SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Sybenga* [2009] QCA 382
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/respondent) **v** **DANIEL PHILIP SYBENGA** (respondent/appellant)
FILE NO/S:	Appeal No 7551 of 2009 SC No 1206 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2009
JUDGES:	Keane and Holmes JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where appellant appealed primary judge's order, pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), that he be detained in custody indefinitely for control, care or treatment – where experts assessed risk of appellant's re-offending if released into community as high, and said 24 hour supervision of appellant was required – whether primary judge wrongly characterised appellant's non-compliance with treatment in prison and while subject to interim supervision order as "wilful" – whether primary judge's finding that the unanimous expert opinion was that risk of appellant's re-offending was too great to allow his release was wrong – whether supervision order would adequately protect the community – whether primary judge's order contrary to principle in *Attorney-General v Francis* [2007] 1 Qd R 396 – whether primary judge's finding that supervision of appellant by his parents would cause destruction of their relationship was wrong – whether primary judge erred in making order for continuing detention for "treatment" as well as "control"

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

Attorney-General v Francis [2007] 1 Qd R 396; [2006] QCA 324, cited
Attorney-General for the State of Queensland v Lawrence [2008] QSC 230, cited
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: M A Green for the appellant
T A Ryan for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Crown Law for the respondent

[1] **KEANE JA:** I have read in draft the reasons for judgment prepared by Holmes JA. I agree with Holmes JA that the appeal should be dismissed for the reasons given by her Honour.

[2] In *Veen v The Queen [No 2]*, Deane J, speaking before the introduction of the Act, said:[1]

> "... [T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts."

[3] Given the numbers of persons now subject to detention under the Act, and bearing in mind that the purpose of that detention is protective rather than punitive, one may question, as Holmes JA observes, whether it would not now be economically feasible and socially desirable to establish a facility of the kind referred to in *Veen v The Queen [No 2]* by Deane J for the custody of persons detained under the Act.

[4] **HOLMES JA:** On 2 July 2004, the appellant was sentenced to four years imprisonment, with a recommendation for eligibility for parole after 16 months, in respect of 16 counts of indecent treatment of children under the age of 12. He did not apply for parole, and before his full-time release date the respondent sought an order under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) in respect of him. An interim supervision order was made on 28 May 2008, and the matter was adjourned for a full hearing, which did not take place until May 2009. While subject to the interim order, the appellant was housed at the Wacol precinct, a property under the control of Corrective Services, although not part of the prison system; he left the precinct only under escort. After hearing the application for final orders, Martin J ordered that the appellant be detained in custody for an indefinite term for control, care or treatment. The appellant appeals that order.

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1 (1988) 164 CLR 465 at 495.

The appeal grounds and the primary judge's reasons

[5] The notice of appeal, quite unsatisfactorily, identifies as the ground for that appeal that the learned judge erred in making the order, without further particularisation. However, the appellant's submissions here identified five grounds, three of which concerned findings of fact said not to be open. The first of those was the learned primary judge's characterisation of the appellant's non-compliance with treatment as "wilful"; the second, his conclusion that supervision by the appellant's parents would lead to the destruction of their relationship, a finding which, it was said, was based on a misunderstanding of a reporting psychiatrist's evidence; and the third, a finding that the unanimous expert opinion was that the risk the appellant would commit another serious sexual offence was too great to allow his release. In addition, it was said, the judge acted on a wrong principle in making the order for continuing detention, when an order for supervised release was adequate to protect the community; and, insofar as the decision to make that order might have been founded on the need for treatment, there was insufficient evidence to warrant it.

[6] There was no argument here, or at first instance, as to the correctness of the finding that the appellant was a serious danger to the community in the absence of an order. The learned judge set out the details of the appellant's previous offending. Nine of the 16 offences with which he was charged involved his approaching small girls (up to the age of five or six) in public places, taking his pants down and masturbating in front of them. On two occasions he touched the pudenda of the children involved. The six remaining counts involved a child, aged between three and four, whom the appellant knew through family connections. He had touched her genitalia, exposed himself to her and prevailed upon her to masturbate him. Prior to his sentence, the appellant was assessed by an experienced forensic psychiatrist as suffering from a schizoid personality disorder, and exhibiting paedophilia.

[7] The learned judge's reasons for concluding that a continuing detention order should be made are encapsulated in the final paragraph of his judgment:

> "A matter which assists to persuade me in this case is that there is no prospect of his obtaining appropriate treatment or participating in appropriate programs within the general community. While the prospects of his doing that within a prison are slim, there is at least a possibility that he might participate and thus might be better able to control himself. More compelling though is the unanimous expert opinion that the risk that he would commit another serious sexual offence is too great for him to be released into the community. The precinct should not be regarded as simply another jail; it has a purpose quite different from that of a prison. The facilities at the precinct are limited and are not intended to be used as a form of indeterminate incarceration. I have considered the evidence of the psychiatrists and those of the officers of the Corrective Services Department and I consider it to be acceptable and cogent. Had the material which was presented to me been available when this matter was first heard I have no doubt that an order for continuing detention would have been made. I am satisfied to a high degree of probability that the evidence is of sufficient weight to justify an order that the respondent be detained in custody for an indefinite term for control, care or treatment and I make that order."[2]

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2 *A-G for the State of Qld v Sybenga* [2009] QSC 161 at [27].

The "finding" that the refusal of treatment was "wilful"

[8] The first area of complaint, that the learned judge wrongly characterised the appellant's non-compliance with treatment as "wilful", is based on three earlier observations in the judgment:

> "One of the disturbing aspects of the respondent's behaviour emerged in prison. He was unwilling to undertake recommended programs. He remained resistant to undertaking a full assessment of his criminogenic needs and demonstrated a lack of motivation to address issues associated with his offending behaviours.[3]
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> . . .
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> One of the major problems in this case is the respondent's refusal to undertake treatment and to avoid treatment or making change.[4]
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> . . .
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> The respondent presents as a person who is unwilling to take steps to reduce or eradicate his offending behaviour. His history discloses that he is unlikely to commence a program. If he does commence a program, he is unlikely to finish it. His behaviour and remarks are consistent with a person who wishes to be in a controlled environment and does not wish to take responsibility for his actions."[5]

[9] The appellant had refused to undertake the "High Intensity Sexual Offending Program" (HISOP) while in prison. He had started a cognitive skills program, but did not finish it. He had also, counsel for the respondent pointed out, commenced but not completed a "Getting Started: Preparatory Program" for sexual offenders; however, his inability to complete that program seems, in fact, not to have been the product of intransigence, but simply the consequence of his release on the interim supervision order. While at the Wacol precinct, he had commenced group therapy treatment, which offered something of an alternative to the HISOP, but withdrew from it after a number of sessions.

[10] The Wacol precinct provides short-term accommodation for persons under supervision orders who have no suitable alternative, with the aim of preparing them for residence in the community. The appellant lived there for almost a year. According to his case manager's report, he regularly declined offers to take escorted leave in the company of his parents, and indeed expressed his unwillingness to leave the precinct at all. The outings were designed to develop his ability to return to the community, but the appellant regarded them as unnecessary, because he expected that he would have someone to attend to his needs into the future.

[11] The appellant's treating psychiatrist, Dr Arthur, had continued to treat him over the period of his residence at the Wacol precinct. He provided a set of written opinions to the Court. In his view, the appellant needed to attempt the HISOP because the individual treatment provided to him had "plateaued", and there was a "reasonable chance" that he would complete it with support. However, Dr Arthur said,

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3 At [10].
4 At [14].
5 At [25].

> "There is a possibility that the [appellant] would either not attempt or complete the HISOP and that a return to prison would satisfy his avoidance and dependency needs."

[12] Three experienced forensic psychiatrists, Drs Sundin, Beech and Lawrence, reported for the purposes of the hearing. In their joint report, they made these points:

> "Mr Sybenga withdrew himself from the group therapy that was provided by Dr Paul White once he started being challenged in that setting. His reasons for leaving remain unclear despite attempts at exploration. His failure to complete the program is a poor prognostic indicator in terms of his risk of re-offending.
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> There is evidence to support the view that he has remained passive and avoidant in his management at the Wacol Precinct and he has been unwilling to pursue attempts at reintegration. He is using other residents to meet some of his needs for care."

In evidence, the three psychiatrists identified the appellant's failure to complete the group therapy program as also increasing, as a matter of statistical probability, the level of risk he posed. They agreed that his significant behavioural traits were dependence; avoidance – of conflicts, and of acceptance of responsibility for himself; and desiring supervision and care. They concurred in a view that the appellant's schizoid personality disorder made it difficult for him to participate in group therapy.

[13] The appellant's counsel attributed to the learned judge a characterisation of the appellant's response to treatment options as "wilful". That characterisation, he went on to say, failed to pay proper regard to the psychiatrists' evidence as to the appellant's personality disorders and their effect on his behaviour. But an examination of the judgment shows that his Honour did not use the word "wilful" to describe the appellant's response to suggested programs. His descriptions of the appellant as being "unwilling", and of his behaviour in refusing to undertake treatment as "consistent with a person who wishes to be in a controlled environment and does not wish to take responsibility for his actions", accurately reflected the evidence of the appellant's responses, and were entirely consistent with what the psychiatrists had said. The appellant had refused to participate in some programs and failed to finish others, and had remained resolutely inert in the face of attempts to reintegrate him into the community. It added nothing to say that the attitude and behaviour had their genesis in personality traits; the problem was the poor prognosis for rehabilitation which resulted, whatever the source of the difficulties.

The expert opinion as to risk

[14] Counsel for the appellant contended that the primary judge's finding that "the unanimous expert opinion that the risk that he would commit another serious sexual offence is too great for [the appellant] to be released into the community" was wrong; rather the expert opinion was that the interim supervision order had been adequate to protect the community.

[15] Of particular concern to the experts dealing with the appellant were some statements he had recently made. He had told his case manager on 30 April 2009 that he

considered himself a danger to children and was likely to re-offend; that he would "do it for the rush". He had made a similar comment to Dr Arthur, and had also said that he believed that some children could give informed consent to sexual activity. The joint report of Drs Beech, Sundin and Lawrence made these observations:

> "He has disclosed to Dr Arthur an attitude that if he were unsupervised he would engage in further offending. At face value this is an indication of continuing high risk. It is also possible that these statements are designed to put in place restrictions that will ensure that he remains supervised and cared for in an institutional setting.
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> It is the opinion of all the psychiatrists that it is clear that he is at high risk of offending and in fact his risk is probably higher than had previously been considered. He would not at present be thought suitable for un-escorted leave in the community because of this high risk."

[16] In evidence, Dr Beech said that the existing supervision order was sufficient to manage the risk posed by the appellant, because it placed him somewhere where he could not offend and permitted him only supervised, escorted leave in an arrangement which was, in effect, "house arrest". The appellant required what Dr Beech described as "eyeball" supervision. He did not think that level of supervision could be reduced in the immediate foreseeable future. Asked whether he was of the opinion that the appellant needed to be imprisoned in order to adequately protect the community, Dr Beech answered:

> "Yes, ultimately that is my opinion. It's just that the level of supervision and escort [provided under the interim supervision order] creates a highly secure environment in the community ."

[17] Dr Sundin expressed approval of what Dr Beech had said on the topic. She said that the supervision order ensured compliance only so long as the appellant was under the 24 hour "eyeball" supervision of another adult; he was effectively in prison. Both Dr Beech and Dr Sundin identified a risk that the appellant would breach an order involving a lesser degree of supervision by re-offending in order to be taken back into custody. Dr Lawrence said that the appellant's statements about being unable to trust himself with a child indicated that the risk of his re-offending was "very considerable". She agreed that community protection had been addressed by the conditions set in place under the interim supervision order, but expressed doubt that "a cost benefit analysis would stand up".

[18] The experts' view as to the adequacy of the conditions of the interim supervision order under which the appellant was managed at the Wacol precinct was, it is clear, based on the premise that it involved 24 hour supervision of the appellant in conditions described as "house arrest" and a "mini prison". None of the psychiatrists countenanced anything short of that kind of supervision as meeting the risk of his re-offending. In other words, the risk was, as the primary judge had said, too great for him to be released into the community.

Supervision order as providing adequate protection

[19] The expert consensus that the interim supervision order adequately managed the risk led, necessarily, to consideration of whether a final order on similar terms could

or should be made, requiring the appellant to stay at the Wacol precinct under full-time supervision. Counsel for the appellant pointed to that part of the paragraph concluding the primary judge's reasons in which his Honour said that the Wacol precinct had limited facilities and was not intended for long-term accommodation. That reasoning, it was said, could not stand with this passage from this Court's decision in *Attorney-General v Francis*:[6]

> "The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[20] If the conditions under which the appellant lived for the duration of the interim supervision order at the Wacol precinct provided adequate community protection, counsel argued, a supervision order had necessarily to be made. There were no practical considerations preventing the accommodation being available on a long-term basis in the appellant's particular case.

[21] But a case manager with the Department of Corrective Services, Ms Lynas, gave evidence that the Department did not have the resources to continue providing escorted leave to the appellant should he stay at the Wacol precinct, which, in any event, was not designed for longer-term accommodation. The purpose of accommodating persons on interim supervision orders in the precinct was to give them the opportunity to be released to reside in the community, but the appellant was unusual in that it had not been possible, because of his perceived level of risk, to give him any unescorted leave. The supervision which had been involved during his stay there had had an impact on the capacity of staff to manage other offenders in the community.

[22] The reporting psychiatrists identified the HISOP as a factor which could reduce the risk that the appellant posed to the community. They were not, however, optimistic about the prospect of the appellant's successfully completing it if he were returned to custody; although Dr Sundin and Dr Beech advocated his undertaking first a preparatory program which would improve his prospects. (Dr Sundin specifically identified the Getting Started: Preparatory Program.) Mr Smith, a clinical supervisor with the Department of Corrective Services, explained that the HISOP was only available within prisons; it ran for nine months on an intensive basis, and such a program was not readily re-created in a community setting. It could not be run in the Wacol precinct, which had neither the staff nor the space. The optimal number of participants for the program was eight to 10. There were not sufficient candidates for it in the precinct, and the difficulty was exacerbated by the need to ensure that only a limited number of the participants had high needs.

[23] The judgment of this Court in *Attorney-General v Francis* does not demand the impossible, or even the impracticable, of Corrective Services. *Francis* was a case in which no evidence had been offered to explain why the Department was unable to

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6 [2007] 1 Qd R 396 at 405.

provide the resources to monitor the appellant there on a supervision order. The following passage explains what followed from that failure:

> "There was no evidence, however, that the resources required of the department to provide effective monitoring of the appellant's compliance with the conditions of supervised release would be so extensive that it would be unreasonable to expect them to be provided, or that the effective provision of such resources would be impracticable. It must be borne in mind that any supervision order made by the court under the Act must contain, by virtue of s 16(2)(f), a condition for supervision of the prisoner while on supervised release. The Act thus assumes that supervision will be available. The court should not conclude either that it will not be made available or will not be made sufficiently available in the absence of clear evidence to that effect and an explanation as to why its provision is regarded as unreasonable or impracticable. There was no reason to conclude that any necessary supervision by the department could not, or would not, be made available."[7]

[24] In contrast, in the present case, evidence was given by Ms Lynas, and explanation made, as to why the level of supervision which the appellant required was impracticable. To boot, the psychiatrists had identified as the only prospect for the appellant's improvement his completion of the HISOP, which was not possible at the Wacol precinct. The learned judge was entitled to act on the evidence of Ms Lynas and Mr Smith. The concluding paragraph of his judgement, in my respectful view, accurately identifies the impracticability of attempting to accommodate the appellant under a supervision order in the Wacol precinct for an indefinite period. And there is force, too, in the respondent's contention that an order imposing such an arrangement would amount not to a supervision order, but a continuing detention order given effect in a more agreeable form of prison.

The prospective role of the appellant's parents

[25] Counsel for the appellant complained of this statement by the learned judge:

> "The alternative [to accommodation at the Wacol precinct if a supervision order were imposed] was that he be under similar control by his parents. I accept the evidence that to do the latter would be likely to lead to the destruction of one of the most important relationships in his life."[8]

That was, counsel said, an over-statement of Dr Sundin's evidence that supervision by his family had

> "the potential to alienate him from them, and thus alienate him from his most important primary supports."

[26] Counsel had elicited evidence about the role of the appellant's parents from Dr Sundin and Dr Beech. Dr Beech confirmed that there had been a meeting between the reporting psychiatrists and the parents, after which he was satisfied that they accepted the risk that the appellant posed and the need for his supervision.

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7 At 404.

8 *A-G for the State of Qld v Sybenga* [2009] QSC 161 at [25].

They were, he said, supportive and protective and "willing to undergo quite significant hardship in order to supervise him". Dr Beech said the "arrangement" had not eventuated because it was cancelled by the appellant; it seems probable that he was talking about supervised leave from the Wacol precinct rather than full-time supervision. Dr Beech also observed that to ask them to be the guardians of the appellant would put them in "an invidious situation".

[27] Dr Sundin was asked questions about the adequacy of family members "escorting" the appellant. She said that it was an onerous task and had the disadvantage of allowing him to avoid responsibility, thus increasing his risk of re-offending. It was in that context that she made the remark about its potential to alienate the appellant from his parents.

[28] The primary judge's statement did not reflect a misunderstanding of Dr Sundin's evidence. Rather, it was an open and proper inference drawn from all the evidence he had heard about the appellant's characteristics, his need for 24 hour supervision, and what Dr Sundin had said about the potential for any supervisory role to alienate the appellant from his parents. In any event, it was of little consequence, because supervision by the appellant's parents was not seriously advanced at the hearing as a real option. They had not given evidence in any form, and Corrective Services had previously assessed residence with them as unsuitable. Although they had been described by Dr Beech as supportive, protective and willing to undergo hardship, it was not entirely clear whether their discussion with the psychiatrists had concerned the prospect of the appellant's living with them, as opposed to their undertaking an escorting role while he was living at Wacol. Certainly, none of the psychiatrists expressed in evidence any view that the appellant's parents were capable of managing him in the round the clock supervision that would be required.

The need for treatment

[29] The learned judge's reason for concluding that a continuing detention order was necessary was the risk that the appellant would commit another serious sexual offence if released into the community, so as to make control the pressing element of the order. Because no error has been shown in that conclusion, it is unnecessary to consider the last argument, that the evidence did not justify an order that the appellant be detained in custody for an indefinite term for treatment. The order made might more correctly have been limited to detention "for control", but it was not suggested that it should be varied so as to delete the requirement of treatment.

Conclusion

[30] It is unfortunate that an individual who poses such a risk of re-offending as to require 24 hour supervision must be held in a custodial setting designed for the serving of sentences. Given the numbers now subject to orders of a kind once thought extraordinary, one might question whether there ought not to be an alternative secure form of accommodation which does not impose the rigours of jail on persons detained for protective, not punitive, purposes. Those concerns, however, cannot affect the conclusion that the order for detention in this case was properly made on the evidence. The appeal must be dismissed.

[31] **FRYBERG J:** In the last paragraphs of their respective reasons for judgment, both of my colleagues have drawn attention to the need for the construction of secure accommodation elsewhere than in a prison for those detained under the *Dangerous*

Prisoners (Sexual Offenders) Act 2003. I respectfully endorse their Honours' remarks.

[32] In the United States, where continued detention of dangerous sexual offenders was implemented before it was implemented in Queensland, such facilities have been established.[9] Queensland has similar facilities, under the auspices of the Department of Health, but they are generally not available for those detained under the Act, even if they are suffering from severe personality disorders or worse:

> "[62] Until a fairly late stage in the trial it seemed to my untutored mind that a logical place to house a person diagnosed as suffering sexual sadism and antisocial personality disorder would be as an involuntary patient in a secure mental health facility. A similar thought evidently occurred to McPherson J when sentencing Mr Lawrence in 1985:
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> > 'Now, it has occurred to me as the matter has progressed with counsel discussing it that your incarceration in an ordinary prison along with other people who do not suffer either your disadvantages mentally or your difficulties in relation to sexual control would not be desirable, either from the point of view of other prisoners or from your own point of view. Unfortunately, there does not seem to be specific power which would enable me to direct what should happen to you. … The most I can do, and what I will do, is to recommend that the prison authorities give consideration at an appropriate time to the transfer of each of you to a security patients' hospital, and both before that time and after, that so far as it can be done, you receive whatever kind of psychological and other medical assistance can be given to you with a view to improving both your present condition, if that can be done, and making it less likely that you will reoffend.'
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> The Government provides such facilities for the accommodation and management of forensic patients (and others) considered to be high risk patients. Issues such as the level of observation of the patient and restrictions on movement are decided on the basis of clinical indicators. The State Director of Mental Health, Dr Groves, described these facilities as 'not quite of the degree of security of a prison'. Unfortunately (at least as Dr Groves currently interprets the *Mental Health Act* 2006), a psychopathic sexual sadist would not qualify for involuntary admission to a security ward. On his approach there is nothing in that Act to prevent psychopathic sadists from wandering around in the community."[10]

[33] The unwillingness of the Department of Health to become involved with these people does not relieve Queensland of its statutory obligations. One of these is the implementation of the preventive objects of the Act. Mr Sybenga presents an even more extreme example than did Mr Lawrence, but I venture to repeat what I wrote in relation to the latter (citations omitted):

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9 See *Attorney-General for the State of Queensland v Lawrence* [2008] QSC 230 at [50].

10 *Ibid* at [62] (citations omitted). Further information is provided in the footnotes to the passage quoted.

"The court must review the order at the end of the year from now. The State of Queensland and the Attorney-General as its representative will doubtless be aware that the evidence may be more focused at that time. It will no doubt be conscious of what was said by Dr James regarding accommodation for persons such as Mr Lawrence:

> 'Prisons are not the right place and I think in the spectrum of care there is a gap and the gap is of the kind of institution … where it is both secure and therapeutic, both those goals are rich and salient.'

The evidence before me does not suggest that it would be impractical or unreasonable for the Government to make suitable facilities available for housing Mr Lawrence (if they are needed and do not already exist), at least after a year from now. The Government has a positive obligation to implement the preventive objects of the Act:

> 'It is possible, too, that the view taken by Gummow J in *Fardon v Attorney-General for Queensland* supports an argument that executive government repudiation of the preventive objects of the Act in a particular case (as, for example, by the refusal of any treatment to a prisoner clearly capable of, and amenable to, rehabilitation) could lead the court to refuse to make any order at all. If it were to appear to the court that any further detention would be truly punitive in character and, thus, contrary to the intention of the legislation, there would be no basis for the court to make an order of any kind under the Act. The conditions of further restraint upon the detainee's liberty would be out of character with the intention of the legislature: that such restraint is preventive. The character of the detention authorised by the Act is, as was explained in the reasons of the High Court in *Fardon v Attorney-General for Queensland*, not punitive but preventive.'

An unreasonable failure to provide suitable facilities might constitute another example."[11]

[34] For the reasons given by Holmes JA, the appeal should be dismissed.

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[11] *Ibid* at [71].