The preventive detention of 'dangerous' people

By Bernadette McSherry

On 23 January 1835, Sir Francis Forbes, the first Chief Justice of New South Wales, was walking near his country residence when he was stopped by the mounted police. According to *The Australian* newspaper,[1] he 'gave a lame account of himself' and was promptly arrested on the grounds of being a suspected bushranger. He was taken to the district constable who quickly realised the mistake. The account in *The Australian* rather drily goes on to comment that 'His Honour was however well satisfied even at his own expense, to be fully acquainted with the diligence and activity of the Mounted Police'.

Sir Francis Forbes was arrested under the *Robbers and Housebreakers Act* 1830[2] which gave 'any person whatsoever' the power to apprehend any person reasonably suspected of being 'a transported felon unlawfully at large'. This legislation was generally referred to as the *Bushrangers Act* because of the police practice of using the powers under it to detain suspected bushrangers for indefinite periods. The burden of proof was placed on the apprehended person to prove 'to the reasonable satisfaction' of a Justice of the Peace that he or she was *not* a felon. If the Justice was not so satisfied, the person could be detained indefinitely.

The 1830 Act is but one example of laws that enable indefinite detention on the grounds of community protection. If the term 'felon' or 'bushranger' is replaced by 'terrorist', a pattern can be discerned in the use of laws to detain certain individuals without charge. The common theme running through current preventive detention regimes is the fear that certain individuals might cause harm to members of the community if their right to liberty prevailed. In popular parlance, they are considered to be 'dangerous' people.

Preventive detention laws fall in and out of favour according to the level of fear generated in relation to certain groups. Currently, it is not only suspected terrorists who can be detained in order to prevent possible harm to others, but also individuals with severe mental illnesses or intellectual impairments, those with certain infectious diseases, and high-risk offenders. In relation to the last group, what is significant is that in Queensland, NSW, Victoria and Western Australia, legislation enables serious sex offenders to be held in prison *post-sentence*. The other forms of preventive detention apply to those considered to be at risk to others, but are not based on the occurrence of a crime.

POST-SENTENCE PREVENTIVE DETENTION: DOMESTIC AND INTERNATIONAL PERSPECTIVES

This section focuses on legislation in Australia that enables post-sentence preventive detention of sex offenders. Despite being held to breach international human rights law, such legislation still seems to be regarded as a legitimate way to combat the fear of future harm.

The *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) was the first law enacted in Australia to provide for the post-sentence continuing detention in prison of a class of offenders. It enables the Queensland Attorney-General to apply to the Supreme Court for the indefinite detention of a prisoner serving a period of imprisonment for a serious sexual offence, whether or not the person was sentenced to imprisonment before or after the commencement of the Act. A serious sexual offence is defined in the Schedule to the Act as an offence of a sexual nature involving violence or against children. The application period is restricted to the last six months of the prisoner's term of imprisonment.

Under s13, the court must be satisfied to a high degree of probability that the prisoner is a 'serious danger to the community'. This is defined in s13(2) as meaning that there is an 'unacceptable risk that the prisoner will commit a serious sexual offence' if released from custody. The court has some discretion in the orders that can be made. Under s13(5) it can make a 'continuing detention order' which is an order for indefinite detention, or a 'supervision order' where the prisoner is released from custody but is subject to certain conditions, such as reporting to and receiving visits from a corrective services officer.

In making detention and supervision orders under the Act, the court must have regard to evidence from two psychiatrists who must prepare a report under to s11 which indicates the level of risk that the prisoner will commit another serious sexual offence and the reasons for that assessment.

The majority of the High Court of Australia in *Fardon v Attorney-General (Qld)*[3] held that the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) was constitutional. Similar schemes were subsequently enacted in other states by the *Dangerous Sexual Offenders Act* 2006 (WA); the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) and the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic).

The decision in *Fardon's* case was limited to the issue of whether s13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) conferred jurisdiction upon the Supreme Court of Queensland which was repugnant to, or incompatible with, its integrity as a court. >>

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Six of the judges (with Kirby J dissenting) held that s13 of the Act was valid on the basis that the legislation dealt with a *class* of offenders rather than an individual (distinguishing it from previous legislation that was held to be unconstitutional in *Kable v Director of Public Prosecutions (NSW)*[4]), and because sufficient safeguards were in place to ensure the Supreme Court was exercising its judicial discretion in making preventive detention and supervision orders.

Gleeson CJ was careful to point out that the High Court had no jurisdiction to consider policy issues concerning the legislation:

> 'There are important issues that could be raised about the legislative policy of continuing detention of offenders who have served their terms of imprisonment, and who are regarded as a danger to the community when released. Substantial questions of civil liberty arise. This case, however, is not concerned with those wider issues. The outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court.'[5]

The High Court decision in *Fardon's* case is irrelevant to the question of whether or not continuing detention in prison is in breach of international human rights law. Accordingly, in 2006, Robert Fardon instructed the Prisoners' Legal Service of Queensland to initiate a communication to the United Nations Human Rights Committee on the basis that his continued detention breached international human rights law. A separate communication was also filed in relation to Kenneth Davidson Tillman, who was the first person to be preventively detained in prison in NSW under its equivalent legislation. Both communications were filed in 2007 and the Human Rights Commission delivered its views three years later.[6]

Eleven of the 13 members of the Human Rights Committee agreed that both schemes were in violation of the right to liberty set out in Article 9(1) of the *International Covenant on Civil and Political Rights*. They pointed to four significant factors leading to their conclusion:

(1) The continued detention in prison was equivalent to a fresh term of imprisonment which is not lawful in the absence of a conviction.
(2) Because imprisonment is penal in nature, both Fardon's and Tillman's continued detention in prison amounted to a 'new sentence' which meant they suffered a heavier penalty than that applicable at the time the offences were committed.
(3) The procedures under the Acts, being civil in nature, did not meet the due process guarantees for a fair trial under Article 14 of the *International Covenant on Civil and Political Rights*.
(4) Because of the problematic nature of the concept of feared or predicted dangerousness, the Courts had to make a finding of fact on suspected future behaviour which might or might not materialise.

The Human Rights Committee held that the onus was on the state to demonstrate that rehabilitation could not have been achieved in a manner that was less intrusive than continued imprisonment and that Australia had failed to discharge this onus.

In both decisions, the Human Rights Committee requested that Australia inform it within 180 days of the remedy taken to give effect to its views. The Australian government did not respond within this time limit. On 6 September 2011, the Australian government filed a five-page document, setting out the reasons why both Fardon and Tillman remained in prison and stating that it rejected the Human Rights Committee's view that there were less restrictive means available to achieve the purposes of the NSW and Queensland legislation other than detention in prison.

The statement concluded with the observation that the NSW and Queensland governments did not consider any further action needed to be taken. Thus, despite the Human Rights Committee's finding that Fardon and Tillman's continued imprisonment breached their right to liberty under international human rights law, the Australian government has clearly signalled that there will be no changes made to current preventive detention schemes.

THE EMPHASIS ON RISK

While preventive detention laws have long existed, what is new is a growing reliance on preventive detention regimes at both the pre-crime and post-sentence ends of the spectrum *in conjunction with* a growing emphasis on risk and precaution.

Preventive detention and supervision regimes relating to sex offenders rely on the evidence of psychiatrists and psychologists in assessing the risk of future harm. In the past two decades, there has been a massive growth in the use of risk assessment techniques to classify the risk of future harm, for both management and prediction purposes. Despite this, assessing the risk of future violence remains a notoriously difficult task.

'Structured professional judgment' is a relatively recent approach to risk prediction which attempts to incorporate the strengths of actuarial methods (the use of scales based on statistical measures of offending such as the 'Psychopathy Checklist'[7] and the 'Violence Risk Appraisal Guide'[8]) and

clinical methods (based on the professional experience of mental health professionals) into a single decision-making approach. The structured professional judgment approach uses scales (generally referred to in the literature as 'instruments') that assess the offender against a range of factors that are thought to be associated with future offending, but leaves room for clinical experience in the interpretation of these scales. One example of an 'instrument' that can be used in this way is the 'Risk for Sexual Violence Protocol'.[9]

The number and variety of risk assessment instruments are on the increase and it can be difficult to work out the reliability and validity of newer instruments. If these instruments are to be used correctly, it is imperative that assessors are properly trained in their use and know the limitations of each. Such limitations may exist in relation to:

- the specific variables used in actuarial instruments;
- the variable-based approach itself;
- applying group data to the individual;
- translating the use of instruments to particular groups; and
- the use of risk assessment techniques in the courtroom.

In particular, there is a concern that reliance on risk assessment scales can lead to unnecessary detention due to 'false positives' – that is a 'positive' finding that the individual concerned is at risk of harming others when this is not really the case.

While the state of knowledge on risk assessment has improved in recent years and assessment instruments may assist in *managing* risk within hospital settings, there is still no assessment procedure that can *predict* risk with certainty, and this can have serious repercussions when a person's liberty is at stake.

The main difficulty for mental health professionals called on to assess a prisoner coming to the end of a sentence is how to take into account risk factors when, because of the very fact of imprisonment, the person has not re-offended, perhaps for a decade or more. Mental health professionals are forced to fall back on the prisoner's behaviour *before* imprisonment because it seems that the best predictor of future violence is past violence.

The difficulty, therefore, for mental health professionals called to give evidence under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 and similar legislation is that such opinion evidence will of necessity be based on a reconsideration of the prisoner's criminal record prior to incarceration or worse, on controversial personality constructs. This leads to the problem that sexual offenders will be preventively detained simply because of who they are.

With some notable exceptions (such as *Director of Public Prosecutions for Western Australia v Mangolamara*[10] and *Director of Public Prosecutions (WA) v GTR*[11]), expert >>

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testimony in court regarding preventive detention and supervision is generally accepted by judges without challenge. This is concerning given that actuarial risk assessment instruments and their use in courts have been widely criticised. This is one area where there is definitely room for more communication between lawyers and mental health professionals.

In Australia, at least, structured professional judgement is not used to the same extent for other groups subject to preventive detention as it is for post-sentence detention schemes. Involuntary detention and treatment legislation relating to people with severe mental illnesses usually has a 'danger to others' criterion which is based on the premise that severe mental illness is directly linked to harm to others.

There is a widely held belief among the public, and thus among policy-makers, that mental illness *causes* criminal behaviour. However, there is little evidence that this is the case and because of the low base rate of violence of people with mental impairments, it is exceptionally difficult to predict who will become violent in the future. Usually it is left to the treating clinician to make a decision on the risk of harm to others, based on observations and experience which have not been scientifically tested.

While the notion of risk permeates most preventive detention regimes, what is striking about preventive detention of suspected terrorists is that, until recently, there has been a relative lack of attention to 'risk' terminology. Instead, detention is based on the concept of 'reasonable suspicion' or a belief on 'reasonable grounds' that the individual concerned is a terrorist. What is 'reasonable' in this regard is vague and open to debate.

Models for the prediction of risk have typically been developed for use with specific populations such as serious sex offenders. It is debatable whether a group that can be labelled as 'terrorists' even exists, given the considerable controversy about what the term 'terrorism' actually means. Nevertheless, risk assessment scales for predicting future terrorist activity are now in the process of being developed.

CONCLUSION

Legally sanctioned preventive detention regimes are not new and they have long been used to detain certain 'outgroups' in society, from suspected bushrangers to suspected terrorists.

The post-sentence preventive detention of sex offenders has been held by the United Nations Human Rights Committee to breach the right to liberty, but such schemes remain attractive to governments because they are based on a community protection model that taps into public fears about certain 'dangerous' groups in society.

The language of risk now permeates the post-sentence preventive detention of sex offenders and, to a somewhat lesser degree, the detention for treatment of those with severe mental illnesses. The preventive detention of suspected terrorists is based on the concept of reasonable suspicion rather than risk, but there are signs that risk assessment techniques will carry over to this group as well.

While risk assessment techniques have advanced over the past decades, it remains the case that there is no method of risk assessment that gets anywhere near 100 per cent predictive power. A rigorous approach to risk assessment techniques therefore needs to be applied, both inside and outside the courtroom, given that preventive detention breaches the right to liberty.

It may be that Australia is at the crest of the wave at present in relation to legislative schemes for the preventive detention of certain groups in society and it may be that their use will ebb as other options prove more economically or socially viable. Until that occurs, however, given the decision of the United Nations Human Rights Committee in the *Fardon* and *Tillman* communications, it is essential that the scope and justifications for preventive detention schemes continue to be rigorously examined. ■

Notes: **1** *The Australian,* 23 January 1835, No 157, Vol III, p2. **2** *Robbers and Housebreakers Act* 1830 (11 Geo IV No 10) www.legislation.nsw.gov.au/sessionalview/sessional/act/1830-11a.pdf. **3** (2004) 223 CLR 575. **4** (1996) 189 CLR 51. **5** (2004) 223 CLR 575 at 586. **6** *Fardon v Australia,* Human Rights Committee, UN Doc. CCPR/C/98/D/1629/2007, 12 April 2010; *Tillman v Australia,* Human Rights Committee, UN Doc. CCPR/C/98/D/1635/2007 12 April 2010. **7** Hare, RD, *The Hare Psychopathy Checklist – revised* (1st ed, Toronto: Multi-Health Systems, 1991). **8** Harris, GT, Rice, ME, & Quinsey, VL, 'Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument' (1993) 20 *Criminal Justice and Behavior* 315-335. **9** Hart, SD, Kropp, PR, & Laws, DR with Klaver, J, Logan, C, & Watt, KA (2003) *The Risk for Sexual Violence Protocol* (RSVP), Burnaby, BC: Simon Fraser University, Mental Health, Law, and Policy Institute. **10** (2007) 169 A Crim R 379. **11** [2007] WASC 318.

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