicted by the account Mr Fardon himself gave to Dr Moyle which suggested an inappropriate response to the program.

[66] Mr Fardon has made some efforts to address the causes of his offending behaviour and has, according to material provided by the Department, participated in some programs designed to assist his rehabilitation. He has, however, failed or refused to attend some programs. He failed to attend stress management programs in 1992. He refused to see a psychologist to assist him with childhood issues in 1995. After initially saying he was willing to attend, he refused a place in SOTP in October 1997. He refused a cognitive skills program in October 1997 as well as one-on-one counselling with a resident psychologist. He failed to attend substance abuse programs in 1998. Mr Fardon was offered extra support through Psychologist, David Tessman to assist with PEP and other issues such as institutionalisation, but refused to continue. He was offered the CORE cognitive skills program April 1997, August 1997, January 1998, and January 2001 but failed to attend at any of those programs. He was offered CORE Anger Management in October 2001 and failed to attend.

[67] However, he was granted leave of absence for release to work purposes on 12 July 1988 as a labourer for Chessell Springs Pty Ltd. He completed a forklift course conducted by Advanced Industry Training on 16 June 1993. He worked at the Recycling Plant in the prison from 15 September 1993. On 16 November 1993, he attained a certificate for satisfactory participation in "Handling Anger and Conflict". He attended a cognitive skills workshop on 27 February 1996 and a workshop on attitudes, choices, responsibility and self-esteem on 7 March 1996. He worked at the nursery from 20 May 1996. In February 1997, he attended the Foundation Nursery Skills Course offered by the Barrier Reef Institute of TAFE. He agreed to one-on-one counselling with Russell Fraser. He attended a pre-release program from 10 to 24 November 1999. Finally, Mr Fardon partially completed Certificate 1 in Vocational Access from the Australian College of Tropical Agriculture on 21 March 2003.

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41 s 13(4)(c), (f).

[68] It is difficult to judge whether or not participation in these programs have had a positive effect on Mr Fardon. He appears to have ceased offending in prison. However, he is reported to be very changeable and to be extremely difficult to help. His participation in programs designed to change the personal factors which led to his offending behaviour has been poor.

5. Information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future and the risk that the prisoner will commit another serious sexual offence if released into the community[42]

[69] There is no other relevant information apart from that to which reference has been made under other headings.

6. The need to protect members of the community from that risk and any other relevant matter[43]

[70] As Dr Moyle noted, re-offending is catastrophic for victims, families and the community. While the protection of the community is best served by the rehabilitation of offenders, that is not always possible. The difficulty remains that the protection of the community must be weighed against the imprisonment of a person who has completed his or her sentence and so is effectively to be punished by detention for a crime he or she has not committed and may never commit.

Conclusion

[71] Taking all of the above matters into account, including Mr Fardon's criminal history of opportunistic, impulsive and predatory sexual offending, and the various assessments made of him including the court ordered psychiatric report of Dr Moyle and the lack of successful rehabilitation, I am satisfied to a high degree of probability that there are reasonable grounds for believing that Mr Fardon is a serious danger to the community in the absence of a division 3 order.

[72] As to the exercise of any discretion under s 8(2) not to order his continued detention pending the final hearing, it is difficult to see in what circumstances such a discretion could be exercised. The court has no power to impose conditions on any release pending the final hearing. Mr Fardon, through his counsel, offered to provide undertakings consistent with the conditions found in s 16 of the Act if he were released. However, it would appear from Dr Moyle's report that an undertaking given by Mr Fardon could not be relied upon. The risk of re-offending would not be sufficiently reduced by the giving of such an undertaking.

[73] As I am satisfied that Mr Fardon would be released from custody before the application is finally decided, I am prepared to order his detention in custody pending the determination of the application. I shall hear submissions as to the form of the order.

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42 s 13(4)(e), (h).

43 s 13(4)(i), (j).