SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Fardon* [2019] QSC 2
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Applicant) **v** **ROBERT JOHN FARDON** (Respondent)
FILE NO/S:	BS 5346 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 January 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2018
JUDGE:	Bowskill J
ORDERS:	**The application for a further supervision order is dismissed.** **Order for non-publication of this decision for a period of seven (7) days to be made.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the Attorney-General applies for a further supervision order for the respondent, who has been subject to, and complied with, a supervision order for the past five years, and been subject to various orders for detention and supervision under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 for the past 15 years, following convictions of serious sexual offences committed in 1978 and 1989 – where the respondent is now 70 years of age, and has not been convicted of any criminal offences for the past 30 years – where the application for a further supervision order is pressed on the primary basis that the respondent presents an unacceptable risk of committing a serious sexual offence, due to the potentially stressful and destabilising effect on him of trying to find independent accommodation absent a supervision order, and dealing with media scrutiny and attendant community vigilantism as a result of his notoriety – where the

evidence of three psychiatrists is that even in the face of such stressful circumstances, the risk of the respondent sexually reoffending is low, taking into account the respondent's age, and objective data supporting the significant reduction in risks of reoffending by sexual offenders over the age of 65; the 30 years that have passed since his last sexual offence; his compliance with a supervision order for the last five years; the significant lessening of the respondent's anti-social and psychopathic personality traits, demonstrated in part by his ability to comply with a stringent supervision order for five years; his demonstrated abstinence from alcohol and drugs for many years, which was a significant driver of his past offending; the absence of evidence of a sexual paraphilia, such as paedophilia, and the absence of evidence of ongoing sexual preoccupation; and his positive and sustained engagement with his treating psychologist – whether the court is satisfied, on the evidence, to the requisite high degree of probability, that the respondent is a serious danger to the community in the absence of a further supervision order

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), ss 13, 19B, 19C, 19D
Supreme Court of Queensland Act 1991 (Qld), s 8

Attorney-General (Qld) v Beattie [2007] QCA 96
Attorney-General (Qld) v DBJ [2017] QSC 302
Attorney-General (Qld) v Fardon [2003] QSC 331
Attorney-General (Qld) v Fardon [2003] QSC 379
Attorney-General (Qld) v Fardon [2005] QSC 137
Attorney-General (Qld) v Fardon [2006] QSC 275
Attorney-General (Qld) v Fardon [2006] QSC 336
Attorney-General (Qld) v Fardon [2006] QCA 512
Attorney-General (Qld) v Fardon [2007] QSC 299
Attorney-General (Qld) v Fardon (No 2) [2011] QSC 128
Attorney-General (Qld) v Fardon [2011] QCA 111
Attorney-General (Qld) v Fardon [2011] QCA 155
Attorney-General (Qld) v Fardon [2013] QSC 12
Attorney-General (Qld) v Fardon [2013] QSC 264
Attorney-General (Qld) v Fardon [2013] QCA 16
Attorney-General (Qld) v Fardon [2013] QCA 64
Attorney-General (Qld) v Fardon [2013] QCA 299
Attorney-General (Qld) v Fardon [2014] 2 Qd R 532
Attorney-General (Qld) v Fardon [2015] QSC 20
Attorney-General (Qld) v Fardon [2018] QSC 193
Attorney-General (Qld) v Fardon [2018] QCA 251
Attorney-General (Qld) v Fisher [2018] QSC 74
Ex parte The Queensland Law Society Incorporated [1984] 1 Qd R 166
Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575
John Fairfax & Sons Ltd v Police Tribunal of New South

	Wales (1986) 5 NSWLR 465 *R v Fardon* [2010] QCA 317 *R v McGrath* [2002] 1 Qd R 520
COUNSEL:	P Dunning QC S-G with J B Rolls for the applicant D O'Gorman SC with R Reed for the respondent
SOLICITORS:	Crown Law for the applicant Patrick Murphy Solicitor for the respondent

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Introduction

[1] As the Court of Appeal recently observed, the respondent "has been the continued subject of detention and supervision orders by the Supreme Court in the more than 15 years since [27 June 2003]. The supervision order to which he is presently subject, imposed in 2013 and not contravened since, will expire at midnight on 3 October 2018, three days before he turns 70 and thirty years after he committed his last offence".[1] In anticipation of that event, the Attorney-General applied, under s 19B and s 19C of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) for an order that the respondent be subject to the requirements of a further supervision order for another five years.[2] The application was effectively dismissed, at the preliminary hearing under s 8 of the Act, on the basis that the court was not satisfied there were reasonable grounds for believing the respondent is a serious danger to the community in the absence of further supervision order.[3] The Attorney-General successfully appealed against that order, the Court of Appeal finding that the primary judge erred by taking an irrelevant consideration into account in applying the s 8 test, namely the evidentiary demands of the test which applies on the substantive hearing under s 13 of the Act.[4] On 3 October

[1] *Attorney-General v Fardon* [2018] QCA 251 at [3].
[2] Amended application filed 20 July 2018.
[3] *Attorney-General v Fardon* [2018] QSC 193.
[4] *Attorney-General v Fardon* [2018] QCA 251.

2018 the Court of Appeal made orders for the substantive hearing of the application and varied the 2013 supervision order so that it is in place until disposition of that hearing.

[2] The hearing of the application proceeded before me on 30 November 2018. The court was assisted by the evidence of three psychiatrists, Dr Beech, Dr Harden and Dr McVie.

[3] For the following reasons, I am not satisfied that the evidence establishes to the requisite high degree of probability that the respondent is a serious danger to the community in the absence of a further supervision order. Accordingly, the application will be dismissed.

Relevant principles on an application for a further supervision order

[4] The relevant principles were not controversial. I recently considered them in *Attorney-General v DBJ* [2017] QSC 302 at [7]-[16] and also in *Attorney-General v Fisher* [2018] QSC 74 at [16]-[28]. For convenience, I repeat what I said in *Fisher*.

> "[16] … The process [on an application for a further supervision order] reflects that which applies when the original order is sought.
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> [17] Relevantly, a further supervision order may only be made if the court is satisfied the released prisoner is a serious danger to the community in the absence of such an order (ss 13(5) and 13(1) and 19D(1)).
>
> [18] A released prisoner is a serious danger to the community if there is an unacceptable risk that the released prisoner will commit another serious sexual offence if a further supervision order is not made (see s 19D(1)(f) and s 13(2)).
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> [19] As Davis J recently observed in *Attorney-General for the State of Queensland v Travers* [2018] QSC 73 at [30]:
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>> 'It is important for present purposes that the issue is not one of risk of reoffending in general (or even of offending violently) but a risk of reoffending in a particular way, namely by the commission of 'a serious sexual offence'.'
>
> [20] As defined in the schedule to the Act a 'serious sexual offence' is, relevantly, an offence of a sexual nature, involving violence, or against a child.
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> [21] Importantly, the court may decide it is satisfied the person is a serious danger to the community 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 justify the decision (s 13(3)).

[22] This is a statutory expression of the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362. As to this, in *Attorney-General v Van Dessel* [2006] QSC 16 at [17] White J said:

> '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. In weighing the evidence and deciding whether to make an order the Act requires the court to have the protection of the community as the paramount consideration. The explanation in *Neat Holdings v Karajan Holdings* (1992) 110 ALR 449 at 450 of the 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 probability may be kept in mind. In *R v Secretary of State; Ex parte Khawaja* [1984] AC 74 Lord Scarman observed at 113-4
>
> > '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.'
>
> Here what is at stake is the fundamental legal right to the unfettered personal liberty of the respondent on the expiration of his term of imprisonment. The serious nature of the inquiry is underscored in the Act by the use of the expression 'high degree of probability'.'

…

[24] The purpose of a supervision order is not punishment, but protection of the community against, and to facilitate rehabilitation for, certain classes of convicted sexual offenders.[5] The paramount consideration is the need to ensure adequate protection of the community (s 13(6)(a)).

[25] What constitutes an 'unacceptable risk' is 'a matter for judicial determination, requiring a value judgment as to what risk should be accepted against the serious alternative of the deprivation of a

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[5] See the objects of the Act, set out in s 3. See also *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 597 [34] per McHugh J, at [216] per Callinan and Heydon JJ.

person's liberty'.[6] The test is not satisfied by evidence of *any* risk that the released prisoner may commit a further serious sexual offence. What must be established by the Attorney-General, to the requisite standard, is an *unacceptable* risk, the determination of which involves a balancing of competing considerations.[7] The notion of an unacceptable risk recognises that some risk can be acceptable consistently with the adequate protection of the community.[8]

[26] In considering whether a risk is unacceptable it is necessary to take into account, and balance, the nature of the risk and the degree of likelihood of it eventuating, with the seriousness of the consequences if the risk eventuates.[9]

[27] As observed in *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359[10] at [6]:

> 'Whether a risk is unacceptable depends upon the degree of likelihood of offending and the seriousness of the consequences if the risk eventuates. There must be a sufficient likelihood of the occurrence of the risk which, when considered in combination with the magnitude of the harm that may result and any other relevant circumstance, makes the risk unacceptable.'

[28] Section 13(4) sets out a number of matters the court must have regard to. As Boddice J observed in *Attorney-General (Qld) v Foy* [2014] QSC 304 at [18] the relevant factors to be considered in exercising the discretion under s 19D include the matters specified in s 13 but also factors since the making of the initial supervision order, such as the respondent's performance on the existing supervision order and the impact of the imposition of a further supervision order on him."

[5] I refer also to *Attorney-General v DBJ* [2017] QSC 302 in which I said at [15]:

> "For present purposes, what is required is an assessment of the risk of the released prisoner committing a serious sexual offence in the absence of a further supervision order. Relevantly, the object of the DPSOA is to ensure adequate protection of the community (s 3(a)). That does not mean the

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6 *Attorney-General (Qld) v Sutherland* [2006] QSC 268 at [30] per McMurdo J; see also *Attorney-General (Qld) v Fardon* [2011] QCA 111 at [20] per Chesterman JA.

7 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [22], [60] and [225], referring to *M v M* (1988) 166 CLR 69; see also *Attorney-General (Qld) v S* [2015] QSC 157 at [40].

8 *Attorney-General (Qld) v Sutherland* [2006] QSC 268 at [29] per McMurdo J.

9 *Attorney-General (Qld) v Beattie* [2007] QCA 96 at [19] per Keane JA.

10 In an equivalent, but not identical, statutory context, being s 9(1) of the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic), which empowered the court to "make a supervision order in respect of an eligible offender only if the court is satisfied that the offender poses an unacceptable risk of committing a relevant offence if a supervision order is not made".

purpose of the legislation is to guarantee the safety and protection of the community. If that were the case, every risk would be unacceptable.[11] This is the corollary of the point made by the Court of Appeal in *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396 at [39] that the Act 'does not contemplate that arrangements to prevent [a particular risk] must be 'watertight'; otherwise orders under s 13(5)(b) would never be made' (as opposed to a continuing detention order). In this regard, as McMurdo J noted in *Attorney-General (Qld) v Sutherland* [2006] QSC 268 at [30]:

> 'Adequate protection is a relative concept. It involves the same notion which is within the expression 'unacceptable risk' within s 13(2). In each way the statute recognises that some risk can be acceptable consistently with the adequate protection of the community.'[12]"

[6] Before turning to address the matters in s 13(4) to which the court is required to have regard, I propose to outline the evidence before the court, in terms of the respondent's background and personal circumstances, his history of orders under the Act, and progress over the last five years, as well as the opinions of the three psychiatrists.

Personal background and criminal history

[7] The respondent was born in 1948. He is currently 70 years of age.

[8] As summarised by his treating psychologist, Mr Smith, "[o]verall, Mr Fardon's childhood and adolescence have been overwhelmingly characterised by exposure to, and direct experience of violence, sexual abuse, distorted sexual norms, racism and substance abuse".[13]

[9] Mr Smith records that the respondent was abandoned by his mother when he was a newborn, and then by his father who gave him to a "drinking buddy" and his wife to look after (whom the respondent described as Thursday Islanders) and then disappeared. He grew up in Fingal, on an Aboriginal Reserve, with six siblings, who were a mixture of Murri and Torres Strait Islander children (some also adopted by his adoptive parents). The respondent is said to have described his adoptive father as an extremely violent man. The respondent also reported that one of his older brothers (or cousin) started raping him when he was seven years old, which continued until he was 14. He was not believed when he tried to tell his parents and teachers at school about the sexual abuse. The respondent has also described witnessing sexual abuse of children by adults, and participating in the frequent sexual behaviour that occurred between children on the Reserve, when he was a child. He also reported experiencing

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[11] See *Lynn v State of New South Wales* [2016] NSWCA 57 at [61] per Beazley P.

[12] See also *Attorney-General (Qld) v Bugler* [2017] QSC 261 at [28]-[29].

[13] Mr Smith's progress report dated 28 August 2014 at [29]. See also the report of Dr Beech, dated 23 May 2018, at p 3; the report of Dr McVie, dated 18 October 2018, at pp 10-11; and the report of Dr Harden, dated 20 November 2018, at p 14.

racial abuse, along with his siblings, at school.[14] All of these things led to significant feelings of anger and aggression at a young age.[15]

[10] The respondent left home and school at the age of 14, and made his way to Sydney.[16] He began to engage in delinquent behaviour around this time, which can be seen reflected in his criminal history in New South Wales. He also reported a "brief but influential period of involvement with the Hell's Angels during his teens", which exposed him to "extreme levels of brutality and the sexual exploitation of women; and further distorting his sense of what was normal and appropriate, in terms of sex and violence". He became involved in transporting drugs and alcohol, including into Aboriginal communities, as a means of earning money.[17]

[11] The respondent has been married once, between 1976 and 1978, a period Mr Smith describes as "the most stable period of his adult life".[18]

[12] The respondent has an "extensive history of heavy substance use", starting with cannabis and alcohol at the age of nine or 10. He described himself as a heavy user of a range of drugs by the age of 15.[19] In his progress report dated 28 August 2014 at [50] Mr Smith records that:

> "… after his second substance-related sexual offence, Mr Fardon described coming to a realisation that he needed to stop all substance use or would spend the rest of his life in prison. He reported that the last time he used any kind of illicit substance or alcohol was in 1994, whilst he was in jail. He also reported that he spent two years doing a drug & alcohol program in Townsville Correctional Centre, and that the skills he learned have assisted him to remain abstinent since completion."[20]

[13] A useful summary of the respondent's criminal history appears in the report of Dr Beech dated 23 May 2018 (at pp 2-3):

> "Mr Fardon first came before the courts as a child in 1964. He was found guilty on several occasions for generally delinquent matters, particularly stealing and break and enter offences.
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> In 1967 he was sentenced on one charge of attempted carnal knowledge of a girl under 10 years.

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[14] Mr Smith's progress report dated 28 August 2014 at [22]-[25].

[15] Mr Smith's progress report dated 28 August 2014 at [25] and [32].

[16] Mr Smith's progress report dated 28 August 2014 at [33].

[17] Mr Smith's progress report dated 28 August 2014 at [27]-[30] and [34].

[18] Mr Smith's progress report dated 28 August 2014 at [39]-[40].

[19] Mr Smith's progress report dated 28 August 2014 at [48]-[49].

[20] See also Dr Beech's report, dated 23 May 2018, at p 4, where he records the respondent having said that "he believed intoxication had played a significant role in his violent sexual offences and for that reason he had committed himself to abstention". See also Dr McVie's report, dated 18 October 2018, at p 11.

There were subsequently further offences that included stealing, forgery, break and enter and acting in a threatening manner through to 1974 in New South Wales. His offending continued in Queensland with a conviction for assault occasioning bodily harm in 1977.

Importantly, for these matters, he was convicted in 1980 on charges of indecent dealing with a girl under 14 years, rape, and unlawful wounding. He was sentenced to 13 years imprisonment with hard labour. He was convicted again in 1989 on a charge of rape, carnal knowledge against the order of nature, and assault occasioning bodily harm. He was sentenced to 14 years in imprisonment.

Mr Fardon was subsequently convicted on a charge of rape in 2010 but the conviction was quashed on appeal.

There is no official information about the 1967 offence. Mr Fardon has reported that when he was 18 years old he stayed with a naturist family who had multiple children where all family members slept naked in the same room on the floor. He woke up one morning to find that he had 'cuddled up' to one of the children and was accused of trying to initiate a sexual encounter with her.[21]

The 1980 offences had occurred in a single episode in 1978. (Mr Fardon had subsequently absconded on bail to the Northern Territory and had to be extradited back to Queensland.) They involved two girls, aged 12 and 15 years. He choked the younger child and threatened her with a loaded rifle before raping her in an act that was described as 'brutal because the medical evidence shows that she was severely injured…' (sentencing remarks). When the girl's 15-year-old sister returned, Mr Fardon threatened her with the rifle and made her get into bed with him. He struck her twice with the rifle, causing 'a wounding which was not inconsiderable…' (sentencing remarks). Mr Fardon has consistently said that at the time he was severely intoxicated and cannot recall the incident. Nonetheless, in 2012 he told me that he understood the younger victim would have been severely mentally affected by his actions and he accepted full responsibility for what had occurred.

The 1989 offences occurred within three weeks of his release on parole after serving eight years of the earlier 13-year sentence. Mr Fardon told me in 2012 that he had been very anxious after his release and he had quickly absconded from Brisbane to Townsville despite a pending full release date. He drank and used illicit substances. The sentencing judge found that Mr

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[21] See also the reasons of Atkinson J in *Attorney-General v Fardon* [2003] QSC 331 at [35] where it is recorded that the respondent was sentenced to a good behaviour bond operational for three years, and that the sentencing judge remarked that 'the interference was but slight'.

> Fardon had promised to give the adult female complainant heroin with a view to enticing her back to his flat 'with the intention of committing sexual acts with her against her will if necessary. When you got there, you brutally assaulted her and then you inflicted a series of most degrading acts upon her'.[22] Mr Fardon has consistently said that he was again intoxicated at the time. However, he has said that the woman took the drugs and ran off, and so he had chased after her and brutally assaulted her, citing a belief that she had broken an honour amongst thieves' type of code. Again, in 2012 he told me that his behaviour had not been justified although he had held onto those beliefs at the time."

[14] The respondent was convicted in August 1989 of stealing in 1986. As Atkinson J said in *Attorney-General v Fardon* [2003] QSC 331 at [40]:

> "He has not been convicted of any criminal offences since that time. While it is true that he has been in prison since 1988, this circumstance has served to diminish but not extinguish his capacity to commit further criminal offences. He was involved in breaches of discipline prior to 1990 but has committed no further offences."[23]

[15] In the past 15 years since that decision, the respondent has had periods of time in the community, most notably the last five years, and it remains the case that he has not been convicted of any criminal offences since that last conviction in 1989.

History of orders under the *Dangerous Prisoners Act*

[16] The respondent's full time release date, under the 14 year sentence imposed on him in 1989, was 29 June 2003. Shortly before that, the then Attorney-General made what appears to have been the first application under the *Dangerous Prisoners (Sexual Offenders) Act*, which commenced on 6 June 2003.[24] On 6 November 2003 White J ordered that the respondent be detained in custody for an indefinite term for control, care and treatment (a continuing detention order).[25]

[17] That continuing detention order was affirmed, following an annual review as required under the Act, by order of Moynihan J made on 11 May 2005.[26]

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[22] The sentencing remarks also record that the sodomy was consensual (but the respondent pleaded guilty to this offence as anal intercourse between consenting adults was illegal at the time) and the assault was committed in order to repossess the heroin which the complainant had taken. See also the report of Dr McVie, dated 18 October 2018, at p 8.

[23] See also the respondent's criminal history, annexed to the affidavit of Ms Thies filed on 18 June 2018.

[24] The respondent challenged the constitutional validity of the legislation, but was unsuccessful in the Supreme Court at first instance, on appeal and, ultimately, in the High Court: see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

[25] *Attorney-General v Fardon* [2003] QSC 379.

[26] *Attorney-General v Fardon* [2005] QSC 137.

[18] Following a further review of the continuing detention order in 2006, on 8 November 2006 Ann Lyons J (as her Honour then was) rescinded the continuing detention order, and made an order that the respondent be released from custody subject to a supervision order for 10 years.[27]

[19] An appeal by the Attorney-General from that decision was refused, and the respondent was released from custody on 4 December 2006.[28]

[20] There were contraventions of that supervision order in May and July 2007. These did not involve the respondent committing any further offences. The contraventions involved, in May 2007, the respondent attending a school, on a pre-arranged visit in the company of his support worker, to address year 11 students (about avoiding a life of crime);[29] on 11 July 2007, aiding a neighbour, who was also on a supervision order, to disobey a curfew restriction, by allowing the neighbour to use his car;[30] and on 21 July 2007, after being released from custody after his arrest on 12 July 2007, travelling to Townsville without authority (in circumstances where he was fearful of returning to his residence and particularly fearful of attack by vigilante groups).[31]

[21] Following a contravention hearing before Wilson J in October 2007, the respondent was again released subject to a supervision order, with some amendments.[32]

[22] The reasons of Wilson J record, at [23], that apart from the contraventions, the respondent's compliance with the conditions of his release was satisfactory, referring to the 26 urine and 60 breath tests he had been subjected to from his release in December 2006 until June 2007, none of which tested positive for alcohol or drugs; as well as multiple visits from and reports to a corrective services officer. Her Honour also noted, at [31], that proposed accommodation for the respondent had recently been assessed as suitable. Other evidence placed before the court on the hearing of the present application makes reference to the unfortunate circumstances in which the respondent was forced to leave this accommodation less than 48 hours after moving in, as a result of media scrutiny and community vigilantism.

[23] On 3 April 2008 the respondent was arrested following a complaint of rape made by a woman he was in a sexual relationship with at the time, and whom he had known since they were both teenagers. It was said the complainant suffered from some intellectual impairment. In May 2010 the respondent was convicted of rape, following a trial in the District Court. An appeal against the conviction was allowed, with the conviction

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[27] *Attorney-General v Fardon* [2006] QSC 275 and *Attorney-General v Fardon* [2006] QSC 336.

[28] *Attorney-General v Fardon* [2006] QCA 512.

[29] Said to contravene conditions in his supervision order that he not attend the premises of any organisation in respect of which there are reasonable grounds for believing there is child participation and that he not establish or maintain contact with children under 16. See also Dr Beech's report, dated 23 May 2018, at p 8.

[30] Said to contravene a condition that he abstain from violations of the law.

[31] Said to contravene conditions as to residence and reporting.

[32] *Attorney-General v Fardon* [2007] QSC 299.

being set aside, and a verdict of acquittal entered.[33] Muir JA (with whom Chesterman JA and McMeekin J agreed) referred at some length to the evidence of the complainant, which presented with a number of "evidentiary difficulties", and concluded at [65] that after making allowance for the limited advantage enjoyed by the jury, who saw a video recording of the police interview and of the complainant's evidence-in-chief and cross-examination, that "there is a 'significant possibility' that an innocent person has been convicted"; that "it was not open to the jury to be satisfied beyond a reasonable doubt of the appellant's guilt". At [66] and [67] Muir JA said:

> "I do not consider that it would be appropriate to order a retrial. The difficulties with the complainant's evidence identified above would be present on any retrial. Also, the appellant has been held in custody since 3 April 2008 pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* in consequence of his having been charged with the subject offence. In my view the appellant has been in prison for a period as long as, if not longer than, any term of actual imprisonment likely to be imposed were he to be convicted on a retrial.
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> The sentence of 10 years imprisonment (in excess of 12 years if pre-trial custody is taken into account) imposed by the primary judge, with respect, failed to reflect the alleged nature of the appellant's offending conduct, namely a non-consensual act of digital penetration in the course of consensual sexual activity between persons in a longstanding sexual relationship which, if specifically objected to, was immediately discontinued. The appellant was sentenced on the basis that the penetration had been digital. The primary judge was not referred to decisions which would have provided more relevant sentencing guidance: sentences imposed for rape after the breakdown of a marriage or longstanding de facto relationship."

[24] Notwithstanding the acquittal, as a result of the respondent's dealings with the complainant, he faced proceedings for contravention of conditions of the supervision order prohibiting him from visiting licensed premises, without prior permission, and going unsupervised to the home of an intellectually disabled person (the complainant).

[25] The respondent remained in custody for five and a half years until December 2013, in circumstances where:

1. A contravention hearing took place in April 2011, and in May 2011 Dick AJ ordered that the respondent be released from custody subject to a supervision order.[34]

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[33] *R v Fardon* [2010] QCA 317.

[34] *Attorney-General v Fardon (No 2)* [2011] QSC 128.

2. The Attorney-General appealed that decision. The supervision order was stayed pending the appeal, with the respondent remaining in custody.[35] In July 2011, the appeal was allowed, the supervision order was rescinded, and another continuing detention order was made.[36]

3. That continuing detention order came on for review before Mullins J in October 2012 and February 2013. Mullins J made an order rescinding the continuing detention order, and that the respondent be released from custody, subject to a supervision order for a period of five years.[37] The evidence of Dr Beech (which he referred to, in giving evidence before me on the hearing of the present application) about the appropriate duration of a supervision order is recorded at [39] of Mullins J's reasons, as follows:

> "Dr Beech expresses the opinion that a period of five years would be sufficient for a supervision order for Mr Fardon, as the risk of violent reoffending drops dramatically for a man in his sixties [the respondent was then 64 years of age]. Dr Beech also expresses the view that, if Mr Fardon were to be successful in complying with the supervision for a period of five years, that would show he had adapted to release in the community."

4. The Attorney-General appealed that decision. The supervision order was stayed pending the appeal, with the respondent still remaining in custody.[38] On 28 March 2013 the appeal was allowed, and the matter was remitted to the trial division for rehearing.[39]

5. The rehearing took place before Peter Lyons J in September 2013. His Honour made an order for the release of the respondent, subject to a supervision order, on 4 October 2013, for a period of five years.[40]

6. The Attorney-General appealed that decision. The supervision order was again stayed, pending the appeal.[41] However, this time the appeal was unsuccessful, and the respondent was released from custody on 6 December 2013.[42]

Circumstances since the supervision order was made in October 2013

[26] Since his release from custody in December 2013 the respondent has complied with the supervision order made on 4 October 2013. In opposing the making of a supervision

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35 *Attorney-General v Fardon* [2011] QCA 111.
36 *Attorney-General v Fardon* [2011] QCA 155.
37 *Attorney-General v Fardon* [2013] QSC 12.
38 *Attorney-General v Fardon* [2013] QCA 16.
39 *Attorney-General v Fardon* [2013] QCA 64.
40 *Attorney-General v Fardon* [2013] QSC 264 and the order made on 4 October 2013 (CFI 258).
41 *Attorney-General v Fardon* [2013] QCA 299.
42 *Attorney-General v Fardon* [2013] QCA 365; [2014] 2 Qd R 532. See generally the affidavit of Ms Hunter filed 18 June 2018 at [2]-[21].

order, before Peter Lyons J in 2013, the Attorney-General submitted that there were "strong reasons to believe that the respondent would not comply with the conditions of a supervision order" and that "supervision is not a realistic alternative".[43] Those negative predictions have proved to be incorrect.

[27] He did spend a short period of time in custody in September 2014 (about 2 weeks) following a warrant being issued, on the basis of an allegation he was likely to contravene a requirement of the supervision order (by leaving the precinct, without permission). However, when the contravention proceeding came on for hearing on 16 September 2014, the Attorney-General offered no evidence, said it was no longer contended that the respondent was likely to contravene the supervision order, and the application to rescind the supervision order was dismissed. An order for costs was later made against the Attorney-General.[44]

[28] As Jackson J observed in the recent s 8 decision, the respondent's period of non-contravention dates back longer than December 2013:

> "… In the first place, he has not breached the second supervision order [the order made by Peter Lyons J on 4 October 2013] since he was released on that order on 6 December 2013, a period of almost 4 years and nine months. But it should not be forgotten that the respondent's previous breach of the first supervision order [the order made by Ann Lyons J on 8 November 2006] was on 3 April 2008, now more than 10 years ago. Following that breach, he spent more than 5 years in custody, until 6 December 2013, despite not having been guilty of an offence in that period."[45]

Evidence from the respondent's treating psychologist

[29] The respondent's progress, whilst he has been subject to the supervision order, can be seen from the reports of his treating psychologist, who has seen the respondent regularly since June 2012 (whilst he was still in custody), and continually since his release on the supervision order in December 2013.[46]

[30] In the early years, the respondent remained under very tight supervision, including a 24 hour curfew. He had the benefit of support from a chaplain with the Prison Fellowship, in whose company he was permitted outings.[47] From an early stage, Mr Smith described the respondent as maintaining a positive level of engagement with him, and to articulate a determination never to return to custody, and to continue to comply with his management/supervision conditions.[48]

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[43] *Attorney-General v Fardon* [2013] QSC 264 at [57].
[44] *Attorney-General v Fardon* [2015] QSC 20; see also the affidavit of Ms Hunter at [22]-[25].
[45] *Attorney-General v Fardon* [2018] QSC 193 at [36].
[46] Affidavit of Mr Smith, filed 18 June 2018, at [6] and [7].
[47] See Mr Smith's progress report dated 28 August 2014 at [61]-[64].
[48] See Mr Smith's progress report dated 28 August 2014 at [161] and [162].

[31] In a progress report dated 23 February 2015, Mr Smith recorded that the respondent remained on a (stage 1) 24 hour curfew, but could go on escorted leave outings, for example, to supermarkets and shopping centres, Prison Fellowship barbecues, lunch with the chaplain who continued to support him, and to attend medical appointments. Mr Smith records the respondent being frustrated with Queensland Corrective Services (QCS) at the slow rate of his progression (to lower levels of supervision), and describes his frustrations "boil[ing] over" into significant displays of anger at times; but says for the most part the respondent continued to maintain positive working relationships with all involved in his management and care.[49]

[32] The progress report dated 26 May 2015 notes that the respondent is still on a 24 hour curfew, but has progressed to leaving the precinct in the company of his house-mate (to go to shops, medical appointments, and Prison Fellowship barbecues). There is reference to the respondent trying to get his driver's licence and learning to use a new mobile phone.[50]

[33] By December 2015 the respondent had progressed to a stage 3 curfew. He was required to submit a weekly plan of his proposed movements, and had expanded his range of approved locations. As he still had only a learner-driver's licence, he was still undertaking his leave in the company of other residents, but then moving around unaccompanied after arriving at a destination. He was approved to go on fishing day trips. In a progress report at this time Mr Smith recorded that the respondent "remains strongly focused on never returning to prison, and as a result he continues to adhere to the conditions of his Supervision Order with no demonstration of risk-salient or offence-paralleling behaviours. He continues to show improvement to his mood and attitude in the wake of recent curfew progression and gradually increasing freedoms".[51]

[34] The September 2016 progress report records that the respondent had progressed to a stage 4 curfew, and enjoyed a greater level of freedom.[52] Likewise, in February 2017, new locations for the respondent to go fishing and shopping had been added. By this time, he had obtained his driver's licence.[53]

[35] In the progress report of August 2017 Mr Smith records the respondent is being managed on a stage 5 curfew, and being progressed to the "maintenance" level of supervision. Mr Smith says "[h]e remains on good terms with the majority of the other residents at the Precinct and has achieved a reasonable degree of comfort in moving around the community, attending different approved locations on regular outings, both in company and alone". His physical health remained a matter of ongoing concern.[54]

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[49] See Mr Smith's progress report dated 23 February 2015 at [12]-[16].
[50] See Mr Smith's progress report dated 26 May 2015 at [12]-[15].
[51] See Mr Smith's progress report dated 14 December 2015 at [18].
[52] See Mr Smith's progress report dated 30 September 2016 at [10]-[14].
[53] See Mr Smith's progress report dated 4 February 2017 at [10]-[12].
[54] See Mr Smith's progress report dated 5 August 2017 at [11]-[16].

[36] By February 2018 the respondent is recorded as having improved his level of comfort with moving about the community, having recently caught a train and using a Go-Card for the first time. The respondent had commenced, with permission, attending at a male "day-spa" in order to meet his sexual needs and had no difficult or adverse experiences while doing so. Mr Smith said that "[o]verall, Mr Fardon continues to remain stable and appears to be functioning well. He is making steady progress in adjusting further to the norms of community life, as he moves towards greater levels of independence".[55]

[37] The most recent progress report from Mr Smith is dated 21 November 2018. In this report it is noted that the respondent is still on a stage 5 curfew, being managed at a "maintenance" level of supervision. Mr Smith says the respondent "struggles with a number of health issues, not the least of which was a heart attack in September that led to the identification of multiple blood clots and necrosis of his heart muscle. He also struggles with chronic arthritis pain and emphysema, as well as partial deafness" (at [10]). Mr Smith describes the respondent as being "apprehensive but positive about the prospect of moving into independent accommodation", but says he struggles with ongoing concerns about his eventual address being leaked to the media and also mindful that he has no family and few personal supports in the community (at [11]).

[38] Mr Smith records that the respondent "has not described any ongoing difficulties in remaining abstinent from illicit substances or alcohol, denying any interest or urges to indulge when he has had the opportunity to do so" (at [13]). Mr Smith says, at [14], that:

> "Over the last 12 months Mr Fardon has demonstrated a greatly improved capacity for self-regulation and maintaining overall stability. In spite of the significant disruption in recent months [which I take to be a reference to the court proceedings from July to October 2018], his mental health appears to be stable, although his chronic physical health issues are only becoming more significant as he gets older."

[39] Relevantly in this regard, Dr McVie, who interviewed the respondent on 6 October 2018, records, in her report dated 18 October 2018 (at p 2) that the respondent had a major heart attack two weeks before her interview. He went to his long term GP, who contacted a cardiologist who advised immediate admission. The respondent refused to go to hospital at that time because of his concerns about being identified and media being involved.[56]

[40] Mr Smith concludes at [23] by saying:

> "Mr Fardon has maintained compliance with the conditions of his management and his Supervision Order for the overwhelming majority of the five years since his release from custody, and he remains focused on

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[55] See Mr Smith's progress report dated 18 February 2018 at [10]-[13].

[56] See also the report of Dr Harden, dated 20 November 2018, at pp 13 and 26.

> living his remaining years outside of prison. His stress levels over the last three months have been extreme, but he has also been able to regulate and stabilise, in terms of both his mood and mental state. Mr Fardon's current treatment needs continue to be manageable with monthly appointments and the allowance for *ad hoc* sessions as needed, such as during the most stressful times over the last few months. Maintaining a similar treatment regime under a Mental Health Care Plan has been agreed between the author, Mr Fardon and his GP, and will not be difficult to accommodate."[57]

[41] Dr Beech, in his report dated 23 May 2018 (at p 4), records that:

> "These days there are no restrictions on his movements apart from some locations that he is not allowed to go to. If he puts forward a plan about where he wishes to go, he can move around the community reasonably freely. He has his driver's licence. He can drive himself. He does his own shopping and cooking. He manages his own money."

[42] Although the respondent has no family and few personal supports in the community (outside of QCS case officers and other "supervisees"), he does have the professional support of Mr Smith, whom he has seen for the past six years, and the general practitioner he has seen for 40 years (who was formerly a medical officer to the prison).[58]

[43] The respondent has been on a disability pension in the past, and is now on the aged pension.

Attempts to source community-based accommodation

[44] Whilst the psychologist's reports referred to above demonstrate the progress the respondent has made towards reintegrating into life in the community generally, what has remained a challenge for him is finding somewhere to live.

[45] Since his release from custody on 6 December 2013 the respondent has lived at the contingency accommodation provided by QCS, referred to as the precinct. In that time both the respondent and QCS have tried to find suitable alternative accommodation, without success. It is clear that the conditions of the respondent's supervision order, in particular condition 34 (which requires that the respondent "not establish and maintain unsupervised contact with a person he knows or ought reasonably to know to be in one of the following categories: persons under 16 years of age, intellectually disabled persons, mentally ill persons or persons with active substance misuse difficulties except with prior written approval of an authorised corrective services officer") have made this almost impossible. As outlined in the affidavit of Mr Wilson, since about May 2015,

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[57] See also the report of Dr McVie, dated 18 October 2018, at p 3.

[58] See the report of Dr Beech, dated 23 May 2018, at pp 5 and 6-7; and the report of Dr McVie, dated 18 October 2018, at p 2.

11 properties have been considered and rejected as unsuitable for a variety of reasons including proximity to licensed premises, child-related facilities, places where people over 55 or older reside, places where there were families with children living nearby, parks, shops, or a church. The respondent's notoriety, limited financial means and lack of rental history are also barriers.

[46] It is apparent, from the affidavit of Ms Cross filed on 25 July 2018, that QCS have made efforts to assist the respondent to find suitable alternative accommodation. The respondent has also made a number of efforts. The evidence points to the respondent, understandably one might think, having become frustrated about each proposal being found unsuitable, and not having put forward any further proposals since about July 2018.

[47] The applicant relied upon evidence from Ms Lynas, the director of the High Risk Offender Management Unit within QCS, which indicated that if a further supervision order was made, QCS would support and assist the respondent's transition into community-based accommodation no later than 12 months from the date of the order. Ms Lynas said the assessment of suitable accommodation may now be easier, in light of the three updated psychiatric risk assessment reports all agreeing the respondent presents a low risk of sexual reoffending. That seems to be on the basis that QCS would approach the task differently, with that in mind. There was no evidence, for example, that earlier psychiatric assessments had been a basis for refusal by accommodation providers. However, Ms Lynas' oral evidence was that there is nothing that QCS could or would do, in terms of assisting the respondent to find suitable community accommodation in the future, that it had not already done. Also, the draft further supervision order proposed by the Attorney-General on this application still includes an equivalent of condition 34, which would presumably have the same adverse effect on suitability assessments in the future, that it has had in the past.

[48] Having had the opportunity to hear the evidence of Ms Lynas, Dr Beech said in his oral evidence that he had some part in the conditions that were drafted in 2013 and in retrospect he regretted condition 34 because of the significant impediment it presented to the respondent finding accommodation.[59]

[49] The respondent cannot remain at the precinct when his supervision order comes to an end, if no further supervision order is made. The reasons why that is so are the subject of Ms Lynas' evidence, and make sense. Likewise, if no further supervision order is made, QCS has no formal role in trying to find accommodation for the respondent. Although it would assist the respondent, for example, by putting him into contact with other relevant government or non-government agencies with a role in sourcing community housing for people in need.[60]

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[59] T 1-36.
[60] T 1-23.

[50] As will be discussed further below, the challenges the respondent faces finding suitable accommodation in the community was one of the two factors emphasised by the Attorney-General as supporting the making of a further supervision order (the other being the impact of media scrutiny). However, it seems reasonable to infer that the absence of the restrictions imposed by a supervision order would broaden the options available for suitable accommodation for the respondent.[61] As Dr Beech said, a supervision order provides for restrictions which actually hamper finding accommodation, rather than facilitating it.[62]

Psychiatric evidence

[51] The court has the benefit of evidence from three psychiatrists, Dr Michael Beech, Dr Scott Harden and Dr Ness McVie.

[52] The respondent was interviewed by Dr Beech on 16 April 2018. Dr Beech prepared a report dated 23 May 2018. Dr Beech previously interviewed the respondent in 2012.

[53] At p 13 of his report Dr Beech provides a summary of the previous assessments that have been undertaken of the respondent, by various psychiatrists and psychologists. Dr Beech's table, updated to include the 2018 assessment by Dr Beech, is set out in the Court of Appeal's recent decision at [44].[63] Adding the more recent assessments of Dr Harden and Dr McVie,[64] the table is as follows:

Date	Assessor	Risk
2003	James	Substantial
2003	Moyle	High
2004	Nielssen	Relatively low
2006	Grant	Relatively low
2006	Moyle	High
2007	Arthur	Low
2011	Harden	Moderate-High
2012	Beech	Moderate-High
2012	Grant	Moderate-High
2014	Smith	Moderate

61 See also the oral evidence of the psychiatrists at T 1-42.
62 T 1-57.
63 *Attorney-General (Qld) v Fardon* [2018] QCA 251.
64 And leaving out the scores from various actuarial instruments, which appear in the form of the table in Dr Beech's report at p 13.

2018	Beech	Low
2018	Harden	Low
2018	McVie	Low / Very Low

[54] In his report at p 13 Dr Beech says:

> "A review of all the assessments indicates relatively consistent themes. Mr Fardon has been diagnosed with an anti-social personality disorder, and he is rated high on psychopathic trait assessments. He rates at least in the moderate range for static risk factors for violent sexual offending. There have been a number of specific dynamic risk factors, notably his personality, his tendency to use physical coercion, his rejection of support and treatment, and substance use. There has been an agreement that, notwithstanding the violence involved in the offending, he does not suffer from a sexual paraphilia such as sexual sadism or paedophilia."[65]

[55] The Court of Appeal in its recent decision said the "real force of the [Attorney-General's] argument lies in" "the long history of findings by courts, psychiatrists and psychologists as to the level of risk and danger the respondent has presented to the community in the absence of detention or supervision" (at [41] and [42]). At [45] the Court of Appeal described the summary of assessments as variable, having previously trended down to low and then back up again. The Court said the "past variability in the respondent's assessments is a significant consideration, as against the most recent single assessment".

[56] I asked Dr Beech about this at the hearing. As Dr Beech explained, there had been a downward trend, until about 2011 when it started to go up again. That was explained because of the charge of rape, of which he was convicted and later acquitted on appeal; and also by the fact that he was on a supervision order and been found to have breached it (as a result of his interactions with that complainant). However, now that the respondent has been able to comply with a supervision order for five years, in Dr Beech's opinion the risk has substantially reduced. Dr Harden also said the respondent's ability to comply with a restrictive supervision order for five years was a significant factor in the reduction of risk. As Dr Harden explained, what is different now is the respondent is much older, he is less aggressive and much less sexually preoccupied. Dr Harden said he is "a man who predominantly was an antisocial offender, as in he just broke whatever rules did not suit him at the time" and said "that has really changed".[66]

[57] Dr McVie agreed, but added that it is not just the compliance, it is the engagement, particularly with the psychologist, which she considers a very positive factor. She said

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[65] Underlining added.
[66] T 1-43.

those factors, together with his age, the length of time since the offending and the lack of sexual preoccupation, had all contributed to her assessment of low risk.[67]

[58] These consistent opinions of the three psychiatrists substantially diminish the force of the argument based on the assessments referred to in the table above.

[59] In terms of Dr Beech's current opinion, at pp 14-15 of his 23 May 2018 report Dr Beech says:

> "It is difficult to assess the risk of sexually violent reoffending in a man of Mr Fardon's age who has been on a supervised release order for five years.
>
> There are a few static (historical) risk factors for further sexual offending, notably the four convictions (with one overturned), the history of violence, and the absence of a stable relationship. On the STATIC 99R, a scale that considers his age and his offending, he has a score of 5, which places him in the group of offenders seen to be at above average risk of reoffending. This category placement occurs whether the 2010 conviction is taken into account or not, and whether it is accepted or not that Mr Fardon had a two-year marital relationship in his earlier years.
>
> The difficulty with this scale is that it does not take into account the nature of his sexual offending (it does not for example separate him from extra familial child sex offenders), it does not consider the changes that have taken place since 1980 (or even 2010), and in my opinion does not adequately take into account his advancing years.
>
> There are a number of dynamic risk domains that tend to predict reoffending. These are grouped around the presence of antisocial attitudes and behaviours, mental disorder and substance use, and sexual deviance.
>
> As noted above, I think that a number of these factors were in play in earlier years. These days though, <u>I think that the antisocial personality disorder (ASPD) and psychopathy have significantly lessened over the years</u>. To be sure, he continues to articulate an anti-authoritarian attitude, persecutory ideation, and hostility to supervision. However, <u>despite these ASPD features, he has not breached the rules and restrictions placed on him this time, nor has he contravened what needs to be seen as a very stringent supervision regime</u>. His anti-authoritarian attitude is on display generally against QCS, but he has to a very large degree cooperated with case officers. There is <u>no evidence, in my opinion, [of] an ongoing proclivity to serious criminal offending, despite his adherence to his convict code</u>.

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[67] T 1-44.

The age of three of his victims, and the use of gratuitous or instrumental violence, has given rise to concerns that he has a sexual deviance such as paedophilia or sexual sadism. However, this is not been borne out over many assessments or during psychological therapy. A sexual paraphilia would be a factor in prolonging the risk of reoffending, but there is no evidence that this now exists with Mr Fardon. Similarly, there is no evidence of ongoing sexual preoccupation. He has been stressed at times, irritable, and probably depressed. Despite this, he has not regressed to deviant sexual thoughts or behaviours nor has he used sex as a way to cope with his difficulties. He has been irritable and angry, frustrated and abusive, or alternatively isolated and withdrawn, but he has not shown any evidence of a specific hostility towards females or any proclivity to further sexual violence.

Despite his earlier history of significant substance misuse, and the specific role of intoxication in his offending, there is no evidence of an ongoing active vulnerability to substance use. He has remained abstinent from alcohol and drugs, in circumstances where it has to be said they would have been available.

In my opinion, the most relevant dynamic factors for reoffending have now substantially lessened. Instead, I think there is evidence of maturity in general, and affective settling, and perhaps some development of remorse, and an improved tendency to take advice. Mr Fardon has been consistent in expressing his desire to remain out of prison, and I think overall his behaviour over the past five years points to his progress in that direction.

Finally, I think in the absence of an ongoing sexual paraphilia, in the absence of any evidence of an attraction towards children, and in the reduction of ongoing severe psychopathic traits, his age is a significant factor in reducing his risk of reoffending sexually. I have attached (as appendix D) a graph by Hanson, taken from one of their review articles. It demonstrates the significant reduction over time of the risk of reoffending by rapists, and the risk becomes very low after the age of 65 years. Other studies would also indicate that in the absence of paraphilia or sexual deviance, the risk of reoffending markedly diminishes with age past 60 years.

For those reasons, despite the STATIC 99R score, I think that the risk of violent sexual reoffending by Mr Fardon has reduced past moderate and into the low range. There is a risk that he will find his release from supervision to be very destabilising, and stressful. However, these days, I think there is evidence that when he is stressed he does not revert to sexual violence or sexual means to cope. There is a risk that in the community he will become anxious and react abusively to perceived or actual provocation, or that [his]

> personality style in general will bring him into conflict with others. This might cause problems for him, but again I do not think it will lead to a significant risk of sexual reoffending."[68]

[60] Dr Beech affirmed this view in his oral evidence, explaining that he did not think you could say the risk could ever completely go away, based on historical factors and "some enduring anti-social personality traits, some enduring affective instability from time to time", but the risk remains low, and it would remain low even if the respondent were stressed.[69] Both Dr Harden and Dr McVie agreed.

[61] Dr McVie interviewed the respondent on 6 October 2018. This was the first time she had done so. Dr McVie's report is dated 18 October 2018. Dr McVie identifies the respondent as having significant psychopathic (personality) traits, although notes his antisocial attitudes have attenuated over time (pp 18 and 19). On the basis of static (historical) risk factors for sexual recidivism, Dr McVie says (at p 19) that:

> "Having regard to his advancing age, the attenuation of his antisocial attitudes and lack of evidence of antisocial behaviour over the last five years since release, and the fact that he has not been formally diagnosed with any paraphilia and specifically does not have paedophilia, I would consider his risk of re-offending sexually is very low."

[62] In relation to the violence risk assessment tool, Dr McVie says that:

> "Mr Fardon has a very high loading of static, historical risk factors for violence. His current clinical factors are low. His risk management factors indicate possibilities for destabilisation as he has had extreme difficulty finding appropriate safe accommodation, he will probably encounter ongoing problems with supervision by police and there is a high likelihood of ongoing problems with media intrusion."

[63] In summary, Dr McVie says (at p 20):

> "… Though actuarial and clinical assessment raised high concerns about his risk to the community 15 years ago, he has been compliant with supervision over the last five years and has engaged with his treating psychologist and his trusted GP.
>
> There is no substantiated diagnosis of a paraphilia or paedophilia.
>
> He does meet criteria for a diagnosis of antisocial personality disorder, with considerable psychopathic traits, and criteria for a diagnosis of substance use disorder. It does appear that his antisocial behaviours have mellowed

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[68] Underlining added.
[69] T 1-33.

with time and there has been no documented substance abuse for many years.

While there is no collateral substantiating his recent cardiac problems, from his self- report he is currently at high risk of a further serious cardio-vascular event and his capacity to present for the required treatment has been compromised by his notoriety. Future stress will increase the risk of further cardiac related medical problems."

[64] Further, Dr McVie says (at pp 20-22):

1. "I would consider Mr Fardon's risk of sexual recidivism is very low, with or without a supervision order."

2. "I would consider his risk low without a supervision order. This is based on his age, the lack of a diagnosis of any paraphilia, the length of time since his last sexual offence, and his recent five years on the supervision order without breach."

3. As to how the respondent's risk of sexual recidivism could manifest, in the absence of a supervision order – "It is possible that if he were to resume substance abuse, and if he experienced an actual or perceived injustice while intoxicated, he could respond in anger. The victim could potentially be a male sexual partner."

4. That she considers the obligation to report under the *Child Protection (Offender Reporting and Offender Prohibition) Act* 2004 "should be sufficient to manage the low risk" and that "[c]urrently there is no evidence that he represents a risk to children".

5. "I do not consider a further supervision order under DPSOA will result in any lessening of risk to the community".

6. In relation to the Hanson graph at appendix D of Dr Beech's report, "I do consider the graph is a meaningful demonstration of risk. Risk of recidivism falls significantly from age 60 years. The group where there remains some risk would be those offenders with lifelong paedophilic tendencies, usually where there have been multiple victims over many years. Mr Fardon does not fit this profile". Dr Harden also shares this view.[70]

7. As to what is required to ensure the respondent's risk remains low (with or without a supervision order), "Mr Fardon would benefit from provision of stable safe accommodation and the ability to continue to engage with his current community supports without any perceived persecution or intrusion by media… Mr Fardon would benefit from continued contact and support by his current

[70] See the report of Dr Harden, dated 20 November 2018, at p 31.

treating psychologist and his GP whom he has known and trusted for many years. I understand Mr Fardon intends to continue these supports".

[65] Dr McVie concludes her report by saying:

> "… my assessment is Mr Fardon will present a low level of risk of committing another serious sexual offence at the expiry of the current order (in this case the final determination of the current application), if a further supervision order is not made. Thus I do not support a continuing supervision order under the DPSOA for Mr Robert Fardon."

[66] Dr Harden interviewed the respondent on 12 October 2018, and prepared a report dated 20 November 2018. Dr Harden had previously interviewed the respondent in January 2011.

[67] Like both Dr Beech and Dr McVie, Dr Harden also considers the respondent's future risk of sexual reoffence, with no supervision order in place, is low. Dr Harden's opinion mirrors that expressed by Dr McVie, in that he also recommends the respondent not be placed on a supervision order, encourages the respondent continuing his contact with his psychologist and GP, and avoid intoxicating substances, and that he may require some assistance sourcing appropriate accommodation and avoiding stress associated with media attention (at p 5).

[68] Dr Beech confirmed in his oral evidence that he agreed with the recommendation of Dr McVie and Dr Harden, that the respondent not be placed on a further supervision order.[71]

[69] The opinion expressed by Dr Harden, at the end of his report (pp 30-31) includes the following:

> "There is no evidence that [the respondent] suffers from any deviant sexual interest or paraphilia. He gives a long history of being a sexually driven individual with promiscuous sexual behaviour throughout his life both in and out of prison. This appears to have reduced significantly during the last five years although he has some continuing sexual interest and activity as described.
>
> Most of his sexual behaviour throughout his life has been non-criminal in nature, the sexual offences he has committed in my opinion result from his antisocial personality and attitudes which led (at that time) to him seeing no difficulty, particularly when intoxicated, with the use of force or coercion to obtain sexual gratification if he wished and little empathy for the harm this might cause other people.
>
> …

[71] T 1-41 to 1-42.

His criminal offences in the past have been associated with a lack of empathy towards other human beings and the failure to respect the normal laws by which society operates, this is a common characteristic of people with antisocial personality and psychopathic personality features.

…

He would continue to meet a diagnosis of Antisocial Personality Disorder under DSM 5 although this has diminished significantly. He continues to have psychopathic personality features although there appears to have been slow but steady improvement in this in more recent decades.

He also has a strong history of Polysubstance Abuse with a stated particular preference for alcohol although he has used a very wide range of drugs. He has apparently been abstinent for many years and to my understanding has not returned a positive breath alcohol or drug urine test in recent years.

He has complained of a number of anxiety symptoms over the years with some degree of consistency, these seem to relate to 2 areas, the first being traumatic anxiety and memories regarding his horrific abuse when he was a child, and the second being anxiety associated with situations where he feels like he is not in control. He seems to be coping better with these symptoms in recent years.

Risk Summary

The actuarial and structured professional judgement measures I administered would suggest that his future risk of sexual reoffence with no supervision order in place (unmodified) is below average (low).

My assessment of this risk is based on the combined clinical and actuarial assessment. He starts out with a relatively high degree of static risk factors that will not change with time and relate to his earlier life at assessment. Then there are a number of factors that particularly over the last 5 to 10 years have steadily reduced his risk of sexual recidivism as best this can be assessed. These largely stem from his advancing age with decreasing violent and sexual drives, his substantial period of time stable in the community on a supervision order and his gradual maturation of personality features of an antisocial and psychopathic nature particularly in association with his long psychological therapy with Mr Nick Smith. An additional risk reducing factor is the now relatively prolonged period of abstinence from substance misuse.

To summarise it is my opinion that he is now at (below average) low risk of reoffence sexually in the community with no constraints on his behaviour.

> If he were to reoffend based on his past behaviour it would most likely be in the context of substance intoxication and would be opportunistic rather than planned."[72]

[70] Dr Harden explained, in his oral evidence, that psychopathy is a personality construct and, like all other personality constructs, it changes with age, as it has done in the case of the respondent.[73] He said in a person with antisocial personality disorder and psychopathic personality traits, the risk of offending is often predicated upon poor judgment and impulsivity, and in relation to the respondent said:

> "So I think what's happened in Mr Fardon is he, his impulsivity has decreased and disappeared, really, with age and his judgment – so people with psychopathic personalities can live offence-free lives in the community once they work out that it's actually in their own best interest to do that, and I think that's probably where he is now."

[71] Dr McVie agreed with that, and added that:

> "I got the impression, from interviewing him, that he's made a conscious decision that he's going to comply with the rules of society and that's what he's been doing for the last five years.
>
> If he were still psychopathic and antisocial he wouldn't have engaged in therapy with the psychologist and certainly nowhere near to the level that he has clearly done so from the quality of Dr Nick Smith's reports. He also would have great difficulty in complying with the rules of the order over a five year period. I think his personality has mellowed considerably over the years."[74]

[72] Dr Beech agreed that the respondent's impulsivity and his general volatility has settled, but considered that was the product of age, referring to studies demonstrating that (with the exception of paedophiles with male children victims), the features of a psychopathic personality disorder that lead to reoffending, such as impulsivity, opportunism and poor planning, start to decrease over the age of 60, and people's behaviour generally starts to settle over the age of 60.[75]

[73] Dr Beech and Dr McVie agreed with the view expressed by Dr Harden that if the respondent were to reoffend in the future it would be opportunistic, rather than planned, but involving someone he knows, most likely someone with whom he has a sexual liaison, a sexual partner of some kind, with whom he would become overbearing.[76] Dr Harden and Dr McVie considered it speculative in this case to try to conceptualise risk

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72 Underlining added.
73 T 1-49.
74 T 1-49 to 1-50.
75 T 1-50; see also at 1-46, where Dr Beech says "the impulsivity has markedly lessened over the years".
76 T 1-38; 1-50 to 1-51 and 1-52 to 1-54.

by reference to a particular scenario, noting that the respondent's past offences were quite different, and the respondent did not have a particular *modus operandi*.[77] But it was noted by Dr McVie that substance abuse was the common theme in the past; and Dr Beech also referred to intoxication as a key element in any pathway to reoffending.[78]

[74] The issue of substance abuse and intoxication is directly related to the assessment of future risk posed by the respondent, given that both the serious sexual offences, committed in 1978 and 1989, involved the respondent being heavily intoxicated. In that regard, each of the psychiatrists agreed that there is no reason to believe drugs or alcohol would pose a problem for the respondent, absent the restrictions of a supervision order. As Dr Beech observed, the respondent has been out and about in the community and been able to access bottle shops; he stays at a place (the precinct) where drugs and alcohol are said to be available; and consistently he has had negative tests. Dr McVie said given that he is now 70, and has had several years in the community, if drugs and/or alcohol were going to be a problem, there would have been hints of that already and she said "because there hasn't been I think it's probably highly likely that he'll stay away from alcohol".[79]

[75] In addition, notwithstanding the respondent has been stressed in recent times, and had problems in the community, he has not sought out alcohol or drugs.[80]

[76] The psychiatrists also, in their oral evidence, emphasised the importance to the respondent, as a protective factor, of the good relationship he has with his long term GP and with his treating psychologist over the past 6 years, and the arrangement that has already been made for preparation of a mental health care plan so that the respondent can continue to see his psychologist.[81]

[77] On this application the Attorney-General emphasised the potential impact on the respondent of high levels of stress associated with his notoriety and consequent media scrutiny, and the related challenge of finding somewhere to live. In terms of the effects of stress, Dr Beech referred in his oral evidence to studies which showed that one of the things which can lead to reoffending is destabilisation and stress, particularly in the case of people just released from prison (in contrast to the respondent, who has been released for the last 5 years, albeit under supervision), and studies of persistent sex offenders, some of whom when stressed become sexually preoccupied or revert to sexual means to cope with that stress. But Dr Beech said:

> "I think that's much less likely now for Mr Fardon. The evidence I would use perhaps to support some of that is if you look at the case file material and the case note on the 3rd of September 2018 when these appeal matters

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77 T 1-55.
78 T 1-52.
79 T1-38 to 1-39.
80 T 1-40.
81 T 1-40 to 1-41 and 1-48.

> and release matters were coming up, he was significantly stressed. He was later to go on and have a heart attack. He was anxious about his release. He was, I think, scared, perhaps even at the prospect of being released because, really, it was starting to come to reality. He was worried about the media, things like that.
>
> But the case officer who saw him noted that despite the anxiety and the stress and things like that, there was no evidence of emotional dysregulation and he controlled himself quite well. He was able to reasonably talk about his situation and his progress and overall the assessment was that there was no acute elevation and risk at that time."[82]

[78] Although noting it is not known how the respondent would react if a member(s) of the public accosted him in the street, Dr Beech said the emotional response that has been seen in the last few years has been of anxiety, or to "arc up" and become irritable and argumentative, or even verbally antagonistic, but go no further. He emphasised that the important thing is that there is no evidence of sexual preoccupation – so what the respondent would not do in that situation is go back and ruminate, become sexually preoccupied, then use sex as a way of coping with that adversity. Dr Harden and Dr McVie agreed.[83]

[79] In relation to risks posed once the respondent comes off the supervision order, Dr Beech also said that if the respondent, for example, cannot find accommodation, he may become very stressed or angry. Dr Beech said that on the basis of recent material he thought it likely that this would precipitate physical deterioration, or deterioration in his mental health, such as becoming depressed or suicidal or very anxious; he may become hopeless, and very passive as well.[84] But Dr Beech said the risk that he would reoffend is low "because again he hasn't over recent times when very stressed resorted to sexual deviance, sexual acts, sexual behaviour, sexual coping mechanisms" and "instead there are consistent notes that there's no evidence of sexual preoccupation".[85] Dr Harden and Dr McVie agreed that the risk of the respondent reacting to stressors in the community by sexually reoffending is very low.[86]

[80] The psychiatrists all agreed that the respondent is better placed, in terms of potential risks on transitioning from being subject to a supervision order to no supervision order, than a person who has just been released from custody. As Dr McVie noted, he has been accessing the community, he has negotiated public transport, he has been out and about, he knows where he is, he can drive, he knows how to work a phone and a GPS.[87]

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[82] T 1-35.
[83] T 1-35 to 1-36.
[84] T 1-46; see also at T 1-51.
[85] T 1-46.
[86] T 1-55.
[87] T 1-48.

Once again, the respondent's age now (70), the length of time since he last offended (30 years) and the absence of any paraphilia, were emphasised in this context.[88]

Consideration

[81] The application as filed sought a further supervision order for a period of five years. In the Attorney-General's written submissions a period of two years was proposed. But at the hearing, the applicant reverted to seeking an order for five years, submitting that "relaxed supervision for five years would be better".[89]

[82] I observe that there is no provision in the Act for "relaxed supervision", or for that matter a transitional order. I have previously commented on the lack of flexibility available to the court, particularly on an application for a further supervision order, in *Attorney-General v Fisher* [2018] QSC 74 at [96]-[100]. But that is a matter for Parliament. And it does not alter the relevant question which is whether the court is satisfied, by acceptable, cogent evidence, and to a high degree of probability, that the respondent is a serious danger to the community in the absence of a further supervision order – that is, that there is an unacceptable risk that he will commit a serious sexual offence (being a sexual offence against a child, or involving violence) in the absence of a further supervision order. The paramount consideration on an application such as this is the need to ensure the adequate protection of the community.

[83] I have had regard to the matters set out in s 13(4), in the course of reviewing the evidence, summarised above. This includes the reports of the three psychiatrists (s 13(4)(a)), the reports of the treating psychologist (s 13(4)(b)), the respondent's antecedents and criminal history (s 13(4)(g)), and other relevant matters including the history of orders made under the Act, and the respondent's compliance with the supervision order made in 2013 (s 13(4)(j)).

[84] As to s 13(4)(c), there is no information indicating there is a *propensity* on the part of the respondent to commit serious sexual offences in the future. The Attorney-General submitted it was relevant to have regard to circumstances that might *create* a propensity to commit serious sexual offences in the future. Those "circumstances", in this case, were identified as the stress of finding accommodation and dealing with the respondent's notoriety and the attendant media scrutiny. These factors were also emphasised by the Attorney-General as another "relevant matter" for the purposes of s 13(4)(j).

[85] As to s 13(4)(d), there is no pattern of offending behaviour on the part of the respondent. The one common theme was intoxication. In that regard, as I have noted at [74] above, each of the psychiatrists expressed the opinion that there is no reason to

[88] T 1-47 to 1-48.

[89] T 1-27 and the draft proposed supervision order which was marked "A" for identification. It would be within the power of the court to make a further supervision order for less than 5 years. Section 13A of the Act, which imposes a mandatory minimum term of 5 years for a supervision order, does not apply to an application for a further order (see ss 19D(1) and 19E).

believe drugs or alcohol would pose a problem for the respondent, absent a further supervision order.

[86] Participation in rehabilitation programs, which is referred to in s 13(4)(e) and (f), did not take on any particular significance at the hearing of the present application for a further supervision order. Relevantly, though, is the respondent's compliance with the current supervision order throughout the whole period of the five years since he was released from custody; his sustained abstinence from drugs and alcohol for many years; and his positive engagement with the treating psychologist.

[87] Turning then to the evidence about the risk of the respondent committing another serious sexual offence if another supervision order is not made (s 13(4)(h)) and whether there is a need to protect members of the community from that risk (s 13(4)(i)).

[88] It was made clear at the hearing that the potential impact on the respondent of the stress associated with the end of the supervision order was the primary basis on which the Attorney-General pressed for a further supervision order. It was submitted that "a further supervision order would reduce the opportunities for the respondent to reoffend by removing from him stressors which may destabilise the present emotional equilibrium, thereby heightening the risk of reoffence".[90]

[89] As already noted, the two stressors identified as potentially "destabilising the present emotional equilibrium" are finding accommodation away from the precinct and dealing with media scrutiny and associated community vigilantism, as a result of the respondent's notoriety. It was submitted a further supervision order would ensure the respondent "does not experience a destabilising event" and would provide for a transition from supervision under the Act to living unsupervised in the community.[91] The Attorney-General submitted that a further supervision order would avoid or ameliorate those "circumstances of destabilisation".[92]

[90] It is probably right to say that if a further supervision order is made it will reduce or remove the risk of the media hounding the respondent, and he will still be able to live at the precinct. But that is not the relevant question for present purposes. The question is whether the court is satisfied, to a high degree of probability, that the respondent is a serious danger to the community, because there is an unacceptable risk that he will commit a serious sexual offence if no further supervision order is made. The evidence of the three psychiatrists does not support a finding that the impact of these potentially destabilising circumstances on the respondent is such as to conclude that there is an unacceptable risk that he will commit a serious sexual offence. As can be seen from the summary of their evidence above (including at [59], [60] and [77] to [80] above), all three of the psychiatrists expressed the opinion that, even in the face of such stressful circumstances, it is unlikely that the respondent would react or respond by reoffending

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[90] Applicant's written submissions at [120].
[91] Applicant's written submissions at [123]-[126].
[92] T 1-63.

sexually. The evidence of the psychologist, Mr Smith, also supports this (see [40] above).

[91] Noting Dr McVie and Dr Harden's circumspection about hypothesising a particular offence scenario, the view expressed was that if the respondent were to reoffend, it would be opportunistic, rather than planned, but involving someone he knows, most likely someone he is in a sexual relationship of some kind with, with whom he could become overbearing.

[92] The psychiatrists have made it clear that there is no evidence, from the many assessments conducted over many years that the respondent suffers from any sexual deviance or paraphilia, such as paedophilia (the sexual attraction to children). In the Attorney-General's written submissions at [116], it was said that manifestation of the potential risk in the respondent's case would be to cause a child or male adult sexual partner physical harm. However, as clarified at the hearing, the Attorney-General only makes that submission on the basis of the 1967 offence and the 1978 offence, which involved child victims. On the other hand, the medical evidence is clear and in so far as predictions of possible future offending are concerned, no one predicts offending against a child. Counsel for the Attorney-General confirmed that it is no part of their case to say that there is evidence of a pre-disposition to offend against children. The reference to a male sexual partner comes specifically from Dr McVie's report (at p 21), and is explained by the fact that the respondent's sexual liaisons in more recent times have been with men, in prison or at the precinct or the day spas referred to above.

[93] As to the degree of likelihood of that hypothetical risk eventuating, the expert evidence is consistently that it is low, or very low. That opinion is supported by the following factors:

1. The respondent's age (70), and the objective data supporting the significant reduction of the risk of reoffending by rapists after the age of 60, and particularly past 65.

2. The length of time – 30 years – since his last conviction for a sexual offence.

3. That his previous offending was in part driven by his anti-social and psychopathic personality traits, which have significantly lessened over the years, demonstrated, among other things, by his ability to comply with a very stringent supervision regime for the past five years.

4. That his previous offending was also linked with substance abuse and intoxication, and there is no evidence of an ongoing active vulnerability to substance use, demonstrated by his ability to remain abstinent from alcohol and drugs for many years, despite their availability to him.

5. The absence of evidence of a sexual paraphilia, such as paedophilia; and the absence of evidence of ongoing sexual preoccupation.

6. His positive and sustained engagement with his treating psychologist.

[94] As Keane JA (as his Honour then was) said in *Attorney-General v Beattie* [2007] QCA 96 at [19], the degree of likelihood is not an answer in itself – whether or not a risk is unacceptable must be gauged by taking into account the nature of the risk and the consequences of the risk materialising. In that case, the experts described the risk of reoffending as "moderate", but the nature of the risk was that the offender would target vulnerable street children. Keane JA said the focus of consideration in that case must be upon the likely effect of a supervision order in terms of reducing the opportunities for the offender to engage in acts of seduction of children to an acceptably low level.

[95] In this case, the expert psychiatrists describe the risk of the respondent reoffending as low, or very low. The nature of the potential risk is as outlined at [73] and [91] to [92] above. In the context of considering what is an extraordinary order under the *Dangerous Prisoners (Sexual Offenders) Act*, it must be kept squarely in mind that the risk the Act is concerned with is the risk of committing a "serious sexual offence", which is a sexual offence against a child, or one involving violence. On the evidence, the respondent does not pose a risk to children, and the kind of offence hypothesised, of becoming overbearing with a sexual partner, possibly overstepping the boundaries of consent, arguably does not fall into the second category either. But even if one assumes the latter involves the use of violence, having regard to and balancing the nature of the potential risk, the evidence as to the likelihood of it eventuating (low, or very low) and the harm that may result, does not establish that there is an unacceptable risk that the respondent will commit a serious sexual offence.

[96] It cannot be said there is no risk, because of the respondent's past history of offending. But as noted above, in summarising the relevant principles, what the Act calls for is consideration of whether there is an *unacceptable* risk of committing a serious sexual offence – which in itself recognises that some risk can be acceptable consistent with the adequate protection of the community, within a civilised society which values the liberty of the individual.

[97] I have set the evidence out at some length so that the basis for the court's decision can be clearly understood. Given the issues highlighted in this case about the potential impact of media scrutiny and associated community vigilantism, it is important that the outcome of this application is scrutinised on the basis of the facts and evidence, not speculation. The important facts are:

1. The respondent is now a man of 70 years of age. Objective data supports the conclusion that the risk of reoffending by rapists markedly diminishes, becoming very low after the age of 65.

2. He has not been convicted of a criminal offence for over 30 years.

3. He has been subject of detention orders, and supervision orders, under the *Dangerous Prisoners Act* for 15 years.

4. This case is not about whether the respondent should be released from prison. It is about whether or not to make another order for supervision under the Act.

5. The respondent has been out of prison and in the community subject to a supervision order made under the Act for the past five years. He has complied with that supervision order, which is relevant not just for that fact, but because of the challenge of doing that for a person with his personality traits (anti-social and psychopathic), which supports the conclusion reached by the psychiatrists that, with age, those traits have lessened significantly.

6. Whilst he has been subject of the supervision order, progressively he has been moving about the community relatively freely, going on outings, to shops and going fishing, without any problems.

7. There is no evidence the respondent suffers from any form of sexual paraphilia. He is not a paedophile.

8. There is no evidence of ongoing sexual preoccupation.

9. The antisocial and psychopathic features of his personality (impulsivity, opportunism and poor planning; breaking whatever rules of society did not suit him at the time), which played a large part in his prior offending, have lessened significantly.

10. The respondent has demonstrated sustained abstinence from alcohol and drugs, such that the medical experts consider there is no reason to believe drugs or alcohol would pose a problem for the respondent, even without a further supervision order.

11. The respondent has the support of his long term GP, and treating psychologist, and has made arrangements to continue his engagement with the psychologist after the supervision order comes to an end.

12. The consistent expert opinion of the three psychiatrists is that the respondent poses a low risk of reoffending sexually, without a further supervision order.

13. The consistent view of each of the three psychiatrists was that a further supervision order should not be made.

14. When the supervision order comes to an end, the respondent will become subject to reporting obligations under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004, as a "post-DPSOA reportable offender" (s 7A), for the remainder of his life (s 38A). Although the respondent does not, on

the evidence, pose a risk to the sexual safety of children, which is the purpose of this Act, the relevance of this reporting obligation is that police will have his personal details[93] and the powers conferred by the Act to apply for a prohibition order (ss 13F and 13FA) if the respondent engages in "concerning conduct" (s 13A).

[98] For the reasons set out above, I am not satisfied, on the evidence before the court, that the respondent is a serious danger to the community in the absence of a further supervision order. Accordingly, the application will be dismissed.

Limited non-publication order

[99] On the evidence before me, the main challenge facing the respondent, as his period of supervision under the Act comes to an end, is the media scrutiny he attracts, which in turn may make his transition into ordinary life, in particular finding somewhere to live, difficult.

[100] This is not a new issue. In *Attorney-General v Fardon* [2006] QCA 512, the decision of the Court of Appeal dismissing the appeal from the decision of Lyons J to release the respondent on a supervision order, each of the members of the Court commented on the impact of media and public scrutiny on the respondent: President McMurdo said, at [27]:

> "… The reports before the Court unequivocally demonstrate that one of the respondent's greatest difficulties in reintegrating back into the community after his lengthy period of institutionalisation will be his anxiety. His transition from a prisoner in gaol into the community as a law-abiding citizen is more likely to succeed if he is outside the spotlight of the media or harassment by vigilante groups."

[101] Williams JA agreed with McMurdo P's reasons, and also said, at [34]:

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

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[93] See ss 10A, 18 and schedule 2 to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld).

[102] White J, at [41] "endorse[d] the comments of the President and Williams JA that the protection of the community is best served by permitting the respondent to embark on his rehabilitation in the community without undue attention".

[103] I also endorse those comments. In a democratic society such as ours, governed by the rule of law, there is something unsettling about the argument that an extraordinary order curtailing the personal liberty of a citizen, who has already served a substantial penalty for their crimes, should be made to avoid the stress and destabilisation caused by intense media scrutiny and attendant community vigilantism.

[104] Given the evidence, and the submissions made, about the potentially detrimental and stressful impact of expected media scrutiny, and my concerns about how that could affect the due administration of justice in this case, I invited submissions from the parties as to the power of the court to restrict publication of this decision, for a short period of time, to facilitate the respondent's transition from the precinct where he currently resides, without the immediate glare of the media and the potential for vigilantism.

[105] The court has an express power under s 8 of the *Supreme Court of Queensland Act* 1991 (Qld) to limit the extent to which the business of the court is open to the public provided that the public interest or the interests of justice require it. As the Court of Appeal said in *R v McGrath* [2002] 1 Qd R 520, after referring to the earlier equivalent of this power[94] (at [8]):

> "This is a confirmation and perhaps an extension of the common law power of the court to prohibit publication of proceedings where the court considers this necessary for the purpose of administering justice. The power includes the power to sit in camera if justice cannot otherwise be attained. However, the court has always regarded as fundamental the requirement that judicial proceedings be conducted in open court where members of the public may be present. The power of the court to exclude the public and limit publication of its proceedings is undoubted,[95] but as McPherson J (as he then was) observed in *Ex Parte The Queensland Law Society Incorporated*:
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> > '… the power of the court under general law to prohibit publication of proceedings conducted in open court has been recognised and does exist as an aspect of the inherent power. That does not mean that it is an unlimited power. The only inherent power that a court

[94] Then s 128 of the *Supreme Court of Queensland Act* 1991.

[95] Referring to *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166; *R v His Honour Judge Noud; Ex parte MacNamara* [1991] 2 Qd R 86; *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10; *R v Tait* (1979) 46 FLR 386 at 407 per Brennan, Deane and Gallop JJ.

> possesses is power to regulate its own proceedings for the purpose of administering justice; …'"[96]

[106] It was accepted by the Attorney-General that an order for non-publication of the order to be made today, and these reasons, for a short period of time (a matter of days), to enable operational matters associated with the execution of the order, is within the power of the court and would be properly made, as being essential to the administration of justice by enabling the order to be carried into effect. Both the Attorney-General and the respondent agreed that any non-publication order could not be in place for any longer than a week, acknowledging that such an order is properly to be regarded as exceptional, and should do no more than is necessary to achieve the due administration of justice.[97] It was also agreed that there would need to be some exceptions to any non-publication order, having regard to the respondent's mandatory reporting obligation under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004, the practical need to inform the police of the making of the order, and the courtesy and decency of informing victims of the respondents previous offences of the making of the order today.

[107] In the circumstances of this case, I am satisfied it is in the interests of justice, including ensuring that justice will be done in these proceedings to the respondent, and essential to the fair and equal administration of justice, that the publication of the order to be made today dismissing the Attorney-General's application for a further supervision order, and these reasons for making that order, should be restricted for a period of seven days, subject to those exceptions just identified.

[108] The purpose of making this limited non-publication order is to enable the necessary immediate steps to be taken, to give operational effect to the order of the court to be made today (the effect of which is that the respondent will no longer be subject to a supervision order under the *Dangerous Prisoners* Act) unhampered by the potentially disruptive effect of media or other public scrutiny. After this time, from Wednesday, 16 January 2019, consistently with the principle of open justice, the order made and the reasons published to the parties today will be publicly available.

[109] Although there may be an argument about whether persons, who are not parties to this proceeding, to whom publication of the order made today is permitted to be made immediately, are bound by the non-publication order, as McHugh JA observed in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 477, conduct outside the courtroom which deliberately frustrates the effect of an order made to enable a court to act effectively within its jurisdiction may constitute a

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[96] *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170. Underlining added. See also *Hogan v Hinch* (2011) 243 CLR 506 at [26] per French CJ and at [86]-[87] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

[97] See *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477 per McHugh JA; see also *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 at [39]-[42] and also at [51] per Spigelman CJ (Handley JA and Campbell A-JA agreeing).

contempt of court.[98] The legal representatives for the Attorney-General and the respondent will be directed to clearly inform any such person of their responsibilities in this regard.

[110] I will hear from the parties as to the precise wording of the non-publication order to be made.

[98] See also *R v His Honour Judge Noud; Ex parte MacNamara* [1991] 2 Qd R 86 at 98, *Rockett v Smith; Ex parte Smith* [1992] 1 Qd R 660 at 665-666; also *Hogan v Hinch* at [24] and [46] per French CJ.