SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General v Fardon* [2003] QSC 379
PARTIES:	**RODNEY JON WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	SC No 5346 of 2003
DIVISION:	Trial Division
DELIVERED ON:	6 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27, 28, 29, 30 October 2003
JUDGE:	White J
ORDER:	**Robert John Fardon be detained in custody for an indefinite term for control, care and treatment**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – STATUTORY POWERS AND DUTIES – EXERCISE – GENERAL MATTERS – Where respondent convicted of rape and sodomy – where respondent "serious sexual offender" for purposes of *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where respondent's sentence expired – where Attorney-General made application to have respondent detained indefinitely – whether respondent is a "serious danger to the community" – whether court satisfied of this by acceptable, cogent evidence and to a high degree of probability EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – SUFFICIENCY – where applicant required to establish "to a high degree of probability" that respondent is a serious danger to the community – whether applicant satisfied requisite standard of proof EVIDENCE – ADMISSIBILITY AND RELEVANCY – FACTS RELEVANT TO FACTS IN ISSUE – IN GENERAL – where issue is whether there is an "unacceptable risk" that respondent will commit a serious sexual offence – consideration of material relevant to fact in issue *Criminal Law Amendment Act* 1945 (Qld), s 18 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 5, s 8, s 11, s 13, s 14

Penalties and Sentences Act 1992 (Qld), Part 10

Chester v The Queen (1988) 165 CLR 611, referred to
Coco v The Queen (1993-1994) 179 CLR 427, referred to
McGarry v The Queen (2001) 207 CLR 121, referred to
Minister for Immigration & Multi Cultural & Indigenous Affairs v Applicant VFAD [2002] FCAFC 390, referred to
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449, considered
R v Secretary of State; Ex parte Khawaja [1984] AC 74, considered
Re Bolton & Anor; Ex parte Bean (1987) 162 CLR 514, referred to
Trobridge v Hardy (1955) 94 CLR 147, referred to

COUNSEL: R V Hanson QC, with R W Campbell and M Maloney, for the applicant
S R Southwood QC, with P D Keyzer, for the respondent

SOLICITORS: Crown Solicitor for the applicant
Prisoners' Legal Service for the respondent

[1] The Attorney-General has applied to the court for an order pursuant to Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 that the respondent, Robert John Fardon, be detained in custody for an indefinite term for control, care and treatment.

[2] The respondent was convicted of rape, sodomy and assault occasioning bodily harm on 30 June 1989 at Townsville and sentenced to 14 years imprisonment. That sentence expired on or about 30 June 2003. The *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") came into force on 6 June 2003. The Attorney-General applied to the court for an interim detention order in respect of the respondent on 17 June 2003 pursuant to s 8 of the Act. An order was made by Muir J on 27 June 2003 that the respondent be detained until 4 August or earlier order. On 31 July Philippides J made a further interim detention order to 3 October and on 2 October Atkinson J made a further interim detention order to remain in force until the determination of an application under Division 3 of the Act.

[3] The respondent challenged the orders made by the primary judge on the principal ground that the Act was beyond the legislative competence of the Queensland Parliament in that it infringed Chapter III of the Australian Constitution by vesting in the Supreme Court of Queensland functions incompatible with the court's role as a repository of judicial power derived from the reasoning of the High Court in *Kable v The Director of Public Prosecution (NSW)* (1996) 189 CLR 51 and developed in subsequent cases.

[4] The Court of Appeal (de Jersey CJ and Williams JA; McMurdo P dissenting) held the legislation constitutionally valid. Mr Southwood QC for the respondent informed the court on the present hearing that an application had been filed for special leave to appeal to the High Court and it was proposed to seek an expedited hearing.

[5] The application has, accordingly, proceeded on the basis that the Act is a valid enactment of the Queensland Parliament.

The scheme of the Act

[6] The objects of the Act are

> "(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation", s 3.

The Second Reading speech by the Attorney-General and Minister for Justice explained that the new legislation was, in effect, to extend post-sentence preventative detention of sex offenders who pose a serious danger to the community and who did not fall within the provisions of Part 10 of the *Penalties and Sentences Act* 1992 and s 18 of the *Criminal Law Amendment Act* 1945 concerning indefinite detention, see Queensland Parliamentary Debates 3 June 2003 p 2484. Assessments made of the respondent have concluded that he does not fall within the parameters of either of those enactments.

[7] A person the subject of an order made under the Act may not avail himself of the provisions of the *Bail Act* 1980, s 4.

[8] The Attorney-General may apply to this court for an order under s 8 – an interim detention order – and an order under s 13 which is in Division 3 – a continuing detention order or a supervision order – in relation to a prisoner. A "prisoner" is one who is detained in custody who

> "… is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section", s 5(6).

[9] A "serious sexual offence" means an offence of a sexual nature whether committed in Queensland or outside Queensland involving violence or an offence of a sexual nature against children. "Violence" includes intimidation and threats.

[10] The language of s 5(6) is predicated upon an application being made while the prisoner "is serving" a period of imprisonment. The respondent's sentence has expired. Section 8(4) provides that if the court sets a date for the hearing of a Division 3 order but the prisoner is released from custody before the application is finally decided, for all purposes in relation to deciding the application, the Act continues to apply as if the person were a prisoner. The person the subject of the application remains a prisoner for all purposes if ordered to remain in custody after his period of imprisonment ends, s 8(3).

[11] On 30 June 1989 the respondent was found guilty of rape by a jury in the Supreme Court at Townsville. He had pleaded guilty to sodomy and assault occasioning bodily harm. The circumstances of the offences, to which reference will be made below, made the rape and the sodomy, for which sentences of 14 years were imposed, serious sexual offences within the meaning of the Act. It may be noted that on 8 October 1980 the respondent pleaded guilty to raping a 12 year old girl, indecently dealing with her and unlawfully wounding her 15 year old sister. He was sentenced to 13 years imprisonment for the rape and lesser concurrent terms of imprisonment for the other offences. The respondent was released on parole after serving 8 years of that sentence and within 20 days had committed the offences for which he was sentenced on 30 June 1989. The respondent, who was born on 6 October 1948, has an extensive criminal history, principally for stealing, disorderly behaviour and weapons offences. Of some relevance to this application is his plea of guilty in 1967 in NSW to attempted carnal knowledge of a girl under the age of 10 years. He was placed on a good behaviour bond.

[12] Returning to the Act, after an application is filed for relevant orders, a return date is set to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a Division 3 order. If the court is so satisfied, it must set a date for a Division 3 hearing and may order that the prisoner undergo examination by two psychiatrists appointed by the court who are to prepare independent reports and/or order that the prisoner be detained in custody for a specified period, in effect, pending the final decision of the application for a Division 3 order. As has been mentioned, interim detention orders have been made concerning the respondent.

[13] The court ordered reports from Dr R Moyle and Dr G Larder both of whom satisfy the requirement of the Act that they have registration as specialist psychiatrists. The Act requires that each report indicate "the psychiatrist's assessment of the level of risk that the prisoner will commit another serious sexual offence" if released from custody or released without a supervision order being made, s 11(2). There is a recognised body of research and scholarly writing in the field of psychiatry concerning the risk of recidivism including of sexual offences. Although Dr Larder is a well-qualified psychiatrist it became clear that he did not have the necessary expertise in forensic psychiatry to enable him to assess the level of risk of re-offending by the respondent and thus be able to assist the court in deciding whether the respondent constitutes an unacceptable risk to the high standard required by the Act.

[14] Two other psychiatrists, Professor Basil James and Dr Brian Boettcher, were called by the Attorney-General. Both had had previous dealings with the respondent at the request of Queensland Corrective Services. Professor James Ogloff, Professor of Clinical Forensic Psychology at Monash University in Victoria gave evidence in the respondent's case. A number of psychologists who had contact with the respondent while serving his term of imprisonment also gave evidence by affidavit and some were cross-examined.

[15] The governing provision for this application is s 13. It applies if "the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order". By ss (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."

[16] Sub-section 4 sets out the matters to which the court must have regard when deciding whether a prisoner is a serious danger to the community. They are

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

[17] The court may decide that it is satisfied that the prisoner is a serious danger to the community only if it is satisfied by "acceptable, cogent evidence" and "to a high degree of probability" that the evidence is of sufficient weight to justify the decision. This is in contrast to interim orders under s 8 where the court need only be satisfied that there are "reasonable grounds for believing the prisoner is a serious danger to the community". In deciding whether to make an order, be it a continuing detention order or a supervision order, s 13(6) provides that "the paramount consideration is to be the need to ensure adequate protection of the community." The onus is on the Attorney-General to prove that a prisoner is a serious danger to the community, s 13(7).

[18] If the court is so satisfied the court may order that the prisoner be detained in custody for an indefinite term for control, care or treatment, s 13(5)(a), or may order that the prisoner be released from custody subject to the conditions it considers appropriate that are stated in a supervision order, s 13(5)(b).

[19] If the court makes a continuing detention order it takes effect on the order being made or at the end of the prisoner's period of imprisonment whichever is the later and remains in force until rescinded by the order of the court. Such a person remains a prisoner, s 14.

[20] There are detailed provisions relating to conditions for supervised release, amendment of supervision orders and the contravention of a supervision order which it is unnecessary to discuss here. They are, in general terms, very similar to parole conditions or probation orders.

[21] If the court makes a continuing detention order it must review the order at the end of one year after the order first has effect and afterwards at intervals of not more than one year after the last review while the prisoner continues to be subject to the order, s 27(1). Generally speaking, that procedure follows the procedure for an application for an order under s 13.

[22] An appeal from a decision made under the Act to the Court of Appeal is by way of rehearing, s 43(1).

The standard of proof

[23] The Act requires the court hearing an application for a Division 3 order to be satisfied on acceptable and cogent evidence 'to a high degree of probability' that the evidence is of sufficient weight to justify the decision. This standard must be understood against the settled fundamental legal principle that the right to personal liberty is 'the most elementary and important of all common law rights' per Fullagar J in *Trobridge v Hardy* (1955) 94 CLR 147 at 152 and observations to similar effect in *Re Bolton & Anor; Ex parte Bean* (1987) 162 CLR 514 per Brennan J at 523, *Chester v The Queen* (1988) 165 CLR 611 at 618 and *McGarry v The Queen* (2001) 207 CLR 121 particularly per Kirby J at 141. It is well-recognised that an intention to abrogate an entitlement to liberty which is the respondent's on the expiration of his sentence, must be made 'by unmistakable and unambiguous language' per Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen* (1993-1994) 179 CLR 427 at 437. See also *Minister for Immigration & Multicultural & Indigenous Affairs v Applicant* VFAD [2002] FCAFC 390 at paras 104-114.

[24] In this Act the legislature has manifested its intention by unmistakable language that in certain specified circumstances the liberty of the individual may be curtailed. It has further provided that the court, in weighing the evidence and deciding whether to make an order, must have the protection of the community as the paramount consideration. As Brennan J said in *Re Bolton* at 523:

> '… the courts acknowledge that the balance between the public interest and individual freedom is struck not by the courts but by the representatives of the people in Parliament.'

[25] The explanation in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 450 of the well-known test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 of the proper approach to the strength of evidence necessary to establish a fact or facts on the balance of probabilities may be kept in mind. The dictum of Lord Scarman in *R v Secretary of State; Ex parte Khawaja* [1984] AC 74 at 113-4 is apposite: "The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate to what is at stake." The serious nature of the enquiry is underscored by the use of the expression 'high degree of probability' by the legislature.

The presence of the respondent

[26] Arrangements were in place for the respondent to be present by video-link at the Townsville Correctional Centre where he is imprisoned. Mr Southwood informed the court at the commencement of the hearing that his client did not wish to avail himself

of that arrangement then but that he might do so later. In the event, he did not, but gave evidence as the last witness in the proceedings by video-link.

Some issues

[27] Mr Hanson QC for the Attorney-General expressly did not seek a supervision order in the alternative to a continuing detention order. He did concede that the application was not strictly an *inter partes* proceeding and that the court could make a supervision order even if neither the Attorney-General nor a prisoner sought it. Although Mr Southwood took the position that since only a continuing detention order was sought there was no scope for a supervision order he, too, agreed that one could be made, if in the court's view, it was appropriate to do so.

[28] The focus of much of the oral hearing was on exploring statements made by the respondent that he would kill when released (made before the Act was contemplated) to return to what he regarded as the safe environment of prison; his good conduct within the prison system; and whether there was a level of negative reporting about the respondent by some prison officers and psychologists working in the system.

[29] An important aspect of the respondent's make-up has been his tendency to experience panic attacks when in situations of stress particularly brought on outside the confines of prison or in places with which he is not familiar. Dr Moyle was not entirely persuaded that they were true panic attacks without further exploration. A significant personality trait of the respondent, particularly for this assessment, is his tendency to lie and engage in manipulative behaviour. The respondent has admitted himself that he lies regularly. Therefore, what he tells people about himself must be treated with caution whether it be perceived by others as to his advantage or disadvantage.

[30] I propose to deal with the matters to which the court is required to have regard under s 13(4) of the Act, not necessarily in the order set out in the ss, but so as to give some sense of chronology, and some will be dealt with collectively with others.

The respondent's antecedents

[31] An understanding of the respondent's early life comes from his accounts given to Dr Moyle and Professor Ogloff and from accounts given to others operating within the corrections system which are contained in various reports throughout the material. They are unable to be verified since all those who might have been able to do so are, it seems, deceased, or unable to be traced. There is consistency in the broad outlines although differences in detail amounting to contradictions but it is unnecessary to explore them. Because the respondent has spent so much of his adult life in prison it is well documented. All relevant files were made available to Dr Moyle and to Professor Ogloff and all of that material has been exhibited to relevant affidavits.

[32] The respondent was born in Murwillumbah NSW. His parents separated when he was very young and he had no knowledge of his mother. He believes that she left while she was pregnant with another son but he knows nothing of any such family should there be any. The respondent was principally raised by his father who regularly left him in the care of an aunt and uncle on a farm property. The respondent described his father as a chronic alcoholic who was away much of the time either working as a labourer and farm hand or serving prison sentences. He felt unwanted and when his aunt and uncle tired of him he was given to a neighbour where he was

obliged to work on the neighbour's farm as he did for his aunt and uncle. When his father returned any misdeeds were reported to him and he was severely physically punished. He reported that his father would beat him senseless. He reported that his father said he would consider him a man when he could beat him at fighting and then he would be able to leave home. The respondent told Dr Moyle that a neighbour had given him a puppy which he loved but it was used to punish him. If he did wrong the dog was beaten or kicked. On an occasion when his father returned home the dog apparently annoyed him, the father said it was broken in spirit, took a gun and shot it in front of the respondent who was then about 10 years old.

[33] The respondent said that he did not have problems with the academic side of school and the psychological intelligence test (uncompleted) administered by Professor Ogloff put him in the high average range although others have nominated low normal and normal. He reported social and disciplinary problems at school. He resented being humiliated before others and it was this which brought about his expulsion from school. He reported that he punched a teacher who had punished him in front of the class for something which he believed he had not done. He was then almost 12 years old and thereafter worked on the farm or found other labouring jobs.

[34] The respondent left the farm after a fight with his father when he was about 14 in which he was able to beat his father. He reported that his father said that he was now a man and was on his own. He kept no close contact with his family. He lived off occasional farm-hand work to survive and generally lived in the streets until he was taken up by a motor-cycle gang after successfully acquitting himself in a hotel fight. He drifted back onto the streets and kept himself sufficiently by fruit picking, working on the railways and other farm-hand work from time to time.

[35] The respondent's sexual history and relationships are set out in detail both in the files and in the reports of Dr Moyle and Professor Ogloff. He reported that he was sexually abused by an older cousin who was intellectually impaired when the respondent was about 7. He said that this went on for about 3 or 4 years until he was old enough to defend himself against the cousin. His complaints to his aunt and uncle and father were not believed. He also said that he was sexually abused by other cousins and an adult family member. The respondent reported that he was introduced to heterosexual sex by his father at about 11 years of age when his father had a woman whom he had brought home from a pub initiate him into sexual activity. His first sexual experience with a same age girl was when he was about 13 or 14. Although the respondent told Professor Ogloff that he was predominantly attracted to adult women sexually he has engaged in sexual behaviour both in detention as a youth and in prison as an adult with males although the latter activity, at least, is likely to have been as much about power as sexual gratification. As is apparent from this brief recital, the respondent had a childhood devoid of love or appropriate socialising models.

[36] He was married for about 2 years in 1976 and had two sons with whom he has no contact. Those children were placed in foster care and then adopted. Problems arose with them and in 1993 the adoptive parents and the boys (or one of them) met with him for some hours at the prison. He has had no contact since.

[37] The respondent was introduced to alcohol at the very early age of 5 or 6 years by his father and was regularly given alcohol thereafter. He had past general alcohol abuse and was a consumer of a range of illicit drugs. Indeed the respondent contends that

the offences committed in 1978 were whilst he was under the influence of alcohol and "mushroom juice". He was provided counselling by Mr Graham Kennedy in the Townsville Correctional Centre from about mid-1991 until early 1993 and has abstained from alcohol and drugs in prison since. The records show negative results for random urine testing. He had used illegally produced alcohol during his previous long term of imprisonment.

[38] The respondent has had very limited formal education but over the years has worked at his literacy skills. Professor Ogloff observed that vocabulary is one of his strengths. This is evident from letters which he has written which are on his files and also during the oral evidence which he gave to this court.

Criminal history and whether or not there is any pattern of offending behaviour on the part of the respondent

[39] The respondent's extensive criminal history began when he was a juvenile with offences of stealing for which he was sent to Boys' Homes. In summary he has appeared in Magistrates and District Courts on approximately 20 occasions with convictions for some 40 offences. He was sentenced to short terms of imprisonment on five occasions. The offences were, for the most part, property and dishonesty related offences and firearms offences. It is necessary only to discuss those offences with a sexual element. As has been mentioned, when the respondent was 18 he was charged with attempting carnally to know a girl under the age of 10 years on 7 March 1967 in New South Wales. He entered a plea of guilty in the Local Court at Murwillumbah and was sentenced in the District Court at Grafton on 17 April 1967. The only information about that offence comes from the sentencing remarks apart from the respondent's own comments on it. The District Court Judge said

> "I suppose the outstanding feature of the case is the age of the little girl, but that is not the only matter to be considered. There is much to be said for the circumstances in which you committed this offence, stressed by Mr James [presumably his counsel] as circumstances of loneliness and withdrawal from ordinary society, but whatever that may be you must have known that interference with a little child is not to be tolerated at all. However, the medical certificate indicates that the interference was but slight and there appears to be no evidence of any permanent injury or permanent interference with her mental makeup ... I defer passing sentence on you but I order you to be bound over on recognisance in the sum of $100 to be of good behaviour during the period of 3 years from this date and to appear and receive sentence if called upon ..."

[40] The respondent denied to Dr Moyle and Professor Ogloff that any misconduct occurred at all and said that he simply woke up with the 10-year-old girl in the bed with her having come into his bed while he was asleep. It must be presumed that the respondent gave instructions to his lawyer, consistent with the observations of the sentencing judge, to make submissions as to why he committed the offence. They are at odds with his present denial that the circumstances were anything other than completely innocent. This is consistent with the many reports about him which tend to show that he seeks to minimise his wrong-doing or fails to accept responsibility for wrongful actions. Mention was also made by the sentencing judge of the

respondent's concern for his sick father which suggests a continuing relationship beyond the time when he left home at 14 or 15.

[41] In 1978, the respondent's wife had just given birth to a child and he invited friends to celebrate at his house in Redcliffe. In the course of the festivities he forced a girl of 12 who was present at the party to enter a room with him and threatened her with a rifle unless she consented to sexual activity. He allowed her to leave the room to go to the toilet but later forced her back into the room and brutally raped her. It seems that the adults present were too terrified of the respondent to go to her assistance. According to the sentencing judge "the medical evidence shows that she was severely injured". When her 15-year-old sister went to her aid the respondent asked her for sex and on her refusal struck her with the butt of the rifle on her head on two occasions which caused blood to flow. The respondent was arrested that day and charged. He was remanded in custody and on 16 March 1979 was released on bail. He absconded and was arrested in Darwin some 18 months later. He was extradited to Queensland and on 8 October he pleaded guilty to indecently dealing with a girl under the age of 14, rape and unlawful wounding in the Supreme Court in Brisbane. As has been mentioned, he was sentenced to a head sentence of 13 years. The respondent maintains that he has no memory of these events because in addition to consuming alcohol he had been drinking "mushroom juice".

[42] The respondent was imprisoned in Townsville for the first 7 years of his sentence. In May 1988, notwithstanding concerns expressed by a parole officer and a corrections psychologist that he should undergo a comprehensive psychiatric assessment prior to a final decision on his transfer to release to work, he was granted release to work to live in a hostel in Kennigo Street, Brisbane. Shortly afterwards the respondent suffered an anxiety attack in a city street and was taken to hospital. He was returned to secure custody on 26 July. It was recommended that the respondent should undertake intensive counselling to assist his pre-release plans and he was transferred to Wacol where he was to undergo a program before further community release. This program was not available and on 14 September 1988 he was released subject to parole supervision on the usual conditions, see "JAS-1" to the affidavit of Julie Ann Steel filed 29 July 2003.

[43] The respondent left Brisbane on 24 September without the knowledge of his parole officer and hitch-hiked to Townsville where he reported to Townsville Community Corrections a few days later. He made no further contact and a home visit made to his residence on 4 October revealed that he was no longer there. It was on that day that he committed the serious sexual offences for which he has most recently been imprisoned. His parole was suspended on 7 October 1988, the day he was apprehended, and he was remanded in custody with respect to the new offences and his parole subsequently cancelled.

[44] There is no dispute that the respondent was released on parole with very little, if anything, in place for his support and reintegration back into the community. He had nowhere to live and no money and fraternised with people from prison who helped him become a seller of drugs. He had said that he had had consensual sexual relations with a number of women after leaving prison before committing the offences in question. He has told people that he was introduced to the woman who became the complainant because he had heroin for sale. She offered him sex in return for drugs. According to the respondent, they went back to his flat and both injected heroin. They had sexual relations involving oral, anal and vaginal sex. He

saw headlights approaching the flat and was fearful of a police raid because he had drugs and drug paraphernalia in the flat. As he was trying to dispose of this evidence the complainant, he alleged, ran off with his drugs. He chased after her after realising that the approaching people were friends and not the police. When he caught her he hit her in the back, dragged her back to his flat while he kicked her and hit her head against telephone poles. He continued to beat her after dragging her back into his flat.

[45] The respondent pleaded guilty to sodomy but maintained that the sexual conduct was consensual. However the jury accepted the evidence of the complainant and he was convicted of rape. In his sentencing remarks, Mr Justice Kneipp, relying on the evidence of the complainant, said that once inside the house on the first occasion, the respondent "brutally assaulted her and then [he] inflicted a series of most degrading acts upon her". On the respondent's account the only assault related to the alleged theft. As recently as his interview in October this year with Professor Ogloff, the respondent maintained that beating the complainant was "right" because she had tried to steal from him notwithstanding his convoluted attempt, when giving evidence in this hearing, to have the court accept that he was telling Professor Ogloff how he felt at the time of the offence.

[46] It is reported that the respondent said that he committed those offences to secure a return to custody.

[47] On 22 August 1989 he was convicted of stealing between 1 September and 31 October 1986 whilst in custody.

[48] The respondent has spent almost 23 years in prison since October 1980. The three most serious crimes relate to sexual offences. Two involve children. There has been no psychiatric finding of paedophilia. Dr Moyle considers the absence of an understanding of what was in the respondent's mind at particularly the time of the 1978 offences makes it difficult to conclude whether his behaviour is explicitly sexual or merely reflects the style of relating to others that he has used in his life – hostility and violence. For the same reason, a conclusive diagnosis of no paraphilia cannot be made.

Efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs and whether they had a positive effect on him

[49] The respondent has good institutional behaviour particularly since he returned from participation in the Sex Offenders Treatment Program ("SOTP") in Brisbane in 1995. He is noted to be a hard and competent worker. He has engaged in a number of vocational type courses. He completed a fork lift course conducted by Advanced Industry Training on 16 June 1993. He worked at the prison Recycling Plant from 15 September 1993. He undertook a Foundation Nursery Skills course in February 1997 run by a TAFE college. He worked at a nursery from 11 June 1997 and partially completed the Australian College of Tropical Agriculture Certificate 1 in Vocational Access in March 2003. He was granted leave of absence for release to work purposes on 12 July 1998 as a labourer for Chessell Springs Pty Ltd.

[50] However when he was offered professional intervention programs to assist with his personality deficits he has generally declined to participate or failed to attend.

[51] He was listed to complete a stress management program on 5 November 1992 but failed to attend. He failed to attend a similar program in the following month. He did receive a certificate for satisfactory participation in handling anger and conflict in November 1993 and attended cognitive skills workshops for attitudes, choices, responsibility and self esteem in early 1996. I will deal separately with his participation in the SOTP which commenced in late 1994. He was referred to a psychologist to assist him with childhood issues following SOTP recommendations but failed and then refused to attend. He was offered a further SOTP towards the end of 1997 but refused and, at the same time, refused to participate in a cognitive skills program. He was offered one-on-one counselling with a resident psychologist and refused. He failed to attend substance abuse core programs in 1998 and a management relapse prevention course in 2001. He did not attend any programs in CORE cognitive skills programs in 1997, 1998 and 2001 after being enrolled. He terminated psychotherapy sessions which had been recommended by Professor James with Mr de Groot in 1999. He declined to continue with extra support through Mr Tessman-Keys with whom he had become familiar through the 5 months he attended the SOTP and with whom he apparently got along.

[52] Mr Bruce Young, a psychologist employed with Corrective Services, has been professionally involved with the respondent as his sentence manager and psychologist for some years. His first involvement was as a case manager responsible for six monthly reviews on the respondent's progress and rehabilitation. The respondent refused to attend the sentence management reviews conducted by Mr Young on 16 December 1999 and 26 June 2000. Mr Young concluded that a multi-disciplinary approach was required for the respondent's management and rehabilitation. On 2 June 2000 a meeting involving management coordinators and support officers, psychologists and counsellors met to discuss rehabilitation options and release plans for the respondent. As a result he was referred to Professor Basil James for a report concerning farm placement and the benefit of one-to-one counselling as well as other release plans.

[53] Professor James had first reported to Corrective Services about the respondent after examining him in July and August 1998. This was to provide an opinion as to his psychiatric status and to make comments about his rehabilitation. Professor James noted that the respondent was not suffering from any psychiatric illness, that he engaged well and seemed keen to share his experiences. He seemed to have good insight into the nature of the problems and those responsible for his rehabilitation. In Professor James' opinion his early developmental experiences were such that, in addition to more socially orientated and adaptive capacities, his "inner world" needed serious and focussed attention. If this were not given he believed "both Mr Fardon and the staff responsible for rehabilitation would be facing an impossible task."

[54] In the absence of a suitable special facility in Queensland for treating therapeutically people with the respondent's problems Professor James considered that "the most important missing ingredient to date has been individual long-term psychotherapy of a dynamic kind and in Mr Fardon's case based on the so-called 'self-psychology'."

[55] Professor James considered moving the respondent to the prison farm without specific preparation would constitute an unacceptably high risk. He said that the respondent

> "speaks of the unbearable anxiety and inability to cope which besets him when he is in a less-structured environment, and although he would very much like to be able to make the adjustment to the wider community he is aware of the gulf that exists between his present ability to deal with it, and what would be required."

He believed that the respondent's transfer to the open-prison farm environment could occur but slowly with careful psychotherapy and preparation.

[56] Corrective Services acted on Professor James' recommendation that he should receive treatment from Mr de Groot, who worked with Professor James and who he described as the most appropriate psychotherapist in Townsville.

[57] It was proposed that the respondent should receive weekly 50 minute psychotherapy sessions to assist him "with the slow process of the integration of his personality". Mr de Groot had six meetings with the respondent but on the 16 December 1998 the respondent terminated the sessions because he believed that there was a conspiracy between Mr de Groot, Professor James and the Ombudsman. Mr de Groot reported

> "I would hope that now that time has passed, this man might reconsider and re-engage into psychotherapy as a means of providing a safer entry into society. This would also provide an ongoing backup that he could utilize on a twice-weekly basis when finally released. Without this, I feel that his chances of survival when released are slim.
>
> I believe that until this man undergoes and completes a course of therapy with a person skilled in psychodynamic psychotherapy, the future holds little for him other than possible re-offending to gain re-entry into the penal system."

[58] Professor James reported in August 2000 of a further meeting with the respondent. He spoke to Professor James of his belief that he had in many ways "painted (him)self into a corner" meaning that he had created a sense of apprehension with respect to his potential re-offending. He told Professor James that such communications had been intended to impede any precipitate discharge. Professor James reported that he expressed "more than once in quite unequivocal terms his assurances that he would never commit a serious offence". All Professor James could offer at that point was a "round table conference" about the respondent's rehabilitation.

[59] Subsequently the respondent has refused to transfer to the Moreton Correctional Centre in Brisbane to have his anxiety disorder treated and to have his behaviour monitored. On 6 February 2001 Mr Young reported to the General Manager of the Townsville Correctional Centre concerns held by a number of the professionals in the corrections system about the respondent's failure to commit himself to rehabilitation programs. Although Mr Southwood challenged Mr Young about

unjustifiably strongly expressed views about the respondent, they were only matters of detail and did not affect the overall tenor of the report that there had been singular lack of success in rehabilitation strategies for the respondent due to his lack of co-operation.

[60] Mr Young prepared a detailed report for the Townsville Regional Community Corrections Board dated 11 October 2002. He concluded that without a solid pre-release program and psychotherapy and psychological intervention aimed at reducing the respondent's level of fear of returning to the community, the release plan which the respondent had then put forward was not viable. Reference was made to his recent behaviour at a church-based integration program which was said not to have been appropriate. The directors of that program gave evidence at this hearing. Although the respondent attended on 12 occasions he was oppositional to the life skills program being offered. There was thought to be an inappropriate attachment to a female with a seven-year-old boy who was a volunteer at the centre.

[61] Mr Young recommended that the respondent, apart from receiving professional support, demonstrate his ability to progress in his reintegration by residing at the farm before being considered for post-prison release. He recommended that he complete all programs which had been recommended to him previously including cognitive skills, anger management, substance abuse education programs and substance abuse relapse and prevention programs and the SOTP. Mr Young continued to hold those opinions in a memo dated 3 October 2002 to the Regional Director of Corrective Services and at this hearing.

[62] Ms Berryl Buckby, a psychologist with Corrective Services, commenced seeing the respondent in April 2003 for the purposes of assisting him to cope with anxiety prior to his release into the community. She saw him for seven formal sessions varying in length from between 40 minutes to 90 minutes. After the seventh session she discontinued sessions. She found him upset and angry but modestly cooperative. She thought that up until the last session there had been some trust and respect between them but on this occasion on 3 July 2003 he was "extremely resistant and seems to have regressed to a pre-intervention stage". She said that he was very focussed on venting his anger and frustration.

[63] The respondent engaged in therapeutic counselling with Mr Russell Fraser, a social worker employed as a tutor on a part time basis by Corrective Services in the Townsville Correctional Centre. He saw the respondent approximately weekly for about an hour from about October 2000 until October 2001 with a break of approximately 6 weeks over Christmas. He had no contact with the Centre during 2002 but during the therapy sessions had offered to assist the respondent when he was released from prison. He was approached more recently to see if he was still interested in following through that offer and said that he was. He has spoken to the respondent for about 10 minutes since the end of the therapy program in October 2001. He believes that he had been able to establish a good rapport with him. When the sessions concluded he thought that the respondent had demonstrated a desire not to re-offend because of the harm this would cause his victims. He believes that the respondent has developed "his own internal sanctions against re-offending and to have a deeper level of insight into his offending behaviour". In oral evidence Mr Fraser said that during the sessions he believed the respondent "started to develop

some awareness – or a greater level of awareness of the effect that his behaviour had on other people".

[64] Mr Fraser is part of the plan advanced on behalf of the respondent should he be released into the community. He makes the point that it is likely that the respondent will continue to have difficulties with psychologists and/or counsellors who are employed within the prison system because he perceives their authority as being derived from the prison and having a punishment and not a therapeutic purpose.

[65] The respondent participated in the SOTP at the Moreton Correctional Centre in Brisbane between September 1994 and April 1995. It was a 45 week program of which the respondent completed 26 weeks. He was said to be transferred out of the program because of inappropriate institutional behaviour and not because of his response to the program although he does seem to have inhibited the other participants from progressing satisfactorily. Mr David Tessmann-Keys was a psychologist in the program and the respondent's individual case manager over a five month period. He prepared a lengthy summary of the respondent's participation in the program dated 6 June 1995. He gave oral evidence at the hearing but was dependant upon his reports for his recollection of events and so it is appropriate to refer principally to what he wrote at the time. Psychometric assessment was administered to the respondent when he entered the program. Mr Tessmann-Keys noted

> "Mr Fardon's extreme scores on the Superego Strength Socialisation Depression and Psychoticisim [sic] scales would seem to indicate that his general motivation is of a hedonistic nature and often marked by a pessimistic approach to his life situation.
>
> Such scores may be correlated with his generally demanding and often pessimistic interactions with treatment staff. His hedonistic tendency may also be correlated with what appears to be a lack of concern for the welfare of others as indicated by the nature of his crimes and his apparent inability to establish any sense of empathy for his victims (superego strength).
>
> His high scores on the psychoticisim [sic] scale (P) is consistent with his scores on the paranoia (Pa) and schizophrenia (Sc) scales. Thus indicating that his thoughts are often disorganised, he retreats from reality and he often feels persecuted.
>
> ... Therefore, although self sufficient and self driven his hedonistic tendencies, seeming driven by a lack of trust and a sense of persecution often defends himself both physically and intellectually in an anti-social fashion."
>
> He did not complete an exit assessment since he left the program prematurely.

[66] The respondent completed the pre-entry and treatment planning phases of the program and was involved in the effective relationships and victim issues module when he was transferred out of the program. The reports which Mr Tessmann-Keys received from the facilitators of the pre-entry phase indicated that although the

respondent exhibited a high level of motivation and a considerable depth of insight into his own behaviours he was restricted by his tendency to regress to past behaviours based on his beliefs about the correctional system and entrenched patterns of interaction with others. He was noted to have discarded physical violence as a coping mechanism which was seen as encouraging. He was noted to be inhibited by his earlier experiences of childhood abuse and requested additional support which was provided to him by Mr Tessmann-Keys in one-on-one contact.

[67] His involvement in the treatment planning module was marked by high motivation but inhibited by his perceived unjust treatment by the system and expectation that the treatment providers "must fix him" representing, as Mr Tessmann-Keys observed, a limited sense of ownership of his problems. Throughout the victim issues module the respondent was not prepared to consider the effects of his offences on his victims. This was thought to have been blocked by a very powerful victim's stance based on his own sexual and physical abuse as well as his treatment while incarcerated. Mr Tessmann-keys noted

> "Throughout his group participation Mr Fardon would often seek the support of other group members, diverting from the treatment issues and focussing on legalistic justifications for his behaviour. This served to inhibit other group members' learning opportunities. Since his departure the group has regained direction and are beginning to function quite well."

[68] During his contact with the respondent, Mr Tessmann-Keys encouraged the respondent no longer to allow himself to use his early experiences as a defence against taking responsibility for changing his behaviours and beliefs and to develop alternative coping strategies. Mr Tessmann-Keys noted the respondent's ability to verbalise and conceptualise alternative behaviours but he seemed unable to implement such changes. Although no charges were laid, the respondent was transferred back to Townsville after allegations that he had made threats of physical violence towards another inmate and had also soiled a number of inmates' cells. That conduct operated against a conclusion that progress was being made.

[69] The respondent had received drug and alcohol counselling over a two year period in Townsville from Mr Kennedy but he had no structured relapse prevention plan. Dr Moyle and others considered that although the respondent had not used illicit substances whilst in prison and contended that he had a strong motivation not to do so, his extensive history of substance abuse demanded a more formalised approach.

[70] In his affidavit filed on 31 July 2003 the respondent explains that he declined to take part in a number of courses which had been recommended by Mr Young because they had been completed as part of the SOTP course at the Moreton Correctional Centre. He deposes that he did not complete the full SOTP course "because of the trauma I was undergoing at that time as a result of the realisations that occurred for me during the SOTP," contrary to Mr Tessmann-Keys' explanation. He says that has declined other offers to complete the course because of his past experiences of participating in the program which brought him so much grief when he realised how much suffering he had experienced as a victim. He says he feels shame and remorse for what he has done to the victims of his crimes and has tried to convey this to psychologists and others.

[71] The respondent complains that since 1993 he has consistently sought assistance to reintegrate into the community prior to his release but it has not been provided to him "in any consistent or meaningful way". He explains that he chose not to complete his leave of absence with the church group because it was close to a park where other former prison inmates lived or congregated. They came to the centre for their lunch, recognised the respondent and approached him with offers of drugs, alcohol and sex which he declined. This was contrary to the account given by the directors of the centre who were concerned about his inappropriate attitude to women volunteers and to the program generally.

[72] The respondent says that he is highly motivated to leave prison and to live and participate in the community again. He explains his anger or emotional response to prison authorities when they have spoken to him about release because he believes they have consistently ignored his requests for help and that their motives in asking him questions about release are questionable. His response to the allegations that he has said that he would kill to return to custody is to deny that he did so. He had put a "spin" on his comments by suggesting that what he was saying was expressing his fear that he would end up living with other ex-prison inmates and that if trouble broke out he would be blamed and would return to prison. Expressing his fears, he says, has led to him being misinterpreted as making threats.

The report prepared pursuant to s 11 and other medical, psychiatric, psychological or other assessment relating to the respondent

[73] Section 13(4)(a) requires the court to have regard to the reports prepared by the psychiatrists pursuant to s 11 of the Act. Sub-section 13(4)(b) requires the court to have regard to any other medical, psychiatric, psychological or other assessment relating to the prisoner. Dr Moyle, a very experienced forensic psychiatrist and Professor James Ogloff an eminent psychologist in the field of forensic risk assessment gave detailed attention to the question of the risk of the respondent re-offending by committing a serious sexual offence. They had very similar methodologies and differed little in their assessment of the respondent. They prepared detailed reports and gave extensive oral evidence. They had access to and read all information on the respondent held by Corrective Services, court documents including witness statements and sentencing remarks. They both interviewed the respondent for slightly more than four and a half hours over a day and were made familiar with the provisions of the Act. The respondent was informed of the purpose of the interviews and that the discussions would not be confidential. He co-operated with them in the assessment.

[74] Professor Basil James, a consultant psychiatrist in private practice in Townsville, has seen the respondent as mentioned on three occasions at the request of Corrective Services – July and August 1998 and August 2000. He has written a number of reports about the respondent, to which I have referred earlier, although none after the implementation of the Act. He was asked to consider the application of both s 18(4) and (6) of the *Criminal Law Amendment Act* 1945 and the *Mental Health Act* 2000 to the respondent. He is a highly qualified psychiatrist having been a Professor of Psychiatry at both James Cook and Queensland Universities and Professor of Psychological Medicine at the University of Otago in New Zealand and some time Director of Mental Health in the Department of Health in Wellington, New Zealand. He has concluded

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

[75] Dr Brian Boettcher was asked to review and report on the respondent in November 2000. He was then Director of the Forensic Mental Health Service in North Queensland. He has qualifications both in psychiatry and law and extensive experience in making forensic assessments. He doubts that his opinion about the respondent would be revised if he saw him now. He wrote

> "The most important aspect of this report is that he does not suffer a mental illness. He does however, suffer from a Socio-pathic Personality Disorder and this was mentioned in 1994 in the progress notes. His panic attacks continue to be a major problem for him.
>
> I believe that if he is discharged from Prison, he will re-offend. He said that he would become extremely angry if he is just thrown out onto the street without any assistance and that he may co-operate with a program that is being worked out between himself and the Psychologists. He is very fearful of tackling this program however.
>
> He, himself cannot give me any guarantees that he will not re-offend again and I think with the very serious risk that he presents, when one takes all the factors into account, then there is a high chance of him of re[sic]-offending.
>
> He is very resistant to the idea of any medication being used, although there may be some that could help him with the panic attacks.
>
> I have read Professor Basil James' report and can concur with it completely. In view of the serious risks he presents of re-offending, and the threats that he has made together with his complete lack of remorse and belief that the system has completely abused him, together with the lack of treatable psychiatric diagnosis, I believe that indeterminent [sic] sentence should be considered."

[76] All of the psychiatrists concluded that the respondent does not suffer from a disease of the mind and neither is he unable to control his sexual instincts. For many years he has been diagnosed as suffering from an Anti-Social Personality Disorder brought about by his early developmental experiences and consolidated by prolonged periods of institutionalisation.

[77] A major concern to the psychiatrists and psychologists are the respondent's panic attacks from which he suffers when in an unknown and therefore, to him, unsafe environment. He is resistant to taking any medication which may assist him. Over

the past several years he has made threats on four occasions to kill someone, either a Corrective Services officer or a member of the wider community should he be released, in order to be returned to prison. He has told many people over the past decade that prison was his home and he could not function outside. At least since his pending release date approached he was expressing great anxiety about the need for assistance to prepare him for life back in the community. He expressed this concern at his appearance before the Townsville Regional Community Corrections Board on 11 October 2002:

> " ... maybe, if, some form of Home Detention and Parole is granted to me, with conditions that I seek or they make me have help by way of a psychologist or counsellors or debrief me, take some of the post-traumatic stress disorders and everything like that, ok, I'm anti-social, anti-everything. I can't fit into society. I can handle in here because I am used to it, I have survived in here. But put me into an alien environment now, how am I going to react, I don't know, I can't answer those questions. I am sorry. But I know I'm not going to survive there."

[78] It is appropriate to consider Professor Ogloff's report and evidence when considering that of Dr Moyle. Both Dr Moyle and Professor Ogloff were careful to stress that present scientific tools did not permit a determination, with a reasonable degree of accuracy, of an individual's likelihood of being violent or re-offending sexually. What has been developed and validated are risk assessment schemes principally in studies in Canada and the United Kingdom and used in Australia. Those familiar with both the schemes and the person under investigation and having the necessary skills are able to identify with 'some degree of accuracy' the category of risk into which the person is likely to fall. Beyond that, from a scientific perspective, it is impossible to state with confidence whether a particular individual will re-offend. A clinical judgment may be made, informed by actuarial analysis, about the risk which a particular offender presents. Dr Moyle and Professor Ogloff and, to a lesser extent, Professor James and Dr Boettcher, approached their assessment of the risk of the respondent committing a serious sexual offence in this manner although the latter were much more comfortable with and dependant upon clinical assessment informed by a detailed knowledge of the respondent's history.

[79] Dr Moyle identified a number of factors currently considered in the literature most relevant in determining who are most likely to be recidivists:

- those who fail to complete sex offender programs;
- those who have a history of significant substance abuse;
- those who have negative mood states;
- those who have considerable anger and hostility;
- those who have access to victims;
- those who are younger;
- highly significant are those who have a variety of victims;
- those who have more than one paraphilia;
- greater than five offences;
- a lower IQ;
- higher psychopathy rating;
- those who have difficulties maintaining intimacy;
- those with negative social influences;

- those with anti-social attitudes or attitudes that promote sexual offending;
- those with poor general self-regulation.

He identified the respondent with many of these factors. As to the challenge from Mr Southwood that the respondent was a model prisoner, Dr Moyle pointed out that this was in the structured prison setting so far as daily functioning was concerned and that the respondent had engaged in oppositional behaviour to participating in programs designed to assist him to rejoin the community.

[80] Both Dr Moyle and Professor Ogloff administered the psychopathy check list-revised (PCL-R). The scoring clearly involves some subjective assessment of the historical material but they had similar scores – Dr Moyle assessed the respondent at 34 out of a possible 40 and Professor Ogloff at 31. Professor Ogloff noted that there is a standard error of measure of approximately three points. A score of 0-2 may be given.

Personality Attributes Contributing To the Concept of Psychopathy	**Dr Moyle**	**Prof. Ogloff**
Glibness/superficial charm	2	2
Grandiose sense of self-worth	1	1
Need for stimulation/proneness to boredom	1	1
Pathological lying	2	2
Conning/manipulative	2	2
Lack of remorse/guilt	2	2
Shallow affect	2	2
Callous lack of empathy	2	2
Parasitic lifestyle	2	1
Poor behaviour controls	1	1
Promiscuous sexual behaviour	1	1
Early behaviour problems	2	2
Lack of realistic long term goals	2	1
Impulsivity	1	1
Irresponsibility	2	2
Failure to accept responsibility for actions	2	2
Many short term marital relations	1	1
Juvenile delinquency	2	1
Revocation of conditional release	2	2
Criminal versatility	2	2

Higher scores on the PCL-R are suggestive of an increased level of risk for re-offending. On Professor Ogloff's assessment the respondent fell at the bottom end of the high range, indicating that he demonstrates many but not all of the personality traits and behaviours associated with psychopathy. On Dr Moyle's assessment he is in the middle of the high range of risk.

[81] It is generally accepted that as an individual ages the personality characteristics associated with psychopathy remain relatively stable but the behavioural aspects tend to reduce over time. At least in the context of the prison system the respondent's

behaviour has become quite stable since the early 1990's. During his earlier term of imprisonment and at the commencement of this term there was significant volatility.

[82] Dr Moyle identified a number of potentially modifiable high risk factors, namely:

1. Violence occurs when intoxicated.

2. Panic disorder is treatable if he accepts treatment (Dr Moyle has some reservations about whether he actually suffers from this disorder).

3. He could control his thinking to cease persistent angry, hostile responses and give effect to what he has learnt in his anger management and conflict resolution courses.

4. Limited access to potential victims to demonstrate that through his own efforts he can minimise his risk to others.

5. Increasing manual work in lower risk environments would allow him to continue to achieve occupationally as he has in the past.

6. Individual treatment could be undertaken targeting his sexual and physical violence.

[83] Dr Moyle concluded that the respondent was at the top of any measurable risk assessment for committing an illegal offence which meant that his risk of offending 'would be greater than 50:50 based on research outcome data currently available'. The risk that a sexual offence would be committed if he re-offends is 'approximately half of that'. Dr Moyle explained that the respondent fell into the group of 51 per cent of persons likely to re-offend and of that category of persons there was a greater than 50 per cent chance that he would offend with a serious violent sexual offence. This was consistent with Professor Ogloff's findings.

[84] Professor Ogloff dealt with other assessment schemes referred to descriptively by Dr Moyle. The HCR-20 was developed in 1995 and revised in 1997 to provide information about both static and dynamic factors that have been found to relate to a likelihood of re-offending violently. They are historical, clinical and risk management and have been found to relate significantly to the risk of future violent offending. It takes into account the respondent's past behaviour, current functioning and future level of risk, that is, risk management. He found that the respondent's level of risk on the historical subscale placed him at a high risk of re-offending violently but identified two risk factors that the respondent did not demonstrate fully, that is, that he was not under 20 when the first violent incident occurred and he has never had a major mental illness. Professor Ogloff concluded that the respondent's clinical factors were more positive than his historical factors and would serve to moderate the risk of re-offending indicated by his historical scale. Clinical risk factors alone place him at a moderate level of risk of re-offending violently.

[85] As is not surprising, Professor Ogloff concluded that the most unknown component for risk for future violence is the risk management subscale. The fact that the respondent re-offended so quickly when he was last released from custody indicated

how important any risk management strategy would be for him. Professor Ogloff wrote:

> "The level of risk represented by this subscale is based on considerations about the feasibility of his future plans, exposure he might experience to destabilising influences in his life, a lack of personal support in his life, non-compliance with remediation attempts that might be put into place in the future, and the sources of stress that Mr Fardon is likely to encounter in the future."

It is here that the major difference between Dr Moyle and Professor Ogloff emerges. In Professor Ogloff's view the management plan proposed suggests "some degree of hope" that the respondent can be managed in the community. Dr Moyle considers it is premature, but possible.

[86] The HCR-20 results indicate that the respondent is 'at a moderate to high level of risk for re-offending violently in the future' and 'only with careful and realistic risk management planning would his overall level of risk be tempered'.

[87] Professor Ogloff considered two further instruments for addressing the respondent's level of risk for sexual re-offending. These were the Static-99 that is historic factors which relate to the risk of sexual re-offending and the SVR-20 – the Sexual Violence Risk developed to identify a comprehensive range of factors related to the risk of sexual violence. As to the historical factors, Professor Ogloff concluded that his level of risk for sexual re-offending fell into the high category but was tempered by his age, that is, the studies indicate that offenders with scores in the high category who went on to offend sexually ranged from 39 per cent over five years, 45 per cent over 10 years and 52 per cent over 15 years. Given the respondent's age the level of risk for re-offending would decrease over time.

[88] There are some factors in the sexual violent risk instrument which diminish the risk of re-offending. The respondent does not appear to have suicidal or homicidal ideation, he does not have a major mental illness and does not appear to have a paraphilia. As mentioned, Dr Moyle is unable, on the present state of the evidence, to come to any conclusion about paraphilia. Professor Ogloff concluded:

> "Taken together, Mr Fardon would appear to fall into the moderate to high risk category of risk for re-offending sexually and for re-offending violently in the future. His historical and psychosocial risk factors are high, and this is consistent with his history of behaviour prior to his present period of incarceration. Mr Fardon's degree of stability and the changes that have occurred in his behaviour serve to moderate his overall level of risk to some extent. As I will discuss in the final section of this report, the likelihood that Mr Fardon will re-offend violently will depend upon the extent to which his level of risk could eventually be managed in the community and the extent to which he would be responsive to treatment."

[89] He thought that this might be managed in the community with intensive community supervision and after-care. In particular the supervision order should include an order that the respondent stay in a designated residence where he can be supported and

supervised; an order to abstain from the use of alcohol and drugs; an order to engage in ongoing treatment with an experienced counsellor particularly to assist him to manage his level of distress which might occur as a result of adjusting to the community, and offence related and specific behaviours. Professor Ogloff emphasised in oral evidence that when he referred to supervision

> "I mean intensive. I don't mean checking in once a month in the office … A man like Mr Fardon given his level of risk would require an experienced Community Corrections Officer who is prepared to engage the other supports that have been put in place to, first and foremost, be certain that if any relapse occurred in any of the risk factors – and I mean specifically here beginning to use substances, beginning to show any violence in the community, that, immediately, that the Community Corrections would be notified and that behaviour would be simply – there would be no tolerance for such behaviour." t/s 238.

Dr Moyle considered quite strongly that the respondent should not be released quickly

> "… until a graded release has occurred and he's been allowed to show those that are monitoring his graded release that he is able to comply with the community mental health professionals, such as Mr Fraser, until attendance has been stabilised and he has been able to sustain that attendance even when difficulties arise … He would need to have some activity to engage himself in during the day, designated employment, voluntary employment and other activities and social support away from potential victims and children. That can be assessed by a Community Correctional Officer doing random checks on whether he is complying with it. … A designated agreement to abstain from all drugs and alcohol but a measurable agreement. Mr Fardon should be monitored by random urine and blood samples if he is out in the community and he should be able to show that he is supported in that approach by attendance with the designated drug and alcohol counsellor, and again this should occur even when difficulties arise, when he starts to panic or when he has an upset he should not abandon those who have tried to provide support, and to counter any impulse to re-offend, if he finds himself out in the community and doesn't feel like he's coping … I think there would be several steps to take before I could recommend a community supervision order in any shape or form. t/s 43-4.
>
> He suggested that the respondent first be moved to an open classification within the prison system.

[90] Dr Moyle concluded that the modifiable factors which he associated with the respondent 'are not likely to be adequately managed quickly'.

> "At present he has not achieved the observable outcomes for safe community placement to be recommended and therefore he could only be released on criminological grounds, i.e. end of sentence, not because a clinician has recommended release."

[91] He recommended against the respondent's 'immediate release' but he could support release for short periods as a trial in light of the support offered to the respondent in the community.

[92] Professor Ogloff agreed that a graded release program with monitoring would "perhaps" be a preferable option. He did not agree that change within the corrections system, to another locality, to ascertain if he can cope with change would be of assistance.

The Proposal

[93] The respondent has put forward a proposal for his release into the community. It has been considerably changed and refined since Dr Moyle interviewed him on 7 July 2003. He told Dr Moyle that he proposed living with a woman friend who has visited him in prison on a temporary basis but had no other firm plans. By the time he was interviewed by Professor Ogloff on 13 October 2003 a more comprehensive program had been developed. Mr and Mrs A B have known the respondent for six years through their visits to the Townsville Corrections Centre with a church ministry group (not the life skills group referred to earlier). They have visited the respondent on family days for about five years and believe they have a good relationship with him. The respondent broke off contact with them about 12 to 18 months ago. He told them that it was because he understood that he feared that they might become the target of community vigilantism if it became known that they had offered to accommodate him on release. In light of his personality traits that explanation must be treated with some reserve. Mr and Mrs A B arranged a visit with the respondent on 21 October 2003 and resumed their friendship. Notwithstanding their detailed knowledge of the nature of the offences committed by the respondent they are prepared to have him live in their home for as long as necessary to rehabilitate him to community life aware that he will be alone in the house with the wife when the husband works three nights a week. The wife is employed during the day. The husband works one day and three nights and would otherwise be available to offer support to the respondent. They gave oral evidence and seemed firm in their commitment. They expressed the view in their affidavits that a person has a right to rejoin society and amend his life once his sentence is served in reparation for crimes committed.

[94] A part-time court and prison chaplain employed by the Salvation Army has known the respondent for some 10 to 14 years, seeing him approximately weekly over that period and feels he has developed a comfortable relationship with him. He is willing to offer the respondent consistent moral and practical support on most afternoons during the working week.

[95] A Uniting Church prison chaplain who has known the respondent for about four years and assisted him in dealing with the death of friends in prison has offered assistance to the respondent and to liaise with professional counsellors within the Uniting Church. She has also offered to share some recreational activities with him. She offers support for Mr and Mrs A B who live nearby.

[96] A social work co-ordinator with Catholic Prison Ministry in Brisbane has had eight discussions with the respondent since September this year about his plans post-release. She has made arrangements with Centrelink and an employment agency on his behalf. She has acknowledged the slow process that his desensitisation to

institutional life will involve and has discussed this process with Mr Russell Fraser. She notes that the respondent will be able to garden and interact with animals at Mr and Mrs A B's home, something which has assisted him in the prison environment.

[97] Mr Fraser proposes continuing to treat the respondent in the community two or three sessions weekly and would otherwise be available during normal weekly working hours. Although Mr Fraser's sincerity was not in doubt, nor his professionalism, I was concerned that he appeared to accept the respondent's own assessment of his newfound empathy with his victims. As the experienced psychiatrists and psychologists have concluded, the respondent has a very complex personality, lies and is manipulative.

Conclusion

[98] The very detailed reports and evidence of Dr Moyle and Professor Ogloff together with the reports and evidence from Professor James, Dr Boettcher and the psychologists within the Corrective Services system are cogent and acceptable evidence and, together with the respondent's antecedents and criminal history, establish to the requisite standard that the respondent is a serious danger to the community in that there is an unacceptable risk that he will commit a serious sexual offence if released from custody. The question is whether that risk can be managed by a supervision order. I am conscious of Professor Ogloff's opinion that it is not until the respondent is tested in the context of a suitable release plan that it can be known if he can be released safely. But the consequences of failure are very serious. I accept that he has had 16 escorted leaves of absence in recent times without serious incident but that is a minor first step. I am not persuaded that his recent expressions of empathy with and apology to victims are deep-founded or come from any understanding of what it is to be the victim of his violence.

[99] The accommodation and support proposals from lay people and professional counsellors are not unrealistic. Corrective Services has not indicated whether that level of 'intensive supervision with a highly qualified community corrections officer with a focus on the provision of after-care and long term supervision' as specified by Professor Ogloff is available in Townsville or at all.

[100] What is of major concern is the failure by the respondent to participate in or to participate to completion in a course or courses of therapy which address his 'inner world' and give him risk minimisation strategies whether related to his violent sexual offending or alcohol and drug relapse prevention. Such skills are also necessary for his own well-being as has been stressed particularly by Dr Moyle and Professor James. That this has not occurred in the past is, largely, because of the respondent's determination to maintain some level of independence from the authorities which he does by being defiant. For some ten years there have been efforts made to assist the respondent towards reintegration into the community. Contrary to the respondent's assertions, the system has not failed him this time, whatever serious criticisms might be made of his last release. He has, for the most part, chosen not to take some responsibility for his own rehabilitation and engage in appropriate treatment. His work ethic and skills are a positive note for reintegration but unless he can address the other concerns fundamental to his personality he constitutes a serious danger to the community which cannot be addressed at this time by a supervision order.

[101] 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. But until that occurs, the respondent must be detained so that the community may be adequately protected.

[102] The order is that Robert John Fardon be detained in custody for an indefinite term for control, care and treatment.