SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Fardon* [2006] QCA 512
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/appellant) **v** **ROBERT JOHN FARDON** (respondent/respondent)
FILE NO/S:	Appeal No 9605 of 2006 SC No 5346 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	10 November 2006
JUDGES:	McMurdo P, Williams JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - PURPOSE OF SENTENCE - PROTECTION OF COMMUNITY AND PREVENTIVE DETENTION - where respondent has an extensive criminal history for serious offences of rape and sexual assault - where respondent completed his most recent term of imprisonment in 2003 but at that time was deemed an unacceptable risk to the community and ordered to be detained indefinitely - where that order is subject to annual review - where most recent review ordered respondent's release subject to 32 conditions relating to intensive supervision and lasting for 10 years or until further order of the court - where Attorney-General (Qld) appeals against this supervised release order - whether the judge erred in making the order - whether the respondent is an unacceptable danger to the community if released from custody subject to supervision conditions *Corrective Services Act* 2006 (Qld), s 72(1), s 478A

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13, s 27, s 30

A-G (Qld) v Fardon [2003] QSC 379; SC No 5346 of 2003, 6 November 2003, considered
A-G (Qld) v Fardon [2005] QSC 137; SC No 5346 of 2003, 11 May 2005, considered
A-G (Qld) v Fardon [2006] QSC 275[2006] QSC 275; SC No 5346 of 2003, 27 September 2006, considered
A-G (Qld) v Fardon [2006] QSC 336[2006] QSC 336; SC No 5346 of 2003, 8 November 2006, considered
A-G (Qld) v Francis [2006] QCA 324[2006] QCA 324; Appeal No 452 of 2006, 30 August 2006, applied
Fardon v A-G (Qld) [2004] HCA 46; (2004) 210 ALR 50, considered
House v The King (1936) 55 CLR 499, applied

COUNSEL: W Sofronoff QC, with M D Hinson SC and M Maloney, for the appellant
D P O'Gorman SC for the respondent

SOLICITORS: Crown Law for the appellant
Prisoners' Legal Service for the respondent

[1] **McMURDO P:** The appellant, the Attorney-General for the State of Queensland, appeals from an order of a judge of the Trial Division of 8 November 2006. The order followed the annual review under s 27 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") of the respondent Robert John Fardon's continuing detention under the Act after completion of the service of his most recent sentence of imprisonment. The appellant contends that although the judge was rightly satisfied that the respondent was a serious danger to the community in the absence of an order under Division 3 of the Act, the judge erred in determining that he would not be a serious danger to the community if released from custody from 9 November 2006 subject to conditions for 10 years or further order of the court.

[2] The 32 conditions of his ordered supervised release the subject of this appeal were very onerous on him. They required that during the first 10 years of his release he be under the supervision of a Corrective Services officer ("the officer"); report to the officer within 24 hours of his release and advise the officer of his current name and address; reside at all times at an address within Queensland approved by the officer by way of a suitability assessment with regard to the respondent's need for drug and alcohol counselling support services and including but not limited to proximity to recreational areas and vulnerable members of the community; report to and receive visits from the officer as deemed necessary by the officer; notify the officer of every change of name at least seven business days before the change occurs; notify the officer of employment details which must not involve working with children; notify the officer of every change of employment at least two business days before the change occurs; notify the officer of every change of residence at least seven business days before the change occurs; not leave or stay out of Queensland without the written permission of the officer; not contact victims of his offences; abstain from violation of the law and from the consumption of alcohol and illicit drugs; take prescribed drugs only as directed by a medical

practitioner and submit to alcohol and drug testing as directed by an officer; not visit licensed premises without the consent of the officer; not go unsupervised to a place that houses children, the intellectually disabled, the mentally ill or persons with drugs misuse difficulties; attend a psychiatrist approved by the officer as recommended by the treating psychiatrist; receive reintegration counselling from an individual therapist familiar with the needs of discharged long-term prisoners; receive specific counselling from an individual therapist in relation to remaining abstinent from alcohol and drugs; receive intensive support for the first three months following his release (30 hours support for the first two weeks with this support gradually reducing over the three months to four hours per week; the details of the transitional support plan are those agreed to between Queensland Corrective Services and the respondent); permit any treating psychiatrist, psychologist or counsellor to disclose details of medical treatment and opinions relating to his level of risk of reoffending and compliance with this order to the Department of Corrective Services ("the Department"), upon written request, for the purposes of updating or amending the supervision order and/or ensuring compliance with it; attend any program, course, psychologist or counsellor as directed by the treating psychiatrist and the officer; agree to medical testing or treatment including testosterone level tests by an endocrinologist as deemed necessary by the treating psychiatrist and the officer and permit the release of the results and details of the testing to the Department; obey the lawful and reasonable directions of the officer; respond truthfully to enquiries by the officer about his whereabouts and movements generally; not join, affiliate with or attend premises or activities carried on by any club or organization in respect of which there are reasonable grounds for believing there is child membership or child participation; not visit public parks without prior written permission from the officer; not undertake unsupervised care of children; not establish and maintain contact with children under 16; and not access child pornographic images.

[3] At the commencement of the appeal hearing this Court stayed the primary judge's order conditionally releasing the respondent under supervision for 10 years until the determination of this appeal.

Grounds of appeal

[4] The appellant in his notice of appeal contends that the primary judge erred in 10 ways. Nine essentially relate to her Honour's acceptance of the assessment of the respondent by psychiatrists Dr Grant and Dr Nielssen rather than that of psychiatrist Dr Moyle. Dr Grant and Dr Nielssen considered that he would not be an unacceptable risk of committing a serious sexual offence if released from custody on the strict supervision order made by her Honour. Dr Moyle considered that the respondent remains an unacceptable risk of committing a serious sexual offence if released from custody at all. The appellant's remaining contention is that the judge erred in concluding that the respondent's graduated release into the community, which all three psychiatrists considered to be the most appropriate option, was not an available option under the present prison system. The appellant asks this Court to allow the appeal, set aside the order made at first instance and instead order the respondent's continuing detention under the Act.

[5] The appellant's counsel, Solicitor-General Mr Sofronoff QC, concedes that to succeed on this appeal from a judicial exercise of discretion he must show that the judge erred in exercising the discretion by acting upon a wrong principle, allowing

extraneous or irrelevant matters to guide or affect the decision, mistook the facts or did not take into account a material consideration: *House v The King*.[1]

Background

[6] Before turning to the grounds of appeal it is helpful to refer briefly to something of Mr Fardon's history leading to his appearance before this Court. It is set out more comprehensively in the primary judge's reasons and in the earlier decisions of the Trial Division concerning applications pertaining to the respondent under the Act.[2]

[7] Since the age of 18 he has spent most of his life in prison. He is now 58 years old. He has an extensive criminal history. His last 27 years have largely been spent serving terms of imprisonment for violent sexual offences. In 1980 he was sentenced to imprisonment for 13 years for offences committed in 1978. He was released on parole in September 1988. The next month he committed a series of violent sexual offences on a young woman. In 1989 he was sentenced to a further term of 14 years imprisonment. He served the full term of that sentence and was due for release on 30 June 2003, shortly after the Act became operational. On 17 June 2003 the appellant successfully applied to a judge of the Supreme Court for an interim order under the Act that the respondent be detained in custody. Further interim orders followed on 31 July and 2 October 2003. On 6 November 2003 the Supreme Court ordered that the respondent be detained in custody for an indefinite term for control, care and treatment.[3] Under s 27 of the Act a continuing detention order must be reviewed at the end of one year and afterwards at intervals of not more than one year following the previous review. The respondent's first annual review occurred in February 2005. On 11 May 2005 the Supreme Court ordered that the respondent continue to be the subject of a continuing detention order under Division 3 of the Act.[4] On 10 May 2006 the appellant applied for the respondent's continuing detention following the annual review required under s 27(2) of the Act.

The relevant statutory provisions

[8] The most pertinent sections of the Act are as follows:

> "**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.
>
> ..."

Section 30 of the Act provides:

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1 (1936) 55 CLR 499, 504 - 505.

2 *A-G v Fardon* [2003] QSC 379; SC No 5346 of 2003, 6 November 2003 (White J), [31] - [48]; *A-G (Qld) v Fardon* [2005] QSC 137; SC 5346 of 2003, 11 May 2005 (Moynihan J), [43]; *A-G (Qld) v Fardon* [2006] QSC 275; SC 5346 of 2003, 27 September 2006 (Lyons J), [13] - [19].

3 *A-G (Qld) v Fardon* [2003] QSC 379; SC No 5346 of 2003, 6 November 2003.

4 *A-G (Qld) v Fardon* [2005] QSC 137; SC 5346 of 2003, 11 May 2005.

"**30 Review hearing**

(1) This section applies if, on the hearing of a review under section 27 or 28 and having regard to the matters mentioned in section 13(4), the court affirms a decision that the prisoner is a serious danger to the community in the absence of a division 3 order.

(2) On the hearing of the review, the court may affirm the decision 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 affirm the decision.

(3) If the court affirms the decision, the court may order that the prisoner -

(a) continue to be subject to the continuing detention order; or

(b) be released from custody subject to a supervision order.

(4) In deciding whether to make an order under subsection 3(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

(5) If the court does not make the order under subsection (3)(a), the court must rescind the continuing detention order."

The primary judge's reasons

[9] The primary judge heard the application on 20 and 21 July 2006 and on 27 September 2006 published her detailed and thorough reasons reviewing the material placed before her in the light of the provisions of the Act. The judge concluded that she was satisfied under s 13(4) of the Act, by acceptable cogent evidence and to a high degree of probability, that the evidence was of sufficient weight to affirm the decision that the respondent is a serious danger to the community in the absence of a Division 3 order under the Act. Her Honour then reviewed the evidence she regarded as relevant to the next question for determination under the Act, consistent with this Court's approach in *A-G (Qld) v Francis*,[5] namely, whether a supervision order is apt to ensure adequate community protection; if so this should be preferred to a continuing detention order because the Act's intrusions on the liberty of the subject are exceptional and should be permitted to no greater extent than clearly authorized by the Act. Her Honour dealt with each of Dr Moyle's raised concerns which led him to conclude that the respondent presently remained an unacceptable risk of committing a serious sexual offence if released from custody at all. She noted that all three psychiatrists considered the most appropriate course was for his graduated release from prison into the community but on the evidence that was not an option under the present prison system. After reviewing the evidence she determined that any supervision order under the Act would need to ensure the respondent did not revert to alcohol or substance abuse; managed his anxiety; provided a positive therapeutic relationship; supported his reintegration into the community, particularly in new situations, and adequately supervised him. The draft conditions of release were considered appropriate by Dr Grant and Dr Nielssen. Ultimately her Honour was satisfied that adequate protection of the community could be ensured if the respondent was subject to a supervision order which contained conditions that provided both appropriate supervision and appropriate support especially during the first few

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5 [2006] QCA 324; Appeal No 452 of 2006, 30 August 2006, [39].

weeks of his release when the psychiatrists identified he would be particularly vulnerable because of his institutionalization and high anxiety. Her Honour listed the conditions which she considered to be essential to the protection of the community upon the respondent's release from detention on a supervision order. These conditions could not be immediately implemented without additional funding. The finalization of the supervision order required that a Corrective Services officer approve his proposed residential address by way of a suitability assessment having regard to his need for drug and alcohol counselling support services and other relevant factors including but not limited to proximity to recreational areas and vulnerable members of the community. Her Honour accordingly adjourned the final determination of the application so that this suitability assessment could be completed. The matter was to be relisted within 30 days for the making of final orders.

[10] The application was relisted on 6 November 2006. Her Honour was informed that the necessary funding had been obtained and transition planning was underway in that a Transitional Support Plan had been prepared by Mr Michael Airton, Executive Director of Offender Assessment and Services in Queensland Corrective Services. Counsel for the appellant indicated however that the respondent could not be released on the supervision order because suitable accommodation and a suitable person to provide some of the support required by the supervision order had not been found. The finalization of the review was again adjourned; the respondent was given leave to apply with 48 hours notice and a continuing detention order was made under s 30(3)(a) of the Act.

[11] On 7 November 2006 the matter was relisted at the respondent's request for finalization of the orders. Although counsel for the appellant opposed the medical practitioner suggested as being able to provide the counselling and support to the respondent under the conditions of his supervision, her Honour was satisfied of the medical practitioner's suitability. Her Honour was also satisfied that all additional conditions imposed in her proposed supervision order had now been met. The appellant also pointed out that a psychiatrist approved by the Corrective Services officer under the conditions was not yet available. Her Honour determined, however, that, on the basis of the assessments of Dr Grant and Dr Nielssen that the respondent did not currently have a psychiatric illness or symptoms of mental illness and did not have a sexual disorder which required him to undertake a sexual offender treatment program, there was no evidence that he required immediate psychiatric treatment to minimize his risk of reoffending. She was satisfied that the adequate protection of the community could be ensured by releasing the respondent from custody subject to a supervision order with the 32 listed conditions for 10 years.

Did the judge err in rejecting Dr Moyle's opinion that the respondent was an unacceptable risk of committing a serious sexual offence if released from custody at all?

[12] As noted earlier, the appellant's grounds of appeal primarily concern whether the judge erred in not giving sufficient weight to psychiatrist Dr Moyle's view, that the respondent remained a serious danger to the community because he was an unacceptable risk of committing a serious sexual offence if released from custody at all, and in preferring the views of psychiatrists Dr Grant and Dr Nielssen, that if released from custody on a 10 year supervision order with specified conditions he was not an unacceptable risk of committing a serious sexual offence.

[13] Mr Sofronoff's oral submissions, insofar as they related to her Honour's preference for the views of Dr Grant and Dr Nielssen over those of Dr Moyle, related only to the evidence of Dr Moyle on the issue of whether the respondent suffered from the paraphilia or sexual disorder, sexual sadism, and whether he had a sexual disorder which required him to complete a sexual offenders treatment program. The respondent had commenced but never completed such a program in the past. Dr Moyle considered that because of the respondent's past offending he met the criteria for sexual sadism, although in consultations he did not reveal enough of his sexual fantasy life to make a clinician comfortable with that diagnosis; there is a link between sexual sadism and the risk of recidivism. He concluded that the respondent remains at high risk of general, including sexual, offending if released into the community at present; there remains considerable doubt that he will comply at all times with restrictions placed on his freedom and with treatment strategies. Dr Moyle suggested that the respondent should not go from his present high level of security to community freedom; there should be a graded process of increasing freedom within the prison so that the respondent's behaviour can be monitored. Dr Moyle conceded that before the Act came into force the respondent had for a long time been a low security prisoner. He added however that if the court was of a mind to consider a supervision order he would recommend that the strictest conditions and supervision be imposed and that the proposed conditions were appropriate.

[14] Dr Grant on the other hand thought it unlikely the respondent satisfied the diagnostic criteria for paraphilia (sexual sadism). He considered the respondent had a moderately high level of psychopathy (antisocial personality disorder of multifactorial origin) to which alcohol and drug abuse was very relevant. The diagnostic criteria for a paraphilia rests largely on knowing the offender's sexual fantasy life and how he acts upon it. He conceded it was possible the respondent could be covering up sadistic or violent sexual fantasies; the opinion was based on the respondent's truthfulness. Dr Grant agreed that ideally the respondent would be best released in a graduated way through less secure areas of the prison system but if that was not possible then release upon a strict supervision program would be appropriate. Dr Grant formed the opinion that the respondent's offending patterns and the details of the offences did not suggest the presence of sexual sadism.

[15] Dr Nielssen agreed with Dr Grant's clinical assessment that there has been some change in the respondent over time and that a combination of age, self-control, maturity and insight now indicated a lower risk of offending on release with the main concern being if he returned to any form of substance abuse. Dr Nielssen did not find that the respondent had a disorder of abnormal sexual interest requiring specific counselling or treatment. He required supportive counselling to help him overcome anxiety. His conduct according to prison records had been satisfactory for nearly a decade and he has now passed the age where he represents a serious risk to anyone in the community and is ready for release under supervision, although he will require a high level of support to cope after such a long time in a total institution. He disagreed with Dr Moyle's view that the respondent was at high risk. Dr Moyle's view was actuarially based and ignored the respondent's previous long-standing low risk classification. The Department was unable to return the respondent to a low security setting or to provide him with access to programs that might help his adjustment to life in the community, such as day release or work release, and instead recommended that he participate in "treatment programs" even though there was no agreement that he needed sex offender or substance abuse

treatment and no evidence demonstrating the efficacy of custody-based psychological treatment programs for sex offenders or substance abuse.

[16] The learned primary judge carefully discussed the differing psychiatric views,[6] ultimately preferring the opinions of Doctors Grant and Nielssen in this respect and concluding on this issue that because it was not shown that the respondent had any primary sexual disorder, relevantly sexual sadism, he would not benefit from completing a sexual offenders treatment program within the prison.

[17] The judge had to reach a view as to which opinion she accepted. There was nothing that undermined the validity of the opinions of either Dr Grant or Dr Nielssen. The judge was entitled to prefer their views in this respect and to reach her ultimate conclusion set out in the previous paragraph. It follows that if it was not established that the respondent had a sexual disorder or paraphilia, sexual sadism, then it could not be established that he was required to complete a sexual offender treatment program before his release. These grounds of appeal are without substance.

Did the judge err in concluding that graduated release into the community was not available to the respondent under the present prison system?

[18] The primary judge twice stated in her reasons for judgment that all three psychiatrists considered the most appropriate management for the respondent was graduated release. She noted that Mr Airton's evidence demonstrated that, despite the respondent's lengthy period of good behaviour whilst having a low security classification in Townsville, after the Act came into force he was transferred to Wolston Correctional Centre and immediately reclassified upwards through no fault of the respondent. His current medium security classification means that a graduated release program, which all psychiatrists consider the most appropriate for him, is not available until he works his way once again to the low classification. Graduated release is not an option under the present system.[7]

[19] The fact that the community would be best protected by the respondent's graduated release from prison into the community on leave, presently an unavailable option in the Queensland Corrective Services system, has long concerned courts hearing applications under the Act relating to the respondent. It was raised first by White J in November 2003[8] and again by Moynihan J on 11 May 2005.[9]

[20] During the appeal hearing Mr Sofronoff referred us to recent amendments to the *Corrective Services Act* 2006 (Qld) ("the CSA") which came into operation after the primary judge heard and reserved the case. He submitted that these have the result that her Honour wrongly concluded that the graduated release, considered the best option by all three psychiatrists, was not available. Under s 72(1) CSA the chief executive may grant a prisoner leave. The definition of "prisoner"[10] excludes prisoners under the Act from being granted leave for reintegration[11] or resettlement.[12] Nevertheless the chief executive may grant a prisoner under the Act

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6 *A-G (Qld) v Fardon* [2006] QSC 275; BS5346 of 2003, 27 September 2006, [28] - [36].
7 Above, [74], [75], [106], [111] and [112].
8 *A-G (Qld) v Fardon* [2003] QSC 379; SC No 5346 of 2003, 6 November 2003, [55], [91], [92] and [101].
9 *A-G (Qld) v Fardon* [2005] QSC 137; SC 5346 of 2003, 11 May 2005, [58] and [112].
10 CSA, Sch 4.
11 CSA, s 72(1)(e).
12 CSA, s 72(1)(f).

like the respondent leave for community service;[13] compassionate leave;[14] educational, vocational[15] or health leave;[16] or leave for another purpose the chief executive is satisfied justifies granting the leave.[17]

[21] In response to inquiries from the Court as to the present availability of a suitable graduated release program provided by the Department to prepare the respondent for supervised open release from custody, Mr Sofronoff sought an adjournment of the determination of the appeal so that he could obtain further evidence on that issue. The Court granted that application[18] and has now received evidence from Mr Greg Brown, General Manager, Wolston Correctional Centre. Mr Brown relevantly deposed that he has given consideration to what can be offered to the respondent by way of a graduated release program. Arrangements would be made for him to be assessed by the Prison Mental Health Team as to his anxiety problems and to obtain counselling at Wolston Correctional Centre. If necessary the counsellor can continue to see him in the community upon his release. The Department offers a Post-Release Employment Assistance Program which would assist him in preparing a resume, job seeking and other issues relating to employment after release. He will be offered a place in appropriate modules of the Transitions Program which prepares prisoners for release by educating them on matters such as safe and affordable housing, income support, health issues and related matters. None of these services have previously been offered to the respondent. He was previously employed in light fabrication work at Wolston Correctional Centre but on 7 October 2006 he was involved in an altercation with another prisoner and as a result was relieved of his employment. He may now reapply for employment and if he wishes will be assisted in successfully making that application. He is currently classified as a high security prisoner under s 12(1) CSA. A review of that classification is required under s 13 CSA at intervals of not longer than one year. Mr Brown will cause the respondent's security classification to be reviewed at the end of each three month period until the court's next review under the Act. It is not practically possible to review his security classification at earlier periods.

[22] The Court also gave the respondent leave to file material in response to the appellant's further evidence and submissions. Relevantly Susan Bothmann, Co-ordinator of Prisoners' Legal Service Inc, the respondent's solicitors, annexed to her affidavit a press release issued on 27 September 2006 by the Minister for Police and Corrective Services, the Honourable Judy Spence, announcing that:

> "... sex offenders will no longer be sent to accommodation in prison farms, and will be banned from taking leave of absences from jail other than medical or funeral leave.
>
> The new measures follow her announcement earlier this week that sex offenders would be banned from performing community service work.
>
> '... I have decided today that all sex offenders currently housed in high security correctional facilities will not progress to low security prison farms.

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13 CSA, s 72(1)(a).
14 CSA, s 72(1)(b).
15 CSA, s 72(1)(c).
16 CSA, s 72(1)(d).
17 CSA, s 72(1)(g).
18 The Act, s 43(2)(c).

> In addition, I will ban all leave of absences from jail for sex offenders other than medical or funeral leave, which will be under strict escort, and I have already announced sex offenders will be prohibited from performing community service work ...'."

[23] As Mr O'Gorman SC for the respondent submits, Mr Brown's evidence does not explain why the assistance to the respondent he now proposes was not offered over the past three years since the matter was first raised by White J on 6 November 2003. In any case, the program now suggested by Mr Brown involves only activities within the Wolston Correctional Centre. It is not in reality a program which would truly integrate his gradual release into the community. Furthermore, the CSA has again been recently amended by the addition of s 478A[19] which now provides that a prisoner sentenced for a sexual offence is not entitled to leave of absence other than for compassionate or health leave.

[24] The new evidence led by the appellant in this appeal and the changes to the CSA do not demonstrate any error in the primary judge's finding that the respondent's graduated release into the community was not available to the respondent within the present prison system. That was Mr Airton's evidence before the court. The new evidence and legislative changes confirm the currency of the correctness of that view.

The remaining grounds of appeal

[25] The remaining grounds of appeal all relate to whether her Honour erred in specific findings which led her to prefer the views of Dr Grant and Dr Nielssen over those of Dr Moyle. Mr Sofronoff did not press any of these grounds in his oral submissions. It is sufficient to dispose of them by noting that the primary judge for the reasons she gave was well entitled on the evidence to prefer the conclusions reached by Doctors Grant and Nielssen on all of those disputed issues to those of Dr Moyle. These grounds of appeal are also without substance.

Conclusion

[26] The respondent after serving in full his most recent 14 year sentence of imprisonment for his latest criminal behaviour in 1988 has now spent a further three and a half years in custody because he is a serious danger to the community under the Act. In the annual review under the Act the primary judge carefully considered the material placed before her by the appellant and the respondent. She determined that, whilst the respondent remained a serious danger to the community under the Act, there was not an unacceptable risk that he would commit a serious sexual offence if released from custody on a supervision order for 10 years with the 32 onerous conditions she imposed. Whilst her Honour, like the three psychiatrists who prepared reports for the review and the two judges who had previously considered applications concerning the respondent under the Act, determined that the respondent's graduated release into the community from prison was most appropriate, that was not an order she could make under the Act. In passing s 478A CSA the legislature has effectively closed that door to Queensland Corrective Services, even though the respondent's integrated release into the community has had the support of experienced psychiatrists and judges as being in the interests of community protection for the past three years. The primary judge's approach to the

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[19] Inserted by s 8 *Criminal Code* (*Drink Spiking) and Other Acts Amendment Act* 2006, assented to on 10 November 2006.

annual review of the respondent under the Act was entirely orthodox. She recognized that in determining whether to subject the respondent to a continuing detention order or release him on supervision subject to conditions, the paramount consideration was the need to ensure adequate protection of the community:[20] *Fardon v A-G (Qld)*.[21] Her Honour also rightly noted that, consistent with this Court's observations in *A-G (Qld) v Francis*,[22] if supervision of a prisoner under the Act will ensure adequate community protection then an order for supervised release will ordinarily be preferable to a continuing detention order because offenders, having fully served their sentence, should not be deprived of their liberty unless that is the clear requirement of the Act.

[27] For 10 years after release the respondent will be subject to intensive supervision under the primary judge's order. He will have extensive professional support, monitoring and control; if concerns arise an application may be made to the court under Part 2 Division 5 of the Act to amend or suspend the order and detain him in custody. The reports before the Court unequivocally demonstrate that one of the respondent's greatest difficulties in reintegrating back into the community after his lengthy period of institutionalization will be his anxiety. His transition from a prisoner in gaol into the community as a law-abiding citizen is more likely to succeed if he is outside the spotlight of the media or harassment by vigilante groups.

[28] The appeal must be dismissed with the result that the stay of the primary judge's order is at an end.

Order

[29] Appeal dismissed.

[30] **WILLIAMS JA:** I agree with all that is said by the President in her reasons, and would only add some brief observations.

[31] It would appear that prior to December 2004 the respondent was placed by Corrective Services in a village within the correctional institution in Townsville. That gave the respondent a degree of independent living, and he had a "low" classification. Because it was ordered that he be detained pursuant to the provisions of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) he was transferred to Brisbane and his classification altered to "moderate". It is then said by Corrective Services that because his classification was "moderate" he could never be considered for the gradual release procedure recommended by virtually all of the psychiatrists who have examined him.

[32] That change in his classification was brought about despite any conduct on the part of the respondent which would have justified reclassifying him. One can readily understand the frustrations that the respondent must feel, particularly when impartial observers might reasonably conclude that Corrective Services was frustrating any real attempt to provide for the gradual release referred to by all examining psychiatrists. That sort of frustration is only likely to exacerbate the respondent's condition and in the long run make it more difficult for him to rehabilitate himself in society.

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20 *A-G (Qld) v Fardon* [2006] QSC 275; SC 5346 of 2003, 27 September 2006 (Lyons J), [49].

21 (2004) 210 ALR 50, Gummow J, [112] and s 3(a), s 13(4)(h), s 13(4)(i),s 13(5), s 13(6) and s 30(4) of the Act.

22 [2006] QCA 324; Appeal No 452 of 2006, 30 August 2006, [39].

[33] As it now seems clear that Corrective Services are unable, or unwilling, to provide the gradual release procedure recommended by all examining psychiatrists, the time has come, particularly given the observations of the Court of Appeal in *A-G (Qld) v Francis* [2006] QCA 324, to approve his release on the conditions proposed by the learned judge at first instance.

[34] Given the length of time the respondent has been in custody, and the media attention given to the various applications brought with respect to him pursuant to the *Dangerous Prisoners (Sexual Offenders) Act 2003*, it will be more difficult for him to make the transition to life outside prison, complying with all the conditions imposed on him, if his every move is subjected to intense scrutiny. It is to be hoped that our community is responsible enough to recognise these considerations and not make it more difficult for the respondent to rehabilitate himself.

[35] I agree with the President that the appeal should be dismissed.

[36] **WHITE J:** I agree with the President for the reasons she gives that this appeal by the Attorney-General must be dismissed. I agree with the observations made by Williams JA.

[37] When the original continuing detention order was made in respect of the respondent on 6 November 2003, it was that he be

> "… detained in custody for an indefinite term for control, care **and** treatment." *Attorney-General for the State of Queensland v Fardon* [2003] QSC 379 (emphasis added)

The order was made pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) which provides that if the court is satisfied of the matters set out in subsection (1) of s 13 the court may order

> "(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment".

[38] As was made plain in those reasons at par 101, there was work to be done with the respondent by way of treatment:

> "There is a great deal of guidance to be found in the most recent reports and evidence. Professor James spoke of 'a sense of increasing hope … that appropriate forms of psychotherapy in particular might prove efficacious.' Professor Ogloff hinted in oral evidence that the SOTP program might not be the most appropriate for the respondent and, indeed, this was recognised by Mr Tessman-Keys at the time. This could be further explored. The goal must be one of rehabilitation if the respondent is to remain detained and, with the respondent's co-operation, appropriate treatment together with staged reintegration as recommended by Dr Moyle may lead to a positive outcome when this order is reviewed. …"

[39] Some efforts were made towards rehabilitation between that order and the order of Moynihan J on 11 May 2005 continuing the detention order. His Honour noted at par 113:

> "A graduated or staged supported release into the community remains a viable option for the respondent." *Attorney-General for the State of Queensland v Fardon* [2005] QSC 137

As the President has set out in her reasons a staged supported release into the community is the preferred program of the psychiatrists.

[40] Legislation providing for the detention of a person after the expiration of sentence is, in our system of justice, a drastic step and if particular treatment is likely to prove beneficial to enable or prepare a prisoner for release into the community it is concerning that this is not facilitated by the executive or the legislature. The President has set out the recent amendments to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 which appear to close this path to rehabilitation.

[41] I endorse the comments of the President and Williams JA that the protection of the community is best served by permitting the respondent to embark on his rehabilitation in the community without undue attention.