SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Fardon* [2013] QCA 365
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (appellant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	Appeal No 9428 of 2013 SC No 5346 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2013
JUDGES:	Holmes, Muir and Fraser JJA Judgment of the Court
ORDERS:	**1. It is declared that sections 3 and 6 of the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 are invalid.** **2. The appeal is dismissed.**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – APPROPRIATE FORM OF RELIEF – DISCRETION OF COURT – OTHER CASES – where the respondent filed a notice of contention purporting to challenge the validity of the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 (Qld) (the Declarations Act) – where the notice of contention did not otherwise purport to challenge the validity of the *Dangerous Prisoners (Sexual Offenders) Act* (*DPSOA*) – where the respondent conceded on the hearing of the appeal that a notice of contention was not an appropriate means of challenging the validity of the Declarations Act – where the respondent nevertheless submitted that the Court was empowered to consider the grounds of contention and grant appropriate relief – where arguments on the grounds of contention were heard together with a case stated to the Court of Appeal regarding the validity of both the Declarations Act and the *DPSOA* – where the Attorney-General argued the Court should refrain from exercising jurisdiction to consider

the validity of the *DPSOA* and the Declarations Act – whether the Court should adjudicate upon the constitutional validity of the *DPSOA* and the Declarations Act – whether the Declarations Act contravenes the *Kable* doctrine – whether the Court should make a declaratory order as to the validity of the Declarations Act

CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent was detained under a continuing detention order pursuant to s 13 of the *DPSOA* – where the primary judge, after carrying out the annual review required by s 27 of the *DPSOA*, rescinded the continuing detention order and ordered that he be released from custody subject to a supervision order – where the primary judge described the examining psychiatrists' assessment of the risk of the respondent committing further sexual offences if released on a supervision order as of the order of risk that the average sexual offender would re-offend – whether the primary judge in doing so misapprehended the test to be applied under s 30(4) of the *DPSOA* – where the primary judge identified the prospect of the respondent becoming coercive and exploitative in an intimate relationship as the major concern if the risk of re-offending materialised – whether it followed that the primary judge had concluded that that risk "was not a risk against which the public should be protected by a continuing detention order" – where the primary judge found that the respondent had recognised the difficulties he faced on release and had stated an intention to comply with requirements of a supervision order; that there had been some reduction in his negativity towards corrective services officers; that he had not been involved in any breach of prison discipline for many years; and that he had developed a good therapeutic relationship with a psychologist, who intended to continue his treatment – where one of the psychiatrists expressed the opinion that the respondent was more likely than not to comply with a supervision order – whether there was an evidentiary basis for the primary judge's finding that there were good prospects that the respondent would "comply substantially with the requirements of such an order" – whether the decision of the primary judge was unreasonable

Civil Proceedings Act 2011 (Qld), s 10
Criminal Law Amendment Act 1945 (Qld), Pt 4, Pt 4A
Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld)
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13, s 16, s 27, s 30

Judiciary Act 1903 (Cth), s 39, s 78B
Supreme Court of Queensland Act 1991 (Qld), s 29(3)
Uniform Civil Procedure Rules 1999 (Qld), r 766(1)(b)

Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458; [2013] HCA 7, applied
Attorney-General for the State of Queensland v Fardon [2013] QSC 264, related
Attorney-General (Qld) v Francis [2007] 1 Qd R 396; [2006] QCA 324, applied
Attorney-General (Qld) v Lawrence [2013] QCA 364, related
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, applied

COUNSEL: P J Davis QC, with J Horton and G Del Villar, for the appellant
D P O'Gorman SC, with R W Haddrick and G Lawson, for the respondent

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

[1] **THE COURT:** Earlier this year, a judge in the trial division carried out the annual review required by s 27 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (*DPSOA*) of a continuing detention order made against the respondent, Mr Fardon. The continuing detention order had been made by this Court in July 2011 on a successful appeal against an order releasing Mr Fardon on a supervision order. The primary judge affirmed the decision that Mr Fardon was a serious danger to the community in the absence of an order under the *DPSOA*, rescinded the continuing detention order and ordered that he be released from custody subject to a supervision order. The Attorney-General has appealed those orders on the grounds that the decision was unreasonable and that the primary judge erred in various respects.

Notice of Contention

[2] Mr Fardon filed a notice of contention that the decision of the primary judge should be affirmed on a ground other than the grounds upon which the primary judge relied. The grounds of the contention are that:

> "(a) The *Criminal Law Amendment (Public Interest Declarations) Act 2013*[1] invalidly undermines the authority of the Court of Appeal to make orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* in the present appeal; and/or
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> (b) The *Criminal Law Amendment (Public Interest Declarations) Act 2013* invalidly usurps the exclusively judicial power to impose penalties or punishments under the *Dangerous Prisoners (Sexual Offenders) Act 2003* in the present appeal; and/or
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> (c) The *Criminal Law Amendment (Public Interest Declarations) Act 2013* is a Bill of Penalties, and invalidly compromises

[1] The correct name of the Act is the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013.

> the judicial process set out in the *Dangerous Prisoners (Sexual Offenders) Act 2003* by purporting to authorise punishment by the executive government without judicial process."

[3] Those grounds of contention were substantially replicated in notices given by Mr Fardon to the Attorneys-General of the Commonwealth and other States and Territories pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

[4] A finding that the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 (the Declarations Act) was invalid could not justify the orders made by the primary judge if those orders were made in error under the *DPSOA*. As senior counsel for Mr Fardon acknowledged during the hearing, a notice of contention in this appeal was not an appropriate procedure for bringing a challenge to the validity of the Declarations Act, but he submitted that the Court was nevertheless empowered to consider the grounds of the notice of contention and grant appropriate relief. In reply, senior counsel for the Attorney-General argued that Mr Fardon's challenge to the validity of the Declarations Act could not affect any order made in the Attorney-General's appeal, but he did not take any point about the form in which Mr Fardon's challenge was raised or as to the Court's power to grant appropriate relief according to the merits of the challenge. With that in mind, the irregular manner in which the issue has been brought before the Court and the fact that a declaratory order could not affect the orders made in the appeal do not preclude the Court from making a declaration as to the validity of that Act if such an order is otherwise appropriate.[2]

[5] The Court heard argument on the grounds of Mr Fardon's contention together with argument on a case stated in *Attorney-General for the State of Queensland v Lawrence*.[3] The questions in the stated case were:

> "(a) whether the *Dangerous Prisoners (Sexual Offenders) Act 2003* '(the DPSOA'), or parts thereof, are invalid as a consequence of the enactment of the *Criminal Law Amendment (Public Interest Declarations) Act 2013* in that the DPSOA now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution; and/or
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> (b) whether the *Criminal Law Amendment (Public Interest Declarations) Act 2013* is invalid in that it has the consequence that the DPSOA now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution."

[6] The relevant provisions of the Declarations Act, which commenced on 29 October 2013, are sections 3 and 6. Those sections purport to amend the *Criminal Law*

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2 See *Supreme Court of Queensland Act* 1991, s 29(3), *Uniform Civil Procedure Rule*s 1999, r 766(1)(b), and *Civil Proceedings Act* 2011, s 10.

3 *Attorney-General (Qld) v Lawrence* [2013] QCA 364.

Amendment Act 1945 (*CLAA*) by adding new Pts 4 and 4A and changing the long title of the *CLAA* to reflect that addition. The new Pts 4 and 4A empower the executive government to make a "public interest declaration" in relation to a "relevant person", a term which is defined to mean a person subject to a continuing detention order under the *DPSOA* or a person subject to a supervision order under the *DPSOA* if the person was subject to a continuing detention order immediately before the supervision order was made.[4]

[7] In *Attorney-General (Qld) v Lawrence*,[5] the Court summarised the effect of those amendments in the following terms.

> "After the resolution of any appeal or the expiry of the period for any appeal against an order granting supervised liberty to a person made by the Supreme Court in accordance with the DPSOA on the application of the executive,[6] the executive is empowered to make decisions on the basis of its view of the public interest, the merits of which are not reviewable in any court, whether or not to nullify the Supreme Court's order[7] by imprisoning that person[8] and whether or not subsequently to give effect to the order.[9] The power to nullify orders of the Supreme Court, being exercisable upon the merits of each case on a case by case basis, is analogous to the power of an appellate court to set aside orders found to be made in error. The power is otherwise foreign to judicial power, most obviously because of the political character of the sole criterion for a decision which may result in imprisonment and the fact that the power is exercisable by a party to the proceedings in which the affected order was made."

[8] The ground of invalidity identified in the questions in the stated case was derived from the doctrine enunciated in *Kable v Director of Public Prosecutions (NSW)*.[10] Hayne, Crennan, Kiefel and Bell JJ referred to the doctrine in the following passage in *Assistant Commissioner Condon v Pompano Pty Ltd*:[11]

> "The relevant principles have their roots in Ch III of the *Constitution*. As Gummow J explained in *Fardon*, the State courts (and the State Supreme Courts in particular) have a constitutionally mandated position in the Australian legal system. Once the notion is rejected, as it must be, that the *Constitution* 'permits of different grades or qualities of justice', and it is accepted that the State courts have the constitutional position that has been described, it follows that 'the Parliaments of the States [may] not legislate to confer powers on State courts which are *repugnant to or incompatible with* their exercise of the judicial power of the Commonwealth' (emphasis added). As Gummow J further pointed out, and as is now the accepted doctrine of the Court, 'the essential notion is that of repugnancy to or incompatibility with that institutional integrity of

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4 Declarations Act, s 19 Definitions for Pt 4.
5 [2013] QCA 364 at [35].
6 *DPSOA*, ss 5(1), 27.
7 *CLAA*, s 22B(2)(a)-(c).
8 *CLAA*, ss 22B(2)(d) and (e).
9 *CLAA*, s 22G.
10 (1996) 189 CLR 51.
11 (2013) 87 ALJR 458 at [123] (footnotes omitted).

> the State courts which bespeaks their constitutionally mandated position in the Australian legal system'."

[9] In *Attorney-General (Qld) v Lawrence*, counsel for Mr Lawrence advanced arguments in support of affirmative answers to the questions in the stated case and also adopted the arguments advanced for Mr Fardon in this appeal. In both matters, senior counsel for the Attorney-General argued that the Court did not have jurisdiction to consider, or should exercise a discretion not to consider, the constitutional validity of the Declarations Act or the *DPSOA* and, in the alternative, that neither Act was invalid.

[10] Mr Fardon's outline of argument contended that, as a result of the enactment of the Declarations Act, the *DPSOA* was invalid because:

> "(a) It interposes an executive process upon decisions of the Supreme Court; and/or
> (b) Decisions of the Supreme Court are not final, in the sense that a decision of the Court pursuant to the [*DPSOA*] is then able to be reviewed by the executive government; and/or
> (c) Imprisonment is permitted as a result of something other than a judicial process; and/or
> (d) It constitutes a Bill of Pains and Penalties."

[11] The notice of contention and the notices given under s 78B of the *Judiciary Act* (Cth) impugn the validity only of the Declarations Act. Accordingly, the Court should not consider Mr Fardon's argument that the *DPSOA* is invalid. The Court's consideration must be confined to the question whether the Declarations Act is invalid upon one of the grounds assigned in the notice of contention.

[12] Furthermore, in oral argument, senior counsel for Mr Fardon acknowledged that in this appeal the Court should consider only those of his arguments which invoke the *Kable* doctrine. Mr Fardon's and the Attorney-General's arguments upon that issue were considered in *Attorney-General (Qld) v Lawrence*. For the reasons given in that decision, the Court has and should exercise jurisdiction to adjudicate upon the constitutional validity of the Declarations Act[12] and sections 3 and 6 of the Declarations Act are invalid.[13] There should be a declaration to that effect.

The Attorney-General's appeal grounds

[13] The Attorney-General appealed the orders made by the primary judge on the grounds that the decision was "against the weight of the evidence" and "unreasonable" and that the primary judge

> "…misdirected himself by:
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> i. Apparently assessing risk by reference to the risk of '*the average sexual offender*' when the real test is whether a supervision order would provide adequate protection to the community against [Mr Fardon] against whom a Division 3 order has been made; and
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> ii. Apparently finding that the risk that [Mr Fardon] would '*form a relationship with a woman, in the course of which he*

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12 *Attorney-General (Qld) v Lawrence* at [36]-[40].
13 *Attorney-General (Qld) v Lawrence* at [41]-[44].

> *would coerce her into sexual behaviours (as described by Dr Beech); or he would become exploitive and sexually demanding, and would exceed recognised boundaries as a consequence of his sense of entitlement*' was not a risk against which the public should be protected by a continuing detention order."

The background to the review

[14] The learned primary judge set out Mr Fardon's criminal convictions and the history of the orders made against him under the *DPSOA*:

> "[3] Mr Fardon was born on 6 October 1948. In 1967, at the age of 18, he pleaded guilty to attempted carnal knowledge of a girl under the age of 10 years. He was released on a good behaviour bond. In 1980, Mr Fardon pleaded guilty to charges of rape and indecent dealing. The victim was a 12 year old girl. At the same time, he pleaded guilty to the unlawful wounding of the 15 year old sister of the rape victim. For the rape conviction, he was sentenced to a term of 13 years imprisonment; with lesser concurrent terms imposed for the other offences.
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> [4] Mr Fardon was released from prison after serving eight years. Within 20 days, he committed further offences of rape, sodomy and assault occasioning actual bodily harm. He was convicted of these offences in 1989, and sentenced to two terms of imprisonment of 14 years, and a lesser term, all to be served concurrently.
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> [5] Little is known of his sexual offence in 1967. The offences for which he was convicted in 1980 and 1989 were associated with the taking of drugs and alcohol.
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> [6] Mr Fardon has a more extensive criminal history, with other offences in New South Wales, Victoria, and the Northern Territory, as well as Queensland. Apart from the sexual offences already mentioned, his offending was generally property related, and of limited relevance for the present proceedings.
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> [7] In 2003, an order was made for Mr Fardon's detention under the *DPSOA*. On 27 September 2006, a supervision order was made under the *DPSOA*, subject to conditions, resulting in his release from prison. Mr Fardon contravened those conditions on three occasions. Thus on 4 May 2007, he attended a school, though on a pre-arranged visit to address Year 11 students, in the presence of his support worker. On 11 July 2007, he aided a neighbour, who was also subject to a supervision order, to disobey a curfew restriction. On 21 July 2007 he travelled without authority to Townsville.
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> [8] He was then returned to custody. On 19 October 2007, an order was made amending the supervision order made in 2006, resulting in Mr Fardon's release from custody.

> [9] On 3 April 2008, Mr Fardon was apprehended, and charged with rape. Although convicted at trial, the conviction was quashed and a verdict of acquittal was entered. Before his apprehension, however, he had contravened conditions of the order by visiting a licensed club, without consent; and by attending, without supervision, the home of a woman who was intellectually disabled. On 20 May 2011, when the 2008 contraventions were dealt with, an order was made for Mr Fardon's release subject to a supervision order. However, on 3 June 2011 an order was made staying the operation of that order; and on 1 July 2011 the detention order [imposed by this court]. A review of that order was determined on 13 February 2013, resulting in a supervision order. However, that was overturned on appeal, and the matter was remitted to the trial division of this Court for a rehearing.
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> [10] Mr Fardon has provided to the doctors who have interviewed him a relatively consistent account of his earlier life. He was the subject of physical abuse from his father until about the age of 14 years. He was subjected to sexual abuse by a cousin between the ages of 7 and 14 years. He left home at about age 14, living on the streets. He became involved in a bikie gang at some point.
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> [11] Since 1978, he has spent most of his life in prison. It has been calculated that in this period, he has been in custody for all but about five years."[14]
> (Footnotes omitted.)

The psychiatric evidence

[15] The learned primary judge had before him evidence from a psychologist, Mr Smith, who had been treating Mr Fardon, and two psychiatrists, Dr Beech and Dr Grant, both of whom had given a number of reports on him. All three gave evidence.

[16] By the time the review application was heard by the primary judge, Mr Smith had undertaken some 50 weekly treatment sessions with Mr Fardon. According to Mr Smith, the sessions focussed on dealing with stressors and emotional difficulties affecting Mr Fardon, assisting in his engagement with planning processes for his release, addressing his concerns about living in the community and devising relapse prevention strategies to minimise the risk of any breach of a supervision order. Mr Smith described Mr Fardon as "well engaged" and responsive in their sessions, with which Mr Smith intended to continue if Mr Fardon were released on a supervision order.

[17] When he gave evidence at the hearing of the review, Mr Smith was asked about an incident reflected in a case note of 13 September 2013, in which Mr Fardon had reacted aggressively to a prison psychologist who questioned him in order to assess whether there was any risk of self-harm. Mr Fardon told the prison psychologist that he regarded her as a "piece of shit", said that he would not co-operate with her in the case management process in the future, and left the interview room.

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[14] *Attorney-General for the State of Queensland v Fardon* [2013] QSC 264 [3]-[11].

Mr Smith explained that the reaction was consistent with Mr Fardon's distrust of, and sensitivity to, Corrective Services' actions in respect of him. It had occurred at a time when he and Mr Fardon had been engaging in sessions which focussed on the latter's experiences of sexual abuse as a child. His consequently heightened state of anxiety and distress made him more likely to react badly. It did, however, appear to be a "relatively isolated incident", although it could not be said that similar outbursts would not occur again. Mr Smith said that he was able to act as an intermediary for Mr Fardon in some circumstances where Corrective Services took steps which had implications for his treatment.

[18] Both psychiatrists, Dr Beech and Dr Grant, considered that Mr Fardon had an anti-social personality disorder which reached the point at which psychopathy could be diagnosed. Although he had two child victims, he was not thought to suffer from any specific sexual paraphilia. In his most recent report dated 14 July 2013, Dr Beech noted that Mr Fardon was now in his 60s, an age where the risk of violence declined significantly. After assessing risk with the aid of statistical instruments and allowing for Mr Fardon's current good behaviour, engagement in treatment, reduced level of hostility, abstinence from drugs and alcohol and stable affect, Dr Beech said that he would place the applicant at a "moderately high risk of re-offending sexually". (In an earlier report given in August 2012, Dr Beech had explained that by "moderately high" he meant a risk "more than the average sexual offender but not in the range of those at highest risk".) A supervision order would reduce that risk to moderate.

[19] The difficulty, Dr Beech said, was in determining whether Mr Fardon would abide by an order; he thought that he was more likely than not to do so. The assistance Mr Fardon had received from therapy and his perception of it as the way to negotiate with Corrective Services' staff, his greater level of preparation for release and supervision, and his unit behaviour, which indicated a sustained reduction in his defiance, impulsivity and violence, indicated that his willingness to abide by a supervision order had improved. As to specific risks of offending, Dr Beech identified the most likely scenario as manipulation of a female partner into sexual acts against her will. A more "worrying" scenario would be Mr Fardon's use of drugs or alcohol and intoxication, which could involve a violent sexual assault. Dr Beech thought, however, that the second scenario was much less likely, given Mr Fardon's age, abstinence and lack of general violence over the past decade.

[20] In giving evidence, Dr Beech was asked about the case notes concerning the prison psychologist. He observed that Mr Fardon had a change of case manager at a difficult time when there was a hearing on foot, accompanied by a considerable amount of media attention, and he was going through a difficult stage in his treatment. The incident indicated that Mr Fardon could be hostile, but it needed to be explained to him that on a supervision order he could not act in that way. Dr Beech emphasised the importance of Mr Fardon's having any supervision order explained to him before he was released on it.

[21] Dr Grant, in his most recent report of 22 July 2013, noted that Mr Fardon was calmer and less belligerent than in previous interviews. He was very significantly institutionalised, but a good therapeutic relationship seemed to have been established with Mr Smith and slow progress was being made in dealing with his issues. As Mr Fardon aged, some of the more obvious aspects of his personality disorder had settled, reducing the risk of violent offending and violent offending

but not necessarily the risk of non-violent offending. The STATIC-2002 risk assessment instrument indicated that Mr Fardon was in the "low-moderate group of risk for future sexual offending". Statistically, the risk of his offending would be 1.38 times the recidivism rate of the "typical sex offender". Dr Grant defined the latter term as meaning someone who received a median score of 3 on the STATIC-2002 instrument (as opposed to Mr Fardon's score of 4). On a second instrument, the Risk for Sexual Violence Protocol, Dr Grant rated the risk for future sexual offending as moderate.

[22] Dr Grant expressed his ultimate opinion as to risk in these terms:

> "The moderate risk for sexual re-offending which I have outlined would mean that Mr Fardon has a greater risk than the average sex offender for re-offending but that the increased risk is relatively moderate in extent. In my opinion, that risk could now be contained and reduced by a supervision order, providing Mr Fardon's positive attitudes and co-operation persist beyond the prison environment."

He went on to observe that if Mr Fardon's previous "negative and oppositional attitudes" re-emerged on a supervision order, it was to be hoped they could be dealt with by continued therapy and liaison with Corrective Services.

[23] In evidence, Dr Grant noted that Mr Fardon seemed to have excessive expectations of what Mr Smith could do for him in dealing with Corrective Services officers; nonetheless, Mr Smith's limited role would be helpful because Mr Fardon would be able to speak to him in therapy and be assisted with a strategy to deal with problems. There were improvements in Mr Fardon's attitudes, given the assistance of his relationship with Mr Smith, and there was also some improvement in the way the monitoring system would apply to him. There was still "quite a high chance of breach of supervision" which would more likely be a testing of the limits, such as disobeying restrictions on internet use, arguing with supervisors, or attempting to abscond. As to the last, GPS monitoring made the likelihood of attempted absconding less likely, and if an offender were to abscond it was unlikely they would get very far. Dr Grant concurred with Dr Beech's evidence that there could conceivably be a concern that Mr Fardon would develop a relationship with a vulnerable woman with an intellectual handicap or a drug abuse problem, in the course of which he might "become exploitative and sexually demanding and exceed recognised boundaries in terms of entitlement".

The task to be performed on a review hearing

[24] Section 30 of the *DPSOA* deals with what a judge must do in hearing a review of a continuing detention order:

> "**30 Review hearing**
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> (1) This section applies if, on the hearing of a review under section 27 or 28 and having regard to the required matters, the court affirms a decision that the prisoner is a serious danger to the community in the absence of a division 3 order.
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> (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)—

(a) the paramount consideration is to be the need to ensure adequate protection of the community; and

(b) the court must consider whether—

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.

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

(6) In this section—

required matters means all of the following—

(a) the matters mentioned in section 13(4);

(b) any report produced under section 28A."

The primary judge's reasons

[25] The learned primary judge noted the imprecision in the terms used by the psychiatrists to assess the risk that Mr Fardon would commit a further sexual offence. He referred to Dr Beech's explanation that a "moderately high" risk was greater than for the average sexual offender and noted that it was unclear that a lower level of risk – "moderate" – if Mr Fardon were released subject to a supervision order was any greater than the risk of an average sexual offender's re-offending. Dr Grant had similarly lowered his assessed risk to "low to moderate"; again, it was unclear whether that was any greater than the risk that an average sexual offender would re-offend.

[26] In that context, the primary judge made these observations concerned with the *DPSOA's* lack of specificity about "an unacceptable risk":

> "[66] An application may be made for orders under the *DPSOA* only in respect of a person who has committed a serious sexual offence. Even then, a relatively high threshold is set before an order can be made. This rather suggests that the mere fact that a person who has committed a serious sexual offence has the same risk of committing a further sexual offence as the average sexual offender, does not provide a basis for making an order under Division 3 of the Act; and in particular, for making an order for the person's continued detention. Nevertheless, decisions about orders are matters of judgment. If the offence which the person might commit would involve significant violence, for example, a detention order might be made, even if the risk were lower than average. Ultimately the Act provides little clear guidance about what constitutes 'unacceptable risk' that a person will commit a serious sexual offence; or what level of protection is 'adequate protection of the community'."

[27] His Honour also observed that it was not clear whether Dr Grant's assessment of a "moderate" risk of re-offending and Dr Beech's of a "moderately high" risk if Mr Fardon were released without a supervision order were materially different. Similarly, it was unclear whether there was any real difference between their respective assessments of the risk if Mr Fardon were released on a supervision order as "low to moderate" and "moderate". Neither had suggested, however, that the risk of re-offending if Mr Fardon were released on a supervision order was such that he should be detained.

[28] The primary judge concluded that although the risk of Mr Fardon's committing a violent rape had been significantly reduced, there was a real risk that if he were released from custody without a supervision order, he would commit "a sexual offence against a woman with whom he [was] in a relationship, involving some form of coercion", which could amount to a serious sexual offence. Consequently, his Honour expressed himself satisfied that in the absence of an order Mr Fardon would be a serious danger to the community. He then turned to consider whether Mr Fardon should again be subject to a continuing detention order or should be released from custody on a supervision order. In that regard, he made these observations which were, in part, contentious on appeal:

> "[68] In determining whether to make a supervision order, the paramount consideration under s 30(4)(a) of the *DPSOA* is the need to ensure adequate protection of the community. It is also necessary to consider, under s 30(4)(b)of the *DPSOA*, whether adequate protection of the community can reasonably and practicably be managed by a supervision order; and whether the requirements of s 16 can reasonably and practicably be managed by QCS officers.
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> [69] The requirements of s 16 relate to reporting, providing information including the current name and address, and changes of place of residence and employment, of the person

> subject to the order; compliance with directions; not leaving Queensland without permission; and not committing an offence of a sexual nature. No evidence was led, and no suggestion was made, that these requirements could not be reasonably and practicably managed by QCS officers. It was accepted by the applicant that s 16 did not give rise to any matter which weighed against the making of a supervision order.
>
> [70] The substantial question raised by s 30(4) of the *DPSOA* is whether adequate protection of the community can be reasonably and practicably managed by such an order. In deciding whether to make a supervision order, the paramount consideration is the need to ensure adequate protection of the community."

[29] After considering relevant provisions of the *DPSOA*, the primary judge identified the risk of the commission of a serious sexual offence as the primary focus in considering adequate protection of the community. His Honour went on to review Mr Fardon's history of offending and his history of breaches of previous supervision orders. He noted as a matter of concern the fact that Mr Fardon's breaches of previous orders had been associated with an underlying negative attitude to Corrective Services. Other concerns were the limited support available to Mr Fardon and the likely difficulties he would experience on release into the community, which might cause him anxiety, in turn raising the prospect of a breach of the requirements of a supervision order.

[30] There were also, his Honour noted, concerns about Mr Fardon's capacity and intention to comply with the requirements of a supervision order. In that context, however, it was relevant that Mr Fardon had recognised the problems he would face, particularly the importance of avoiding alcohol and drugs, the need for treatment of anxiety and emotional instability, the difficulties of living in the community and the importance of accepting supervision. In addition, the primary judge noted: Mr Fardon's stated intention in his affidavits to comply with the requirements of a supervision order; Dr Grant's evidence that he showed much greater confidence in his ability to do so; and Mr Fardon's wish expressed to both psychiatrists to be released and not die in prison, which would provide some motivation.

[31] Mr Fardon's relationship with, and treatment by, Mr Smith also tended to make compliance more likely. The evidence indicated some reduction in Mr Fardon's negativity towards Corrective Services officers and it was relevant that he had not breached prison discipline or been involved in any significant adverse incident for many years. Dr Beech thought it more likely than not that Mr Fardon would generally obey the requirements of a supervision order and that the risk of non-compliance was in respect of matters not of great concern. Dr Grant considered it likely he would breach a supervision order but not in a way which raised a risk of a sexual offence, with the exception of the risk that he would abscond. However, as Dr Grant acknowledged, absconding was less of a problem with GPS monitoring and it was likely that Mr Fardon would be caught fairly quickly.

[32] The primary judge summarised the evidence as giving better grounds for confidence that Mr Fardon would now comply with the requirements of a supervision order.

There remained some risk of breach, but such a breach was unlikely to be associated with the commission of a sexual offence. His Honour continued:

> "[90] However, the real focus of these proceedings is not whether or not Mr Fardon might commit some breach of the requirements of the supervision order. It is whether adequate protection of the community can be reasonably and practicably managed by a supervision order, with the paramount consideration being the need to ensure such protection. In other words, the mere fact that a person the subject of such an order might breach a requirement of it, is not itself decisive.
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> [91] In the present case, as I have indicated, if Mr Fardon were released subject to a supervision order, there is reason to be concerned that he might not comply with all of its requirements; although I have identified a number of matters which tend to provide some confidence that, at least in substance, he will comply. However, the evidence of Dr Grant demonstrates that it is unlikely than any breach of a requirement of a supervision order would go undetected for any substantial period of time. That in turn makes it unlikely that Mr Fardon would progress to committing a sexual offence.
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> [92] It is also relevant to consider the nature of any sexual offence which Mr Fardon might commit. The major concern identified by both the psychiatrists was that Mr Fardon would form a relationship with a woman, in the course of which he would coerce her into sexual behaviours (as described by Dr Beech); or he would become exploitative and sexually demanding, and would exceed recognised boundaries as a consequence of his sense of entitlement (as described by Dr Grant). Notwithstanding the seriousness of such conduct, there is a difference between it and the offences which he committed in 1980 and 1989. While there is also some risk that, under the influence of alcohol or drugs, Mr Fardon might commit a sexual offence involving physical violence, that is substantially less likely.
>
> [93] I also note that the risk which the psychiatrists assess that Mr Fardon might commit any form of sexual offence, if released subject to a supervision order, appears to be of the order of risk that the average sexual offender would re-offend. The applicant did not attempt to suggest that, with this level of risk, adequate protection of the community was not ensured.
>
> [94] On balance, it seems to me that if Mr Fardon were released into the community subject to a supervision order including appropriate conditions, adequate protection of the community can be reasonably and practicably managed by the order. There appear to be good prospects that he would

> comply substantially with the requirements of such an order. Some risk remains that he would breach some requirements of the order; but there is little real risk that he would progress to the commission of a sexual offence."

The 'wrong test' argument

[33] The Attorney-General argued that the learned judge's allusion in paragraph [93] of his judgment to the psychiatrists' assessment of risk as "of the order of risk that the average sexual offender would re-offend" indicated that he had misapprehended the tests to be applied under s 30(4) of the *DPSOA*. He had wrongly assessed Mr Fardon's dangerousness by reference to the risk posed by a hypothetical "average sexual offender". To support that argument, the Attorney-General pointed to his Honour's remark at paragraph [66] of the judgment that the "relatively high threshold" which the Act set before an order could be made suggested that the "mere fact" that a respondent presented about the same risk of committing another sexual offence as the average sexual offender would not provide a basis for making an order.

[34] But the primary judge's observation that, as a matter of construction of the *DPSOA*, the fact that a respondent posed the same risk of re-offending sexually as the average sexual offender would not automatically lead to an order was, with respect, entirely correct. Section 13 of the Act (to which his Honour expressly referred by footnote) sets out a range of matters which must be considered in determining whether a respondent constitutes a serious danger to the community without an order. His Honour went on to point out the converse: that a detention order might be made even if the risk were lower than average, if the consequences of the prospective offence were grave.

[35] The psychiatrists' references to the risk posed by an "average sexual offender" as a comparative measure were unsatisfactory, for this reason: there was no attempt at explanation of what proportions of that risk were, or even of how the term "average sexual offender" was to be defined. In isolation from any other information, those references were relatively meaningless; as his Honour observed, somewhat plaintively, the terms the psychiatrists had used as to risk were "rather imprecise descriptors". But the onus lay on the Attorney-General to establish the proportions of the risk Mr Fardon was said to pose. It is clear that the primary judge did his best to make sense of evidence which was, at best, opaque.

[36] The learned judge set out, at a number of points in his judgment, the test which it was necessary for him to apply. An example may be found at paragraph [90]. There is, accordingly, no reason to think that he did not appreciate what it was. That context does not encourage a view that in paragraph [93] he then misapprehended it. Nor do the words of [93] suggest that his Honour elevated the psychiatrists' reference to the average sexual offender's risk of recidivism to the status of a test. The last sentence of the paragraph seems no more than an acknowledgment that the Attorney-General had not attempted to argue that that level of risk *per se* precluded adequate protection of the community. There is no substance in the Attorney-General's contention that the learned judge at this part of his judgment suddenly introduced an impermissible test into the process of review.

[37] In association with that argument, the Attorney-General contended that the primary judge had subjugated the requirement in s 30(4)(a) of the *DPSOA*, of ensuring adequate protection of the community, to a subsidiary consideration, whether adequate protection of the community could reasonably and practicably be managed by a supervision order (s 30(4)(b)(i)). That argument is difficult to understand, let alone accept, in light of his Honour's references in paragraphs [68], [70] and [90] of the judgment to the paramount consideration of ensuring the adequate protection of the community. The Attorney-General did not point to any instance in which the primary judge mis-stated the test. His Honour did not, it is true, restate the test at the end of his judgment, but it was not imperative he do so. It was also suggested that his Honour had focussed on the level of risk and ignored the consequences of the risk materialising, but the content of paragraph [92] shows that that is not so.

The argument that the risk of sexual exploitation was ignored

[38] The second of the Attorney-General's grounds attributes to his Honour a finding that the risk of Mr Fardon's becoming coercive or exploitive in an intimate relationship "was not a risk against which the public should be protected by a continuing detention order". His Honour did not make any finding to that effect. What he did do (in paragraph [92]) was to identify the most likely way in which a risk of re-offending, if it eventuated, would materialise. Then, taking into account the nature of those consequences together with the level of risk, he considered whether the adequate protection of the community could be reasonably and practicably managed by a supervision order. Section 30(4)(b)(i) of the *DPSOA* required him to consider precisely that issue.[15]

[39] The Attorney-General submitted that the primary judge should not have made any comparison between the nature of the offences which Mr Fardon committed in 1980 and 1989 and the possible coercive sexual conduct Mr Fardon might engage in, should he form an intimate relationship. It was, however, entirely relevant to consider whether Mr Fardon still posed a risk of the kind of violent sexual offending which he had previously committed or whether the consequences of offending would be of different proportions. There is nothing in this point.

The unreasonableness/lack of evidence argument

[40] Finally, the Attorney-General contended that the decision was unreasonable and lacked any evidentiary basis. In this regard, it was submitted that the primary judge could not reasonably have made the finding (as he did at paragraph [94]) that there were "good prospects that [Mr Fardon] would comply substantially with the requirements of such an order". His Honour's observations at paragraph [90] misunderstood what were said to be, firstly, the statutory assumption of compliance with the requirements of supervision and, secondly, the psychiatrists' assumption of compliance with those requirements in making their risk assessments.

[41] As to the first, it was said that his Honour's reference to substantial compliance indicated a failure to recognise that full compliance with the conditions of a supervision order was required. The *DPSOA* undoubtedly mandates full compliance, but his Honour did not suggest to the contrary. The submission appears to conflate the consequences of breach of a supervision order, which are

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15 There was a further consideration, under s 30(4)(b)(ii) of the *DPSOA*: whether the requirements of an order could "reasonably and practicably [be] managed by corrective services officers", but there seems to have been no live issue on that point.

dealt with in part 2 div 5 of the *DPSOA*, with the task to be engaged in by a judge in assessing risk for the purpose of determining, as s 30(4)(b) requires, whether a supervision order can manage adequate protection of the community. As this court observed in *Attorney-General (Qld) v Francis*[16] (in connection with a risk of absconding in contravention of a supervision order), "[t]he Act does not contemplate that arrangements to prevent such a risk must be 'watertight'".[17] His Honour, as is evident from the last sentence of the paragraph at [90], was identifying, as was proper, likely consequences should the risk of Mr Fardon's breaching the order be realised.

[42] The suggestion that the psychiatrists premised their assessment of risk on an assumption of compliance is both inaccurate and illogical. If complete compliance with the supervision order were assumed pursuant to s 16(1)(f), since such an order must contain a condition that Mr Fardon not commit an offence of a sexual nature during its duration, the relevant risk must be zero. But what Dr Beech said (in his report dated 14 July 2013) was that a supervision order would, in his opinion, reduce the risk to moderate. He went on to say there remained the question of whether Mr Fardon would abide by an order and expressed his opinion that he was more willing to do so than he had been previously; but he did not qualify his assessment of risk by reference to that consideration.

[43] Dr Grant, on the other hand, did qualify his opinion that the risk of Mr Fardon's committing a sexual offence could be reduced to low to moderate with a supervision order, by adding the proviso that Mr Fardon's "positive attitudes and cooperation persist beyond the prison environment", or (at another part of his report) that Mr Fardon "was able to conform and cooperate to the sanctions imposed by such an order". His opinion depended, it is clear, on whether Mr Fardon maintained a positive and co-operative attitude, not on an assumption that he would at all times adhere to every condition of the supervision order.

[44] What both psychiatrists said on the point raised the obvious question: whether Mr Fardon was willing and able to comply with the conditions of a supervision order. His Honour weighed the evidence, negative and positive, before reaching a finding on that question: that there were good prospects "that [Mr Fardon] would comply substantially with the requirements of such an order". The Attorney-General contends that the finding was not open because there was an absence of any evidentiary basis for it. An examination of the judgment and the features of the evidence to which his Honour referred (summarised at [28]-[29] above) shows that there was, in fact, a substantial amount of evidence to support the finding. In particular, his Honour was entitled to accept Mr Fardon's evidence that he intended to comply; that was essentially a credit finding with which this Court would not interfere. It was, in any event, supported by Dr Beech's opinion; the evidence of the therapeutic relationship with Mr Smith; and the absence of any breaches of prison discipline by Mr Fardon over a significant period of time. The Attorney-General's submission that there was a lack of supporting evidence for the finding is unsustainable.

[45] The Attorney-General has not identified any error in the primary judge's approach to application of the statutory requirements, nor any respect in which his findings of fact were not properly based on evidence. The decision that an order should be

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16 [2007] 1 Qd R 396.

17 At 405.

made for Mr Fardon's release from custody subject to a supervision order was an exercise of discretion properly based on those findings.

Orders

[46] The orders of the Court are:

1. It is declared that sections 3 and 6 of the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 are invalid.

2. The appeal is dismissed.