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‘Only a Pawn in Their Game’: Crime, Risk and Politics in the Preventive Detention of Robert Fardon

Russell Hogg

Queensland University of Technology, Australia

Abstract

In 2003 Robert Fardon was the first prisoner to be detained under the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*, the first of the new generation preventive detention laws enacted in Australia directed at keeping sex offenders in prison or under supervision beyond the expiry of their sentences where a court decides, on the basis of psychiatric assessments, that unconditional release would create an unacceptable risk to the community. A careful examination of the Fardon case shows the extent to which the administration of the regime was from the outset governed by political calculation rather than the logic of risk management and community protection.

Keywords

Preventive detention; sex offenders; risk.

Introduction

In 2003 Queensland enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* (hereafter DPSOA) permitting a court to order the indefinite detention of an imprisoned sex offender after the prisoner’s sentence had expired. Queensland was the first state in Australia to enact such a law. Other states – NSW, Western Australia and Victoria – have since enacted similar laws.¹ Passage of these new generation preventive detention laws has become increasingly common across the Anglophone world (Seddon 2008; Simon 1998). Robert Fardon was the first person detained under the Queensland law and indeed the law was enacted in some haste in order to prevent his release from prison. Fardon challenged (unsuccessfully) the constitutionality of the law in the Australian High Court. He was finally released under supervision in late 2013, after spending most of the previous 10 years in preventive detention under the DPSOA.

The new laws have been widely criticised by lawyers, academics and others (Edgely 2007; McSherry 2005; McSherry and Keyzer 2009). Whilst I share many of the concerns of these critics my primary focus here is on the Fardon case, or what might more accurately be described as the many Fardon cases as he battled to be released and Queensland Governments waged an equally determined campaign to keep him behind bars. This is a case study in the

administration of preventive detention in one Australian jurisdiction. It seeks to assess the efficacy of the law in its own terms by examining in detail the manner in which it was administered against one individual.²

Based on a careful reading of the many legal proceedings involving Fardon between 2003 and 2013 I consider whether the efforts to prolong his detention were motivated by a bona-fide concern to protect the community from the risk that he would commit further sexually violent crimes, or whether other motives played a part and, if so, what these were. In the next section I will consider the key features of the Queensland legislation, which differ little from the schemes enacted in other Australian jurisdictions. This will be followed by a brief discussion of the state of knowledge and the role of risk and science in relation to sexual offending. I then turn to a consideration of the offences for which Fardon was convicted and sentenced before turning to a more detailed consideration of the proceedings spanning the 10 years of his post-sentence detention under DPSOA.

Risk and risk management in the Dangerous Prisoners (Sexual Offenders) Act, 2003 (Qld)

The DPSOA was enacted with the immediate aim of preventing Robert Fardon's release from prison in 2003. The Act applies to prisoners serving a prison sentence for a serious sexual offence defined as an offence of a sexual nature involving violence or committed against a child. On the application of the Queensland Attorney-General the Supreme Court may make a continuing detention order or a supervision order with respect to a prisoner to take effect at the expiry of his sentence. The effect of a continuing detention order is that the prisoner remains under detention *in prison*. A supervision order allows for the prisoner's conditional release into the community.

Before making a detention or supervision order the court must be satisfied on the basis of 'acceptable, cogent evidence' and 'to a high degree of probability' that there is an "unacceptable risk that the prisoner will commit a serious sexual offence" if no order is made. In reaching its decision the court is required to have regard to a number of matters, including independent psychiatric reports assessing the level of risk that the prisoner will commit another serious sexual offence if released, the past pattern of offending of the prisoner, and the prisoner's participation (or not) in rehabilitation programs whilst under sentence. When considering an application for, or reviewing, an order a court must give paramount consideration to protecting the community. If the Court concludes that the prisoner is a serious danger to the community unless an order is made, it must then consider whether adequate community protection can be reasonably and practically achieved by making a supervision order. If so, it must make a supervision order subject to appropriate requirements. In its original form, the Act required an annual review by the Supreme Court, but this was subsequently changed to a bi-annual review. The court is required to give detailed reasons for the making of any order and there is provision for an appeal to be made by the prisoner or the Attorney-General to the Queensland Court of Appeal. A 'continuing detention order' is an order for indefinite detention; that is, until it is rescinded by the court.

The exceptional character of the law, and its infringement of established legal principles protecting personal liberty, was widely recognised at the time by both critics and supporters of the legislation. There were doubts, shared by the then Premier, as to whether it was constitutional (King 2003). An editorial in the tabloid *Courier Mail* expressed concern at the 'haste' with which the law was passed and described it as being 'contrary to all common law principles'. The paper nevertheless supported it as 'appropriate' as long as there is 'convincing evidence' that the prisoner will offend again, the detention only endures while 'that serious risk exists', and 'so long as it is recognised to be exceptional and will only be applied in the most extraordinary situations' (*Courier Mail* 2003).

Introducing the legislation to the Parliament, the then (Labor) Attorney-General argued that existing legal provisions for dealing with sex offenders did 'not accord with current *medical* understanding of paedophilia or ... violent sexual offenders ...' and 'may not assist in protecting the public if the prisoner is, in *medical terms*, considered capable of controlling his or her sexual urge but chooses not to or even if not able to control that urge is considered incapable of being "cured" or rehabilitated' (Hansard 3 June 2003: 2484, emphasis added). He described the scheme under the new act as akin to civil detention under mental health laws. Although not based on mental illness, he claimed it was founded on an 'equally sound principle of public policy', namely the 'paramount' need to protect the community from convicted violent sex offenders who continued to pose a danger because of their propensity to commit further offences of a sexually violent nature.

The Act was conceived therefore on a medical or quasi-medical model wherein a sex offender could be detained (or compulsorily supervised in the community) not simply on the basis of past sexually violent acts (for which a court-imposed sentence had been served) but because of a present violent propensity deriving from a diagnosable sexual disorder. A precedent of sorts for this existed in American sexual predator laws and in particular the targeting of paedophiles for preventive detention under such laws. The *Fourth Diagnostic and Statistical Manual of Mental Disorders* (or DSM-IV) of the American Psychiatric Association defines paedophilia as a psychiatric disorder. This provided a basis for detaining certain sex offenders under the authority of a scientific diagnosis, and for surmounting objections based on the legality principle that such detention is arbitrary and involves an offender being punished twice for the same offence.

Fardon challenged the constitutional validity of his initial detention under the Act, appealing the issue to the High Court. The constitutional question was whether the DPSOA imposed a function or process on the Queensland Supreme Court that was alien to its exercise of judicial power under the Australian Constitution, thus violating the separation of powers. By a six to one majority the High Court held that the law was constitutional. The majority saw no obstacle to a state law that involves a state Supreme Court in a regime of preventive detention as long as conventional judicial process is observed. Unlike the legislation in an earlier case (*Kable* (1996)), in which the Court struck down a NSW law that applied to a single named individual, the DPSOA applied to a general class of persons, rules of evidence applied, a high standard of proof had to be discharged, the court had to exercise a genuine discretion and provide reasons, and the decision was subject to appeal and periodic review. The majority accepted that a decision resting on the predictions of experts as to future criminal behaviour amounting to "an unacceptable risk" to the community was compatible with conventional judicial process.

Justice Kirby was the sole dissenting judge. He was of the view that:³

Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess'.

Where the majority judges took at face value the legislative claim that this was a form of civil commitment for a preventive, non-punitive purpose, Justice Kirby was influenced by the fact that detention under the Act would be administered in a prison – 'the imprisonment "continues" exactly as it was ...'⁴ – leading him to the inescapable conclusion that it was punitive in character. It therefore amounted to a form of double and retrospective punishment on a prisoner for crimes for which he had completed a judicially imposed sentence.

In this respect the DPSOA (and its counterparts in other Australian states) fails to observe the trappings of the US sexual predator laws and other civil commitment regimes. Notwithstanding that the objects of the Act refer to 'control, care or treatment' to facilitate 'rehabilitation' (s 3), detainees are not confined and managed in special treatment institutions or units and nor are they subject to any court- or other externally-supervised treatment and management program (like, for example, those administered by drug courts in Australia and elsewhere). They are detained under exactly the same regimes and rules as prisoners under sentence. This is the clearest signal in the legislation that the trappings of community protection and civil commitment may cloak another, more important, purpose which is to simply perpetuate their punitive incarceration and to recruit the Supreme Court (and psychiatrists) into a regime designed to achieve this objective. Another is that the power to apply for a detention order under DPSOA is vested in the Attorney-General, a senior cabinet member, there being no attempt to distance administration of the Act from the political process as there would be if, for example, the power lay with an independent statutory office like the Director of Public Prosecutions.

The politics become even more transparent when the approach of successive Queensland governments to Fardon's case is considered in detail. But before turning to that it is necessary to briefly consider how law and science are melded with the politics of risk surrounding sex offenders.

Risk, science and the politics of sex offending

The Queensland Attorney-General's second reading speech introducing the DPSOA begs further questions in relation to the purposes of the legislation. The definition of paedophilia in the DSM-IV, which affords the principal scientific foundation for a medical model of detention, is limited to a very specific subset of sex offenders against children believed to possess particular underlying characteristics that justify preventive measures. However, a common strategic manoeuvre witnesses the 'interchangeable use of "paedophile" and "sex offender"', leading to both the spurious implication that "'sex offender" is a diagnostic term' (Gelb 2007: 19; also Greenberg 2013: 233-237) and to a much enlarged mandate for the psychiatric management of sex offender risks. Under the DPSOA any prisoner convicted of a serious sexual *offence* qualifies as a 'sex offender' and is potentially subject to detention under the Act based on psychiatric assessments, regardless of the role sexual motivation may have played in the commission of the offence(s).

The medico-legal complex which sees law joined to psychiatry in the management of the dangerous individual has a long history and an impressive critical literature (Foucault 1978, 2003; Rose 1998; Castel 1991; Brown and Pratt 2000; Pratt 1997). Psychiatry occupied a space that opened in the nineteenth century when the criminal law model of the rational and responsible (and thus punishable) legal subject was confronted with the troubling phenomena of crimes without reason. Psychiatry offered the expertise which explained these crimes to the courts and filled the gap in social defence with the psycho-pathological criteria that justified the segregation, treatment and cure of persons who could not be convicted and punished according to legal standards of responsibility. More recently, there has been talk of a shift from dangerousness to risk, from a clinical psychiatric model of intervention centred on the dangerous individual (a pathological type defined by an internally disordered personality) who requires segregation and treatment to an actuarial model in which the individual is seen rather as a cluster of dynamic risk factors which have to be managed (Castel 1991; Feeley and Simon 1992, 1994; Rose 1998). Psychiatrists in the Fardon case undertook both clinical examinations and actuarially-based risk assessments, but one practitioner conceded that predictions of future offending based on the latter were 'at best informed speculation'⁵ whilst another openly acknowledged it to be a 'weak science' (Watt 2007). This suggests that risk may afford a very

insecure scientific footing upon which to extend the medico-legal complex to encompass the preventive detention of sex offenders.

However, the role of the medico-legal complex needs to be seen in the context of the wider, culturally and politically protean, network of ideas, discourses and practices that make up the contemporary field of risk (Sparks 2000) rather than in narrow clinical, technical or scientific terms. This is a field that has become increasingly saturated with popular fears and demands that the safety of the public be guaranteed at all cost. The threats singled out for heightened attention recall a more ancient figure, that of the 'monster', who now appears in the shape of the paedophile, the Islamic terrorist, the people smuggler, the drug dealer, and so on. There is thus an easy slide from the scientific and the clinical into a very different, highly emotive discourse: that of media, cultural and political representations in which sex offenders (and others) are essentialised as evil incarnate, irredeemable 'monsters' who reside somewhere beyond the human pale, where no amount of punishment is enough and where citizens can feel entitled (frequently with the encouragement of tabloid media) to physically attack and harass them, vandalise their homes and drive them from their suburbs and towns (Simon 1998). As Rose (1998: 191-192) has shown, new risk thinking, notwithstanding the emphasis on dynamic risk factors and a continuum of risk, is quite flexible enough to adjust to its role in the preventive detention of newly designated categories of monster like the sex offender.

However, contrary to the stereotype that sex offenders belong to a distinctive pathological type whose sexually violent urges drive them to repeatedly seek out victims upon whom to prey, sex offenders are not a homogeneous group. They are not in general even more inclined to recidivism than other offenders (Gelb 2007: 21-31; Richards 2011). Sex is not always the sole or primary factor in the commission of many acts of sexual violence. Rape in war is an extreme example but one that points to other motives and emotional drivers that are often present in everyday acts of sexual violence: the desire to dominate and assert power over others, the exaction of revenge, the expression of rage, the desire to humiliate, to name just a few. This is not to say that the choice of sexual violation to assert power or dominance is irrelevant but, as Elizabeth Wilson succinctly summarised the state of knowledge some years ago, '[r]ape for most men is not a compulsion, but is an incidental and not very remarkable act' (1983: 60). Constructing and promoting an image of sexual violence centred on the figure of the pathological stranger, therefore, and building an ever more extensive control apparatus on this foundation (sex offender registration, community notification, preventive detention, punitive sentencing laws), is a costly diversion from the challenges of addressing sexual violence in the manifold forms and settings in which it occurs. Indeed, we have almost daily reminders of this fact as we learn how the protection of the sexually vulnerable has been systematically sacrificed to safeguarding other interests, like the reputation of Church and other powerful institutions, the culture of celebrity and family values.

Figures like Robert Fardon afford a useful target against which to channel, and symbolically assuage, proliferating popular fears around sexual offending, especially the sexual abuse of children, whilst disturbing as little as possible powerful interests and values.

Robert Fardon's life and crimes

Robert Fardon was born in 1948. He has given consistent accounts over many years of his upbringing. His mother left when he was very young and he has no recollection or knowledge of her. He was brought up by his father, a chronic alcoholic who was also violent towards him. When his father was away working or in prison Robert was left on a farm with a neglectful aunt and uncle. As a child he was sexually abused by relatives, one of them an older cousin whose abuse continued over several years. His father introduced him to alcohol when he was five or six and to sex when he was about 11 years old. In his early teens he left the farm and had little

contact with family thereafter. He lived on the streets, surviving as best he could performing seasonal and farm work, thieving, and at one time joining a motor-cycle gang. His criminal record in the 1960s and 1970s is consistent with the life he described: numerous convictions for theft and disorder offences and one known conviction for vagrancy. As a juvenile he was sent to 'Boys' Homes' and later was sentenced to short terms of imprisonment on five separate occasions. In 1967, when he was 18, he pleaded guilty to the attempted carnal knowledge of a girl under 10. The judge observed that 'the interference was but slight' and sentenced him to a three year good behaviour bond.⁶

In December 1978 at a family gathering he raped a 12 year old girl and physically attacked her sister when she intervened. He later pleaded guilty to the charges and was sentenced to 13 years imprisonment. He said that he had no memory of the crimes as at the time he was seriously affected by alcohol and drugs (what he called 'mushroom juice').⁷ He was released on parole after 8 years. In September 1988, 20 days after his release, he committed further violent offences against an adult woman. At the time of these offences he was a heroin addict as was his victim. She had gone with him to his flat in order to inject heroin and, he alleged, to have sex. He claimed she attempted to steal his drugs, whereupon he violently assaulted her. He pleaded guilty to offences of unlawful assault and sodomy. After a trial he was also convicted of rape. In June 1989 he was sentenced to 14 years imprisonment for these offences.

It hardly needs stating that these two episodes of violence were vicious in the extreme. And it is these crimes that have stamped him in political and media discourse and public consciousness as a 'serial sex offender', 'sexual monster', and 'paedophile', to cite just a few of the epithets used to describe him. The implication is that, having committed sexually-motivated violent crimes of the same type on two separate occasions, he is a recidivist violent sex offender who is bound to commit further sex crimes if released from prison.

Even on the basis of the bare facts, however, it might be questioned whether Fardon's offences (however heinous in themselves) readily fit the pattern suggested by the labels repeatedly applied to him. He did not stalk, randomly select, or in any sense cultivate or 'groom' victims for his sexual purposes. Nor is there evidence that these were in any other respect planned or premeditated crimes. Alcohol and/or other drugs played a crucial role in both episodes and these have been repeatedly referred to as a significant risk factor in expert assessments of Fardon's likelihood of re-offending. Also the circumstances of the second episode differ in important ways from the first. The victim was an adult woman. Transactions around heroin use and supply, as well as sex, were significant factors. The motive for the violence was at least in part associated with his perception (right or wrong) that she was seeking to steal his drugs. It has also been acknowledged that his release in 1988, three weeks before these offences, was seriously mishandled by correctional authorities. Recommended counselling and other preparation was not provided because it was not available in the prison in which he was held at the time of release, although he had been transferred to the prison for that very purpose. As one judge described it, he was released 'with very little, if anything, in place for his support and reintegration back into the community. He had nowhere to live and no money and fraternised with people from prison who helped him become a seller of drugs'.⁸

Fardon's crimes certainly reflect a propensity to spontaneous violent rage but they afford a very doubtful basis for any claim that he is a paedophile or even that he was driven by some all-consuming sexual urge or other sexual pathology. As of 2003 Fardon had not been convicted of any criminal offences (involving other prisoners or prison staff) during his period of incarceration from 1988 onward. He was not involved in any breaches of prison discipline after 1990, a surprising record given his acknowledged susceptibility to anxiety and stress and the conflict and tension endemic to the prison environment. In the early 1990s he also underwent counselling in the Townsville Correctional Centre and thereafter abstained from drugs and

alcohol. This has been confirmed by randomly conducted urine tests over the entire period since; that is, both before and after 2003. Whilst enforced abstinence might be thought to be an unavoidable incident of incarceration, it is a mistake to believe that illicit drugs and prison 'brews' are not available in prisons in Queensland and elsewhere.⁹ For at least five years prior to the expiry of his sentence in 2003 he was also on a low security classification at Townsville prison.¹⁰ One judge, recounting his situation in November 2003, described him as 'living relatively independently in the prison at Townsville as one of a group of prisoners in self-contained accommodation, described as a "village" ... He was responsible for his own cooking and washing and worked in a trusted position in the prison tailor shop'.¹¹

It is clear however that he was anxious and ambivalent about his imminent release and how he would cope in the community after being in prison for almost 23 years, which is not surprising given what is known about the effects of long-term imprisonment (Cohen and Taylor 1972). Accounts of his conduct at this time are nevertheless mixed. He was reported by some staff to be uncooperative in relation to plans for his rehabilitation and reintegration and at times verbally abusive. A disputed allegation relied upon in the 2003 application under the DPSOA was that in 1998 he threatened to kill in order to remain in prison (McSherry and Keyzer 2009: 11-12). Others, including psychiatrists who assessed him in this period, found him to be 'cooperative', 'pleasant', 'a well-behaved inmate, a willing and responsible worker ... [who] mixed well with inmates and correctional officers'.¹² In the mid-1990s he had been expelled from a 45 week sex offenders' treatment program after 26 weeks for what was described as 'offensive and inappropriate institutional behaviour'¹³ and he refused thereafter to participate in any sex offender program. In the applications to prevent his release in 2003 and subsequently, heavy reliance was placed on his failure to complete a sex offender treatment program during his sentence. He also refused participation in some other behavioural programs, but completed some and undertook several vocational programs.¹⁴

In 2003 Robert Fardon was like many other prisoners facing the task of returning to society after many years behind bars. As is often the case, prison appears to have exacerbated rather than ameliorated many of his long-standing psycho-social problems. Nonetheless he might have been regarded as better placed than some prisoners to cope with release, given his clean institutional record and abstention from drugs and alcohol over many years and his relatively independent living conditions in a low security environment. He also had a significant outside support network in Townsville. The real issue therefore related to his transition to a free and independent existence in the community. That Fardon came to be the principal target of the new 2003 law may have had as much to do with the profile of another prisoner released early that year as with Fardon's own history and circumstances.

The paedophile controversy in Queensland in 2003

Dennis Ferguson, a prisoner with a long history of convictions of sexual assault on children, was released in January 2003. His release attracted widespread attention and debate at a time of rising media coverage and public anxiety around the threat posed by paedophiles in the community. No law existed to keep Ferguson in detention or return him to prison (unless he reoffended), although his case did prompt passage of other laws designed to monitor his movements and that of other convicted child sex offenders in the community. He was also relentlessly pursued by the authorities and harassed by the media and vigilantes in Queensland and later in New South Wales (McSherry and Keyzer 2009: 6-10). Fardon's treatment from 2003 on – and his portrayal as a 'paedophile' and a 'sexual monster' – owed as much to the contingent fact that the imminent expiry of his sentence coincided with this wider controversy and panic over Ferguson's release as it did to Fardon's particular criminal history which, although violent, was very different to Ferguson's.

The detention of Robert Fardon under the DPSOA in 2003

Fardon has been assessed by at least 10 different psychiatrists in the period since the late 1990s, many of them conducting assessments on multiple occasions. In his decision to issue the initial detention order under the DPSOA in 2003, White J summarised the views of the several psychiatrists who had assessed him to that point.¹⁵ All were in agreement that he suffered 'from an Anti-Social Personality Disorder brought about by his early developmental experiences and consolidated by prolonged periods of institutionalisation'. Subsequent assessments agreed in substance with this diagnosis. None assessed him as suffering from a mental illness and all but one agreed that he does not have an identifiable sexual disorder. One psychiatrist only considered it a possibility that he had a sexual paraphilia. This substantial expert consensus belies the unremitting depiction of him by the media, officials and politicians as a 'paedophile', a 'sex fiend', or a 'sexual monster' and the emphasis repeatedly placed on his failure to complete a sex offender treatment program in prison.

A recurrent concern in the legal proceedings was his capacity to manage the stresses of life outside prison without recourse to violence.¹⁶ His apparent reluctance to cooperate in addressing his personality problems, if not other risk factors, clearly influenced the assessments and decisions under DPSOA in 2003 and again in 2005 when it was concluded that there was an unacceptable risk that he would commit further violent offences if not subject to a detention order. His non-cooperation was however a complicated matter insofar as his resistance to the pressure from within Queensland Corrective Services (QCS) that he undertake a sex offender treatment program was supported by psychiatric opinions that such programs were not appropriate to his problems and would not assist him.

Nevertheless, in 2003 all the psychiatrists and other experts who assessed Fardon expressed the belief (albeit some with greater confidence than others) that with the appropriate preparation, support and supervision in the community he could and should be released at some point. In the early assessments most stressed that there should be a planned, graduated transition from custody to supervised liberty.¹⁷ Although ordering his continued detention in 2003, White J referred to the support network Fardon had developed in the Townsville community, where he had been imprisoned for several years, and to the recent escorted leaves of absence he had from the prison without serious incident. However, he also noted that Corrective Services had not indicated whether it would provide the intensive supervision needed if he was to be released in the future¹⁸. White J concluded:¹⁹

The goal must be one of rehabilitation if the respondent is to remain detained and, with the respondent's cooperation, appropriate treatment together with staged reintegration as recommended by Dr Moyle may lead to a positive outcome when this order is reviewed.

White J ordered that Fardon 'be detained in custody for an indefinite term for control, care *and* treatment' (emphasis added). The Court however exercised no authority with respect to Fardon's conditions or treatment in detention and it soon became evident that, far from accepting the judgment of the Court and acting in accordance with it, the executive would do the opposite in order to frustrate Fardon's release.

On every subsequent occasion that his detention was reviewed the government opposed Fardon's release regardless of the psychiatric assessments, the other evidence and the onerous conditions that could be imposed on the release. On every occasion that the Supreme Court ordered his release (always on onerous conditions) the Government appealed the decision. A litany of other tactics were adopted to keep Fardon in prison or to return him to prison when the Court had released him. This culminated in a nakedly unconstitutional attempt to

countermand by Government edict the final decision in 2013 of the Court of Appeal to release him, a doomed political gesture perhaps made more with the aim of embarrassing the Court and influencing future decisions than in the expectation that it would succeed in keeping Fardon behind bars.

A civil commitment regime lacking civil commitment

After the initial detention order was made Fardon was transferred from Townsville to Wolston Correctional Centre in order for him to address his 'sexual re-offending', notwithstanding expert assessments that he had no sexual disorder which might benefit from a sex offender program. No evidence was provided in relation to his treatment in Wolston on the occasion of the first review of his detention almost 6 months after the transfer, raising a question mark over why it was deemed necessary. The transfer also had the effect of removing him from his external support network developed over a number of years in Townsville. At the first review²⁰ Moynihan J maintained the detention order but noted evidence of progress in a number of areas from a range of witnesses, including psychiatrists who had assessed him and counsellors who had known him for some years and now formed part of his support network in the community. All were agreed that he stood a good chance of succeeding back in the community if he was provided with the appropriate supervision and support to make that transition and several offered their services free of charge.

It became clear at this point that, notwithstanding this body of opinion and the potential to support Fardon's transition to freedom, QCS had no intention of providing or funding any additional support or services needed for him to make the transition, and the Court had no power to mandate and/or supervise their provision. According to McSherry and Keyzer (2009: 69), when DPSOA was enacted, no administrative infrastructure was created and no resources allocated to support the law, suggesting once again that the priority (and perhaps the sole aim) was to keep Fardon (and others) in prison under existing conditions of confinement.

The strongest indication that the Government and QCS was determined to work against the recommendations of the Court and the psychiatrists was Fardon's security reclassification following the initial detention order, noted by Moynihan J as potentially having 'an inhibiting effect on aspects of a program towards gradual supervised release ...'²¹ And indeed in the second annual review of his detention (in 2006) the psychiatrist who recommended against his release on a supervision order relied on Fardon's reclassification to argue that it was unsafe to release him from a high level of security directly into the community, stressing (as he and others had done before) the importance of a graduated process. This was notwithstanding that prior to the detention order in 2003 Fardon had spent many years in a self-managed minimum security environment without incident and no plausible reason was given for reclassifying him.²²

It is difficult to avoid the conclusion that the reasons were simply political: to obstruct his release. The professional opinions and advice of the psychiatrists and the recommendations of the Court appear to have been used by the Government not as a guide to what should be done to alleviate Fardon's risk factors but to do the opposite: to exploit them (and almost certainly exacerbate them) in order to justify his continued detention. If this is so, it is cynical in the extreme, given the emphasis placed on the effects of his long-term institutionalisation, the concern that anxiety and stress associated with uncertainty and change in his circumstances were major risk factors, and the recommendations of judges and the psychiatrists for a graduated release plan. The outcome involved not only his continued detention but also a substantial harshening of the conditions of his detention from that which had pertained when he was under criminal sentence, notwithstanding that this was described as 'civil detention' for preventive and treatment purposes, not punishment.

In 2006 the Court ordered Fardon's release under supervision for 10 years subject to 32 conditions.²³ After the Court had made clear its intention, the Attorney-General persisted in opposing release on the grounds that conditions in relation to suitable accommodation and supervision could not be satisfied, there being a reluctance to accept government responsibility for making such provision. An appeal by the Attorney-General was dismissed.²⁴ In the Court of Appeal McMurdo P was sharply critical of QCS. Relying on the assessment of Dr Nielsen she observed:²⁵

His conduct according to prison records has been satisfactory for nearly a decade and he has now passed the age where he represents a serious risk to anyone in the community and is ready for release under supervision, although he will require a high level of support to cope after such a long time in a total institution. He [Dr Nielsen] disagreed with Dr Moyle's view that the respondent was at high risk. Dr Moyle's view was actuarially based and ignored the respondent's previous long-standing low risk classification. The Department was unable to return the respondent to a low security setting or to provide him with access to programs that might help his adjustment to life in the community, such as day release or work release, and instead recommended that he participate in 'treatment programs' even though there was no agreement that he needed sex offender or substance abuse treatment and no evidence demonstrating the efficacy of custody-based psychological treatment programs for sex offenders or substance abuse.

McMurdo P commented on QCS's active efforts to frustrate a plan for his graduated release by reclassifying him through no fault of his own.²⁶ In September 2006 the Government went further by legally closing off the option of graduated release 'even though the respondent's integrated release into the community has had the support of experienced psychiatrists and judges as being in the interests of community protection for the past three years'.²⁷ She also commented that '[h]is 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 media or harassment by vigilante groups'.²⁸ The other judges agreed with McMurdo J's reasons and shared her concern that both the management of his case and the political and media attention risked exacerbating his condition and making it more difficult for him to rehabilitate himself.

The detention merry-go-round

Having opposed Fardon's release at every opportunity, every opportunity was also taken to seek to have him returned to custody. In July 2007, little more than seven months after his release, the Attorney-General sought an order for his detention based on three alleged breaches of his supervision order. Media at the time also erroneously reported that he was breached for consorting with another sex offender, overlooking the fact that Fardon had been required by QCS, contrary to his wishes, to co-reside with other sex offenders at the Wacol prison precinct. The first breach related to an invited talk by him to Year 11 students at a Brisbane school which was arranged by the Catholic Prison Ministry and during which he was accompanied at all times by a support worker and had no contact with any individual student. Apparently after the visit he received several letters of appreciation to which he did not respond. Secondly, he had lent his car to a neighbour under supervision at the Wacol precinct which enabled the neighbour to breach a curfew condition. Thirdly, and most seriously, he absconded to Townsville. However, there he contacted a former prison chaplain and was taken into custody within two days. He absconded due to harassment by vigilantes in Brisbane.

Although found proved, the Court continued the supervision order with amendments to the conditions (now numbering 38),²⁹ reasoning that the nature and circumstances of the breaches

did not bear on his risk of reoffending. In a telling indication of the monitoring to which he was subject under the supervision order the judge observed of his record of compliance:³⁰

Apart from the contraventions, his compliance with the conditions of his release was satisfactory. Between his release and June 2007 he was subjected to 26 urine tests and 60 breath tests. None of the test results was positive for alcohol or drugs. Over the same period he received visits from and reported to a corrective services officer on numerous occasions – 20 scheduled home visits, 21 random home visits, 18 unspecified visits, 52 personal attendances – and he submitted to substance tests on 62 occasions.

In April 2008 Fardon was arrested and charged with rape. Over two years later, during which time he remained in custody, he was convicted by a jury at trial and sentenced to 10 years imprisonment. The conviction was quashed on appeal and a verdict of acquittal entered.³¹ Fardon and the complainant had known each other for 40 years and were in a consensual sexual relationship at the time of the allegation, initiated by her after his release from prison. The only evidence against him, that of the complainant, was weak and contradictory to say the least. At its strongest the prosecution case was that during the course of consensual sexual intercourse Fardon had digitally penetrated the anus of the complainant (something she said she did not 'like' which does not of itself establish non-consent). When she loudly protested, Fardon immediately stopped. Thereafter, they had gone to a club for a drink where they were both observed to be acting normally. The judges in the Court of Appeal unanimously overturned the conviction and refused to order a re-trial. Had the allegation involved anyone other than Robert Fardon it is doubtful that a prosecution would have been initiated (let alone a conviction obtained at trial). Fardon had applied for a judge only trial on the basis of the existing public prejudice against him, but the trial judge refused the application.

Although acquitted, the circumstances of the allegation were relied upon to allege breaches of the supervision order in that first, he had, without supervision, visited the home of an intellectually disabled person (being the complainant) and, secondly, he had visited licensed premises without the consent of his supervising Corrective Services Officer. Fardon had known the complainant for decades. He admitted to knowing she had 'limited literacy and to be somewhat 'slow' but did not regard her as having an intellectual disability.³² His relationship with the woman was a known fact and a psychiatrist on an earlier occasion had even made a positive reference to it as reducing his risk of reoffending. The licensed premise was the club which he attended in the company of the complainant after the alleged offence. There was no suggestion that he actually consumed alcohol there or at any other time.

Six months later, in May 2011, the Court rejected the Attorney-General's application to rescind the supervision order on the basis of these breaches and ordered Fardon's release, subject to an amended set of conditions (now numbering 47).³³ Two psychiatrists supported his release on a supervision order and one opposed it. The Court was not persuaded that the breaches meant that his release would carry an unacceptable risk of re-offending. The Court refused to include some extraordinary conditions sought by the Attorney-General, one being that Fardon 'not visit public parks without prior written permission from the supervising Corrective Services Officer'. There is nothing in his criminal record or the expert assessments that link his risk of offending to public parks and the Court regarded them as 'unduly restrictive' and likely 'to interfere with his rehabilitation into the community'.³⁴ It is difficult to account for such a legal tactic other than as an attempt to promote an image of Fardon modelled on a familiar paedophile stereotype, in defiance of the facts and abundant expert evidence.

An appeal by the Attorney-General succeeded.³⁵ The Queensland Chief Justice provided the leading judgment. He was of the view that the judge below placed insufficient weight on the conclusion of one of the psychiatrists, Dr Grant, that there was:³⁶

... a high risk of contravention of any future supervision order arising from Mr Fardon's attitudes to authority and control, along with his institutionalization and difficulties adjusting to life in the community. Given the high risk of breaching a supervision order I consider the likelihood of him returning to incarceration if released would be high and there must be considerable doubt therefore about the prospect of successful management in the community under such a supervision order.

Dr Grant's reasoning, and that of the Court of Appeal, overlooks the distinction made by judges in earlier proceedings between the risk of breaches of a supervision order and the risk of a serious sexual offence being committed. The latter is the pivotal consideration under the Act. Dr Grant did not link the likelihood of Fardon being returned to incarceration to the commission of a serious sexual offence but to the risk that he would breach the supervision order. Elsewhere Dr Grant concluded that the risk of any breach is less likely to relate to sexual violence than some other form of rule-breaking. Dr Grant linked these risks to Fardon's institutionalisation, his negative attitude to authority and his poor relationships with corrections staff. The Chief Justice quoted Dr Grant's report at length on these matters, including with regard to Fardon's antagonism towards QCS based on his (Fardon's) belief that they opposed his release and made every effort to return him to prison; his complaints about the stresses of living in the Wacol precinct where he felt under pressure from other ex-prisoners to engage in activities that put him in breach of the supervision order; and his alleged contempt for the requirements of the order.³⁷

At this point Fardon's circumstances begin to look Kafkaesque. He was required by QCS to live at Wacol alongside other ex-prisoners and sex offenders. Recalling that he had been breached on an earlier occasion for lending his car to a co-resident, his complaint that living at Wacol placed him at risk of breaching his supervision order is not taken as a reasonable and legitimate concern of his, but rather is used as evidence that he was at risk of breach because of his negative attitude to QCS. If he did harbour negative attitudes towards QCS this could hardly be surprising, nor regarded as a symptom of pathology, given the strenuous efforts to frustrate his release and an orderly transition from detention to life in the community, made in defiance of repeated recommendations of psychiatrists and the courts in relation to his treatment. When it came to consideration of his past breaches of the supervision order the Court of Appeal made no attempt to contextualise them or acknowledge mitigating circumstances, as had judges on earlier occasions.

Similar reasoning was apparent in a later decision of the Court of Appeal³⁸ (in March 2013) when by majority it overturned another Supreme Court judge's decision to rescind Fardon's detention order and release him on a supervision order subject to 33 conditions.³⁹ His 'entrenched negative attitudes' to authority, to corrections officers and to supervision had been stressed at length in psychiatric assessments by Dr Grant in 2012 and early 2013, notwithstanding that in 2006 Dr Grant had assessed his risk of committing a sexually violent offence as relatively low. Dr Grant cited the past breaches of the supervision order as reasons for changing his mind, suggesting that this pointed to an attitudinal problem that affected the risk of re-offending, a problem that he claimed was also manifest in repeated expressions of hostility to QCS and a generally uncooperative and evasive track record in relation to supervision requirements.⁴⁰

But these assessments continued to overlook the fact that none of Fardon's breaches bore directly on his risk of reoffending. They were technical in nature, like attending licensed premises but without drinking alcohol, or there were significant mitigating factors, as with his absconding in response to harassment by vigilantes. Dr Grant was the psychiatrist who in 2006 cited his sexual relationship with the woman complainant in the later rape allegation as supporting an assessment that Fardon's risk of committing a violent sexual offence was relatively low. Subsequently he was returned to custody because the relationship was treated as a breach of his supervision order and it was listed with others as evidence of an attitudinal problem and a general tendency to evade and manipulate supervision requirements. Acknowledging that Fardon's breath and blood tests had always been negative, Dr Grant nevertheless also worried that he consorted with people at the Wacol precinct who used alcohol and that he had on occasions helped them buy it.⁴¹ This it was said put him at risk of lapsing back into alcohol use, an acknowledged risk factor in relation to the commission of a sexually violent offence, thus projecting the potential chain that would lead from minor evasions to larger dangers. But in 2011 Dr Grant had referred to Fardon's complaints about precisely these problems and pressures of having to reside at Wacol as evidence of his problematic and confrontational attitudes to QCS.⁴²

In these later assessments of both the psychiatrists and the court, the focus on the 'attitudinal problem' was permitted to all but completely overshadow Fardon's objective record of substantial (and substantive) compliance with onerous supervision requirements during the periods he was released from detention, his long term abstinence from alcohol and drugs, and his institutional record of over 20 years without a breach of prison discipline or other serious incident. This record is all the more significant given the extraordinary pressures to which he was subject, especially over the 10-year period after the expiry of his sentence. Engaged in perennial high profile litigation, living in perpetual uncertainty in relation to his future, and subject to constant media and public vilification that made him a focus of abuse and violent threats in prison and equally so if he was released into the community, his record hardly bears out the claim that he lacked any capacity for self-control (the more so perhaps given his hostile attitude to QCS, which might not surprise everyone, even without the diagnosis of an anti-social personality disorder).

Other sources of conflict with QCS officers were cited in a later psychiatric assessment, prepared by Dr Beech in July 2013. Dr Beech had also assessed Fardon in 2012 and had agreed with Dr Grant that his attitude to supervision was a strong indicator of his risk of reoffending. In the later assessment he refers to Fardon's planting of a garden without permission, his purchase of a dog that he was not allowed to keep and driving his car without permission, all instances that caused conflict with QCS.⁴³ It is not clear on this occasion, however, who Dr Beech regarded as the unreasonable party, Fardon or QCS. As with many of the earlier incidents and claims of conflict and hostility, they are open to varying interpretation. Later in 2013 Dr Grant also conceded in oral evidence 'that at least some of the matters of which Mr Fardon complained appeared to have a reasonable basis'.⁴⁴

Although it was only a matter of six months after the March 2013 decision of the Court of Appeal to keep Fardon in prison, fresh psychiatric assessments by the same two doctors were confidently in agreement that with appropriate conditions and support a supervision order would afford adequate protection to the community. According to Lyons J, in his decision on the review of the detention order in September 2013, 'Dr Grant considered that the risk for sexual re-offending by Mr Fardon was now moderate, *even if he was not subject to a supervision order*' [emphasis added].⁴⁵ There was a belated awareness of some of the realities of Fardon's predicament, including the abuse and trauma he suffered in prison, the impact of media attention and the constraints that his continued detention imposed on his making further progress.⁴⁶ More attention was also given to his sound disciplinary record in prison over many

years and his compliance with key requirements of the supervision order when he was released, in particular those relating to reporting and to abstinence from alcohol and drugs.⁴⁷ Doubtless the more positive assessments stemmed also from identifiable changes in Fardon's attitude, especially it seems under the influence of on-going counselling sessions with a forensic psychologist. However, it is hard to resist the conclusion that a marked shift occurred in the interpretive frame through which Fardon was viewed by the psychiatrists who had been centrally involved in proceedings during the later period of Fardon's detention. The Court rescinded the detention order and released Fardon on a supervision order, which it was understood would include GPS monitoring. The Attorney-General sought a stay on the order until an appeal was decided.⁴⁸

Conclusion: Normalising the exception

In anticipation that the appeal would fail, the Queensland Government enacted the *Criminal Law Amendment (Public Interest Declarations) Act 2013* (Qld) (hereafter PIDA), in a last ditch attempt to keep Fardon behind bars. This extraordinary law empowered the Government on the recommendation of the Attorney-General to detain a prisoner who had been released by the Supreme Court under the DPSOA, with no provision for appeal. On 6 December 2013 the Court of Appeal dismissed the Attorney-General's appeal against the rescission of the detention order and ruled unconstitutional the new law that would have allowed it to be over-ruled by executive fiat.⁴⁹ Fardon was duly released under the supervision order. The Attorney-General announced his intention to consider an appeal to the High Court, but abandoned it early in 2014.

Any residual doubts that the all-consuming purpose driving Government decisions and actions with respect to Fardon was to keep him in prison was removed by this attempt to place an unreviewable power to detain directly in the hands of the executive. In a telling indication of how he would exercise the power (if he got the chance), the Attorney-General announced to the media that his intention was to ensure that Fardon 'never comes out of jail' (ABC Radio National, *PM*, 27 September 2013), a statement pre-empting any consideration of evidence, of psychiatric assessments, and of future changes in circumstance. The Attorney-General occupies a time-honoured legal office as well as being a senior member of the government, but not even lip service was paid to the idea that the proposed power of an Attorney-General to imprison an individual (in defiance of a court order) should and would be exercised in a quasi-judicial manner and with some regard for principles of legality.

Although Fardon was released (albeit under strict supervision), this completed a decade-long transformation in the public and political climate surrounding preventive detention laws. The passage of DPSOA in 2003 was seen even by many of those who supported it as an exceptional measure whose power to detain a person who had completed his prison sentence had to be approached with circumspection and restraint (*Courier Mail 2003*). By 2013 what was earlier regarded as exceptional had become the norm. The fact of his release was regarded as necessarily pointing to a flaw in the law and there was a presumption that almost any action was justified which would keep Fardon in prison (*Courier Mail 2014*).

The irony is that prior to 2003 Robert Fardon was largely unknown to ordinary Queenslanders, notwithstanding the violent crimes for which he had spent most of the previous 23 years in prison. His metamorphosis into a publicly reviled sex monster whose release would send shockwaves of fear through the entire community was crucially an effect of the law itself and the manner in which Governments administered it. In his dissenting judgment in Fardon's 2003 High Court appeal, testing the constitutionality of DPSOA, Justice Kirby thought the law was punitive in character because under it 'the imprisonment "continues" exactly as it was'. The judge could not have anticipated that Fardon's imprisonment, under a *civil* commitment regime, would not in fact continue exactly as it was, but become *more* harsh, *more* punitive, as

Governments used it to demonstrate to the community that it was all that stood between their safety and an incorrigible sexual monster. It became less a case of needing the law to control Fardon than needing a symbolic figure like Fardon to justify the law. In the end, the Government was less invested in community protection than in Fardon as a political symbol, a token of their strength, resolve and toughness in an overheated law and order climate they had helped to nurture.

Post-script: The never-ending story ...

On 2 September 2014 (after the completion of this article) Robert Fardon was arrested on the basis of an allegation (arising from hearsay that had travelled through several hands) that he was planning to abscond to New South Wales. The *Courier Mail* (4 September 2014) editorialised that he 'is a man who should never again taste freedom'. The matter was set down for hearing in the Supreme Court on 16 September. The Attorney-General offered no evidence and withdrew the application to return Fardon to detention. Robert Fardon remains on a supervision order under which he must wear a GPS tracking device and reside at the Wacol precinct which he is not allowed to leave without QCS permission.

Correspondence: Professor Russell Hogg, School of Justice, Queensland University of Technology, 2 George Street, Brisbane, 4000, Australia. Email: russell.hogg@qut.edu.au

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- ¹ Crimes (Serious Sex Offenders) Act 2006 (NSW); Dangerous Sexual Offenders Act 2006 (WA); Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic).
- ² Many of the effects of the administration of the law examined here in connection with Fardon were also apparent in other cases in Queensland (see McSherry and Keyzer 2009: 81-85) and elsewhere (see Knox 2008 describing the situation of a prisoner detained under the NSW preventive detention law).
- ³ Fardon v Attorney-General for the State of Queensland [2004] HCA 46 (1 October 2004) at para [125].
- ⁴ At para [156].
- ⁵ A-G v Fardon [2003] QSC 331 (2 October 2003) Atkinson J at [62].
- ⁶ Cited in Attorney-General v Fardon [2003] QSC 379 (6 November 2003) White J at [31]-[39].
- ⁷ Attorney-General v Fardon [2003] QSC 379 (6 November 2003) White J at [41].
- ⁸ Attorney-General v Fardon [2003] QSC 379 (6 November 2003) White J at [42], [44].
- ⁹ Attorney-General v Fardon [2003] QSC 379 (6 November 2003) White J at [37].
- ¹⁰ A-G v Fardon [2003] QSC 331 (2 October 2003) Atkinson J at [42].
- ¹¹ Attorney-General for the State of Queensland v. Fardon [2005] QSC 137 (11 May 2005) Moynihan J at [64].
- ¹² A-G v Fardon [2003] QSC 331 (2 October 2003) Atkinson J at [49], [65].
- ¹³ A-G v Fardon [2003] QSC 331 (2 October 2003) Atkinson J at [65].
- ¹⁴ A-G v Fardon [2003] QSC 331 (2 October 2003) Atkinson J at [66], [67].
- ¹⁵ Attorney-General v Fardon [2003] QSC 379 (6 November 2003) at [76].
- ¹⁶ Attorney-General v Fardon [2003] QSC 379 (6 November 2003) White J at [77]. Also see Attorney-General for the State of Queensland v. Fardon [2005] QSC 137 (11 May 2005) Moynihan J at [67].
- ¹⁷ See, for example, Attorney-General v Fardon [2003] QSC 379 (6 November 2003) White J at [89].

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- ¹⁸ Attorney-General v Fardon [2003] QSC 379 (6 November 2003) White J at [94]-[99].
- ¹⁹ At [101].
- ²⁰ Attorney-General for the State of Queensland v. Fardon [2005] QSC 137 (11 May 2005)
- ²¹ At [112].
- ²² A-G (Qld) v Fardon [2006] QCA 512 (4 December 2006) [13].
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- ²⁴ A-G (Qld) v Fardon [2006] QCA 512 (4 December 2006).
- ²⁵ At [15].
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- ²⁷ At [26].
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- ²⁹ Attorney-General for the State of Queensland v Fardon [2007] QSC 299 (19 October 2007).
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- ³² Attorney-General for the State of Queensland v Fardon [2011] QSC 18 (16 February 2011) Lyons J at [11].
- ³³ Attorney-General for the State of Queensland v Fardon (No 2) [2011] QSC 128 (20 May 2011).
- ³⁴ Attorney-General for the State of Queensland v Fardon (No 2) [2011] QSC 128 (20 May 2011) Dick A/J at [71]-[73]
- ³⁵ Attorney-General for the State of Queensland v Fardon [2011] QCA 155 (1 July 2011).
- ³⁶ Cited at para [26].
- ³⁷ See para [19].
- ³⁸ Attorney-General (Qld) v Fardon [2013] QCA 64 (28 March 2013) Atkinson J dissenting.
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- ⁴⁰ Attorney-General (Qld) v Fardon [2013] QCA 64 (28 March 2013) Muir JA at [16]-[24].
- ⁴¹ At [24].
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- ⁴⁴ At [27].
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