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Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development

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Summary

The management of 'dangerous' offenders is of crucial community concern. This report focuses on the key debates concerning the policy and legal issues raised by post-sentence preventive detention. It analyses focus group discussions carried out in Brisbane, Adelaide and Melbourne concerning three different management regimes for high-risk sex offenders: post-sentence continued detention in prison, indefinite detention, and extended supervision orders in the community. It recommends that consideration be given to the new Scottish model of life-long restriction orders, arguing that post-sentence preventive detention should be seen as a last resort in the management of high-risk offenders.

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1. Chapter One: Introduction

1.1 Scope of the report

Over the last four decades the criminal justice systems in all Australian jurisdictions have battled with the perennial issue of what to do with 'dangerous' offenders and their potential for reoffending. The issue has been exacerbated by highly publicised incidents of sex offences against children and growing community concerns and fears over safety. This report focuses on different options for the management of 'dangerous' offenders in Australia and, in particular, the policy and legal issues raised by post-sentence preventive detention. While incarceration of an offender after trial incapacitates an offender by removing him or her from the community, the concern is what to do with the offender after the completion of the sentence, particularly in circumstances where there is a perception by mental health professionals that the offender has a propensity to reoffend. An option is to release the offender subject to continued supervision in the community. Another option is to continue the incarceration of the offender even after the expiry of the scheduled sentence, thus having the character of 'preventive detention'.

This report provides an overview of current options for the management of dangerous offenders including indefinite sentences, management during sentence, and post-sentence detention and supervision and analyses policy options for dealing with 'dangerous' offenders. It also analyses the results of focus group discussions that were carried out in Brisbane, Adelaide and Melbourne. The focus groups raised a number of practical issues with three different types of management regimes. The report also considers overseas models and trends and recommends that consideration be given to the new Scottish model of life-long restriction orders.

In light of the uncertainty surrounding the consistency of post-sentence preventive detention in prison with international human rights principles, such regimes for the management of high-risk offenders should be seen as a last resort.

Post-sentence preventive detention legislation in Australia

A principal objective of preventive detention legislation is the protection of the community. This objective is used in a number of social policy contexts, including the mental health field and to prevent the spread of infectious diseases. The *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) represented the first attempt to detain people on the grounds of dangerousness *after* the offender's sentence had expired. The Queensland regime of preventive detention has since been replicated (with some differences) in

Western Australia and New South Wales with the passing of the *Dangerous Sexual Offenders Act* 2006 (WA) and the *Crimes (Serious Sex Offenders) Act* 2006 (NSW).

Legislation dealing with preventive detention needs to be distinguished from court powers enabling an order for indefinite detention *at the time of sentence*. While indefinite detention legislation has existed in Australia for almost a century, it was rarely invoked up until the 1990s. John Pratt links the 'renaissance' of indefinite detention legislation with the rise of abstracted systems of protection in lieu of local community supports and the growth of risk management and insurance as a social phenomenon (Pratt 1995). Today, section 65 of the *Sentencing Act* 1995 (NT), section 163 of the *Penalties and Sentences Act* 1992 (Qld), sections 22 and 23 of the *Criminal Law (Sentencing) Act* 1988 (SA), section 19 of the *Sentencing Act* 1997 (Tas), section 18A of the *Sentencing Act* 1991 (Vic) and section 98 of the *Sentencing Act* 1995 (WA) all allow for an order for indefinite detention to be passed at the time of sentence (McSherry 2005).

The early attempts to enact preventive detention legislation were directed at a particular individual rather than a class of persons: the *Community Protection Act* 1990 (Vic) (relating to Garry David) and the *Community Protection Act* 1994 (NSW) (relating to Gregory Wayne Kable). In 1996, the High Court of Australia held by majority that legislation which enables preventive detention of an identified individual *after* that person's sentence has expired was unconstitutional: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

In 2004, a majority of the High Court in *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 upheld the validity of the Queensland *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Keyzer et al. 2004; McSherry 2005). The appeal in *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 was limited to the issue of whether or not the power to order preventive detention under 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. Section 13 of the Queensland legislation empowers the Supreme Court of Queensland to make continued detention and supervision orders in relation to prisoners considered to be a serious danger to the community. Six of the judges (Kirby J dissenting) held that the Act was valid. The Commonwealth Government and four States intervened in support of the Queensland law. The decision was thus significant in opening the door for preventive regimes across Australian jurisdictions (McSherry 2005).

Australian jurisdictions have reacted to the issues posed by high-risk sex offenders in a number of ways. This report focuses on some of the practical issues arising from the different sentencing and management regimes in Victoria, Queensland and South Australia. It also explores the new post-sentence preventive detention regimes recently enacted in Western Australia and New South Wales. At the time of writing Victoria is actively

considering a proposal to introduce similar post-sentence preventive detention legislation. Victoria has already enacted the *Serious Sex Offenders Monitoring Act* 2005 (Vic) to enable the continuing supervision of offenders previously convicted of child sexual offences or bestiality after the expiry of their sentence.

1.2 The current response

There are a number of options for managing dangerous offenders currently in place across Australia. These options — which will be explored in detail below — include:

- **Sentencing options** such as indefinite terms of imprisonment and longer sentences for serious offenders.
- **Management during sentence** through the parole system and treatment programs (including sex offender treatment programs) provided while the offender is either in prison or on parole in the community.
- **Post-sentence supervision in the community** such as extended supervision orders and other schemes for monitoring offenders in the community, including the registration of sex offenders. Extended supervision orders involve the court ordering certain offenders who are reaching the end of their prison sentence to be subject to ongoing supervision in the community after their sentence has expired. Schemes for the registration of sex offenders require offenders to register their details with police and prohibit registered offenders from applying for, or engaging in, child-related employment or voluntary activities.
- **Post-sentence preventive detention**, which involves the court ordering certain offenders who are reaching the end of their prison sentence to be detained in custody for a further period after their sentence has expired. Queensland, New South Wales and Western Australia have both a preventive detention and a community supervision scheme.

Laws that detain offenders beyond the term of their sentence for the purpose of community protection involve balancing the risk of future harm to the public with the restriction of liberty for offenders whose future offending can only be estimated. Difficult practical questions arise, such as:

- Which offenders should be treated as ‘dangerous’?
- How can the risk that an offender will commit a further serious offence be assessed?

Current schemes dealing with high-risk offenders at different stages in the criminal justice process have adopted different approaches to determining which group of offenders should fall within the scheme.

Recent legislation in Australian jurisdictions has focused on the post-sentence supervision and detention of *serious sex offenders*, whereas legislation providing for indefinite sentences to be imposed at the point of sentencing typically apply to both sex offenders and to high-risk violent offenders. These legislative provisions generally define the target group of offenders by reference to a list of 'serious' sexual offences and a list of 'serious' violent offences.

Categorising high-risk offenders solely by reference to the type of crime committed may result in people who pose no continued threat to the community being captured by a particular scheme. Offences against the person differ in their severity according to the circumstances of the case. In addition, many people who commit the most serious offences such as murder do not necessarily pose a high risk of reoffending. It has been cautioned by Floud (1982: 216) that the

> question of penalties for serious offences – even for the worst cases of such offences – must not be confused with the question of protecting the public from the few serious offenders who *do* present a continuing risk and who *are* likely to cause further serious harm.

With the exception of sex offender registers, most of the measures for 'dangerous' offenders require certain criteria to be met before one of these orders can be made. However, identifying which offenders are at high risk of causing serious physical harm in the future is a notoriously difficult task (Mullen 2001).

1.3 Determining risk – Which offenders are at risk of reoffending?

Most serious violent criminals do not have previous convictions for violence and do not repeat their violent offending (Walker 1996). One study has concluded that there is no empirical evidence supporting the conclusion that sex offenders are more likely to engage in repeat offending than non-sex offenders (Simon 1997). Another concluded that sex offender recidivism and parolee revocation rates are lower than for other parolees (Sample & Bray 2003). An oft-cited review (or 'meta-analysis') of studies examining recidivism (reoffending) rates of sex offenders, while acknowledging problems of relying on reconviction rates and the limited follow-up periods of some studies, found that only 13.4 per cent committed a new sexual offence within four to five years (Hanson 2003).

During the early 1980s research showed that mental health professionals tended to be especially cautious in their assessments of possible future offending and to over-predict violence (McAuley 1993: 7). One study concluded that these predictions were accurate in only about one-third of cases (Monahan 1981). Such over-prediction has been shown to result in large numbers of 'false positives', where individuals have been identified as likely to commit further offences but who, upon release, have not actually reoffended (Steadman 2000).

There are different ways of assessing risks of reoffending, including clinical assessments of risk and statistical or 'actuarial' approaches that focus on assessing the particular offender against a range of factors that are known to be associated with future offending (Berlin et al. 2003).

Currently, risk assessment involves examining three main areas for each individual: the person's risk factors, the potential harm that he/she might cause in the future, and the likelihood that the person will eventually offend.

Risk factors that are currently used in actuarial risk assessments include:

- past violence
- pre-existing vulnerabilities (such as a childhood history of abuse)
- social and interpersonal factors (such as poor social networks)
- symptoms of mental illness (in particular, failure to take medication)
- substance abuse (especially in addition to mental illness)
- state of mind (such as anger or fear)
- situational triggers (such as the availability of weapons) and
- personality constructs (such as psychopathy) (McSherry 2004).

While the actuarial method of risk assessment is thought to be more accurate than the clinical method, there has been some suggestion that a combination of the two approaches may produce better results (Hanson 2003: 67). However, as Terence Campbell (2003: 275) explains:

> Adjusted actuarial assessments rely on (i) methods that are trivially correlated with recidivism (clinical judgment) (ii) to identify factors that bear a small correlation with recidivism, (iii) in order to adjust actuarial estimates that are moderately correlated with recidivism. This procedure obviously creates ample opportunities for error.

Certainly, actuarial risk assessments alone do not consider protective factors, such as stable employment, that may mediate the effects of risk factors. By adjusting the actuarial assessment to consider such factors, risk assessments can be better tailored to the individual offender (Rogers 2000).

A difficulty with actuarial methods alone is that they are based on determining whether an individual offender has the same characteristics or risk factors as a 'typical' kind of offender (Campbell 2000; Campbell 2003). Risk assessments can classify an individual within a group — as 'high risk', 'medium risk' or 'low risk' — but they cannot say where in this group a given person lies and therefore cannot identify the precise risk an individual poses. Assigning risk to an individual offender based on the characteristics of a group can therefore lead to inaccurate assessments (Janus & Prentky 2003).

Actuarial risk assessment tools may also pose difficulties when used with particular groups of offenders. For example, Indigenous offenders as a group have higher rates of childhood abuse victimisation and early substance abuse, both of which are included in the assessment questionnaires as factors

associated with high-risk status. Indigenous offenders may therefore be more likely to be classified as high risk than are non-Indigenous offenders.

Further concerns with actuarial risk assessments have been raised about the types of factors that are included in the questionnaires. The main focus of current assessment tools is on static risk factors. These are factors that cannot change over time, such as the age of first offending and childhood abuse. But these are not the only kinds of risk factors that may affect future offending. By including dynamic factors as well — ones that can change over time, such as coping strategies — not only may risk assessments become more accurate but useful treatment targets may also be identified (Hanson 2002).

Preventive detention schemes rely on assessments of risk. While mental health professionals who give evidence in court about offenders' risk are often cross-examined, there is some question about whether such evidence should be admitted at all (Ruschena 2003). These assessments of risk tend to be taken out of their primary context, which is one of treatment and intervention (Ruschena 2003: 127-128). There is also the potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted (Johnson 2005). In addition there are issues as to what level of risk (low/medium/high) should be required by such schemes and what level of offending the risk should relate to (any offending/serious offending/serious 'relevant' offending).

As well as having difficulties with accuracy, predictions of risk may be seen as providing a veil of science over what is essentially a social and moral decision about the kind of offender who creates the greatest fear within the community. Asking mental health professionals to assess the risk of future harm shifts the burden of deciding what to do with such offenders from the community to clinicians whose primary role lies within the medical model of treatment, rather than within the criminal justice model of punishment and community protection.

The theme of the problematic nature of risk assessment is returned to in chapter six which sets out the results of focus group discussions. The next three chapters of this report outline the current law in Australia relating to different management schemes for 'dangerous' offenders. Chapter five outlines some overseas models while chapter six examines some of the practical issues raised by preventive detention schemes. Chapter seven then turns to policy issues relating to balancing community protection with individual human rights such as the right to liberty and security. Chapter eight sets out recommendations for policy development.

2. Chapter Two: Sentencing options

2.1 Introduction

Most sentencing legislation in Australia refers to purposes such as ensuring that the offender is adequately punished for the offence, the promotion of the rehabilitation of the offender and the prevention of crime through deterring the offender and other persons from committing similar offences.

There is a general legal principle that the type and extent of punishment should match the seriousness of the harm caused and the degree of responsibility of the offender. This is referred to as the principle of proportionality. The rationale for this principle is to ensure sentences remain commensurate to the seriousness of the offence, even where the court takes into account the protection of society.

However, some sentencing options such as serious offender and indefinite detention provisions ignore this principle of proportionality. This chapter provides an overview of sentencing option relating to high-risk offenders.

2.2 Serious offender provisions

Three Australian states — Victoria, New South Wales and South Australia — have laws that enable a court to impose a longer sentence than would otherwise be appropriate in the case of serious repeat offenders. These provisions place priority on protection of the community as a sentencing principle. The next sections outline these provisions.

2.2.1 Victoria

In 1993, the *Sentencing Act* 1991 (Vic) was amended to allow for longer prison terms for serious sexual and violent offenders. In 1997, the Victorian Government extended serious offender provisions to include 'serious arson offenders' and 'serious drug offenders'. If a person is a serious sexual offender or a serious violent offender, the sentencing judge **must** give priority to the protection of the community (s 6D(a)) and **may** impose a sentence longer than that which is proportionate to the gravity of the offence considered (s 6D(b)).

A 'serious sexual offender' is a person who has been convicted of either:

- two or more sexual offences for which he or she has been sentenced to a term of imprisonment, or

- one sexual offence and one violent offence arising out of the one course of conduct for which he or she has been sentenced to a term of imprisonment (s 6B(2)).

A 'serious violent offender' is a person who has committed one serious violent offence such as murder, causing serious injury intentionally, causing a very serious disease or threats to kill for which he or she has been sentenced to a term of imprisonment (s 6B(1); Schedule 1, Clause 3).

Once an offender is classified as a 'serious offender', any term of imprisonment imposed on that offender must be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed unless the court orders otherwise (s 6E and see also s 16).

2.2.2 New South Wales

In New South Wales, section 4 of the *Habitual Criminals Act* 1957 (NSW) enables a judge to declare a person to be an habitual criminal in order to pass a sentence for the current offence before adding on a further sentence. The further sentence must be not less than five years or more than fourteen years and must be served concurrently (s 6).

An habitual criminal may be any person older than twenty-five years who has been convicted of an indictable (serious) offence and has on at least two previous occasions served separate terms in prison for indictable offences (s 4(2)). This means that a large number of offenders could potentially be declared habitual offenders. However, in practice, this section is not used (Biles 2005: 14). The scheme reflects mid twentieth-century policies in relation to offenders as reflected in section 7, which enables the Governor to 'grant to the habitual criminal a written licence to be at large'. The release on licence scheme was abolished in 1989 in favour of determinate parole (*Sentencing Act* 1989 (NSW)).

In 1996 the New South Wales Law Reform Commission recommended the repeal of the habitual criminal provisions on the basis that the provisions were 'archaic', offended against the principle of proportionality in sentencing, were rarely used and because the belief underpinning the provisions that certain offenders possessed inherent criminal qualities was no longer appropriate (New South Wales Law Reform Commission 1996: 10.19].

2.2.3 South Australia

South Australian law permits a court to declare a person to be a serious repeat offender if the person has been convicted of three serious offences (committed on at least three separate occasions) (*Criminal Law (Sentencing) Act* 1988 (SA), s 20B). Up until 2003, South Australia also allowed the indeterminate detention of habitual criminals, where there was evidence of repeat convictions

for certain violent and other serious offences (*Criminal Law (Sentencing) Act* 1998 (SA), s 22). This power was abolished by section 5 of the *Criminal Law (Sentencing) (Serious Repeat Offenders) Amendment Act* 2003 (SA).

When a person is declared to be a serious repeat offender, the court is not bound to ensure that the sentence is proportional to the offence and any non-parole period fixed for the sentence must be at least four-fifths the length of the sentence.

In 2005, the scheme was amended by the *Statutes Amendment (Sentencing of Sex Offenders) Act* 2005 (SA) to extend to sexual offences to enable a court to declare an offender a serious repeat offender if convicted of two child sex offences (rather than three).

2.2.4 Issues

Serious offender provisions aim to 'incapacitate' repeat offenders convicted of serious crimes in order to protect the community from harm. In tipping the balance in favour of community protection, these laws override the principle that a sentence should be proportionate to the seriousness of the offence.

Judges have been sparing in their use of serious offender provisions. Research has found a considerable disparity between the intention of the legislature and judicial practice in relation to the use of the Victorian serious offender provisions. For example, a study by Elizabeth Richardson and Arie Freiberg (2004) examined 553 relevant cases from the County and Supreme Courts of Victoria for the period 1994 – 2002. A longer than proportionate sentence was imposed in only 11 of these cases. Six of these cases were overturned on appeal, three of them specifically because of the lack of proportionality in the sentence. There has been similar reluctance displayed in other Australian jurisdictions, the United Kingdom and New Zealand (Ashworth 1995).

2.3 Indefinite sentences

2.3.1 Introduction

Indefinite detention laws have existed in various forms for close to a century. In general, laws enabling indefinite detention come into play **at the time of sentencing** and allow the judge to take into account the risk the offender poses to the community when setting the offender's sentence. A court can sentence an offender to an indefinite sentence on its own initiative, or after an application from the prosecution. The appropriateness of an indefinite sentence can be reviewed at various stages.

The power to pass an indefinite sentence on offenders who are assessed as posing a danger to society exists in the Northern Territory and five Australian

states. Some of the provisions specifically refer to violent offenders and sex offenders, while others are broader in their scope.

2.3.2 Indefinite sentencing provisions in Australia

The offences to which indefinite sentences apply vary between jurisdictions, but most apply to both serious violent and sexual offences. Table 1 sets out these provisions.

Table 1: Legislation enabling indefinite detention

Jurisdiction	Act
NT	*Sentencing Act* 1995 - s 65 (violent offenders convicted of a crime for which a life sentence may be imposed can be sentenced to an indefinite term of imprisonment by the Supreme Court, where the court considers the prisoner to be a serious danger to the community).
Qld	*Penalties and Sentences Act* 1992 - s 163 (violent offender who presents a serious danger to the community can be detained indefinitely). *Criminal Law Amendment Act* 1945 – s 18 (sex offender incapable of exercising control over sexual instincts).
SA	*Criminal Law (Sentencing) Act* 1988 - s 23 (sex offender incapable of controlling or unwilling to control sexual instincts).
Tas	*Sentencing Act* 1997 - s 19 (dangerous offender convicted of a violent crime).
Vic	*Sentencing Act* 1991 - s 18A (offender convicted of a serious offence and high probability that offender is a danger to the community).
WA	*Sentencing Act* 1995 - s 98 (superior court may impose indefinite imprisonment where, if released, the offender would pose a danger to society).

Under s 18A of the *Sentencing Act* 1991 (Vic), an adult offender who is convicted of a 'serious offence' may be sentenced to an indefinite term of imprisonment. A 'serious offence' includes:

- murder
- manslaughter
- causing serious injury intentionally
- armed robbery
- rape
- assault with intent to rape and
- sexual offences against children (s 3(1)).

Generally, an application for such an order is made by the Director of Public Prosecutions, who has the burden of proving that the offender is a serious

danger to the community, but the court can impose such an order under its own initiative (s 18A(5)).

Before passing an indefinite sentence, the judge must be satisfied to a high degree of probability that the offender is a serious danger to the community because of:

- his/her character, past history, age, health or mental condition,
- the nature and gravity of the crime committed, and
- any special circumstances (s 18B(1)).

The judge must consider a number of matters in deciding whether the offender poses a serious danger to the community. He or she must have regard to:

- whether the nature of the offence is exceptional
- relevant material from the transcript of earlier court cases against the offender involving serious crimes
- medical, psychiatric and other relevant reports
- the risk of serious danger to members of the community if an indefinite sentence were not imposed
- the need to protect members of the community from that risk (s 18B(2)).

An offender who is sentenced to an indefinite sentence is ineligible for parole (s 18A(2)). Instead, the judge fixes a 'nominal sentence' equal in length to the non-parole period he/she would have set if passing a determinate sentence (s 18A(3)). The expiry of the nominal sentence triggers a review of the appropriateness of the indefinite sentence (s 18H(1)). If the offender remains detained after the initial review, he or she can apply for further reviews at three year intervals (s 18H(1)).

When the court is no longer satisfied to a high degree of probability that the offender remains a serious danger to the community, it must cancel the sentence and order the offender to be released subject to a five year reintegration program administered by the Adult Parole Board (s 18M).

The Victorian Commissioner for Corrections has advised that only four prisoners to date have received orders for indefinite detention, one of which was amended to a fixed sentence on appeal, leaving three offenders still serving indefinite sentences (Biles 2005: 17). All four had committed sexual offences and had previous convictions for such offences.

In Queensland, a court may impose an indefinite sentence on an offender convicted of a serious (indictable) offence that involves the use of, counseling or procuring the use of, or attempting or conspiring to use, violence against a

person and for which an offender may be sentenced to imprisonment for life, as well as unlawful sodomy, carnal knowledge with or of children under 16 years, abuse of intellectually impaired persons, rape and sexual assaults (*Penalties and Sentences Act* 1992 (Qld), s 163). Similarly, in the Northern Territory, the power to order an indefinite sentence applies to offences 'that, in fact, involves the use, or attempted use, of violence against a person' and for which an offender may be sentenced to imprisonment for life (*Sentencing Act* 1995 (NT), s 65(1)(a)) as well as to sexual intercourse or gross indecency involving children under 16 years, sexual intercourse or gross indecency involving children over 16 years under care, and sexual intercourse and gross indecency without consent (s 65(1)(c)).

In Tasmania the provisions apply if the offender has been 'convicted for a crime involving violence or an element of violence' and the offender has at least one previous conviction for a violent offence (*Sentencing Act* 1997 (Tas), s 19). The criteria in Western Australia are far broader, allowing the Supreme or District Court to order an indefinite sentence in circumstances where the court sentences an offender for a serious (indictable) offence to a term of imprisonment, does not suspend that imprisonment and does not make an order for parole eligibility (*Sentencing Act* 1995 (WA), s 98(1)).

Similarities exist between jurisdictions as to the criteria to be applied. In Queensland, in order to impose an indefinite sentence the court must be satisfied that the offender is 'a serious danger to the community' because of the offender's antecedents, character, age, health or mental condition, the severity of the offence and any special circumstances (*Penalties and Sentences Act* 1992 (Qld), s 163(3)(b)).

The court must also have regard, in determining whether the offender is a serious danger to the community, to whether the 'nature of the offence is exceptional', as well as other factors including 'the risk of serious physical harm to members of the community if an indefinite sentence were not imposed' (s 163(4)). A similar list of factors appears in the Northern Territory legislation (*Sentencing Act* 1995 (NT), s 65(9)).

In Tasmania, before a declaration can be made that the offender is a dangerous offender, the judge must be of the opinion that 'the declaration is warranted for the protection of the public', having regard to the nature and circumstances of the offences, the offender's antecedents or character, any medical or other opinion and any other matter that the judge considers relevant (*Sentencing Act* 1997 (Tas), s 19(2)).

In Western Australia, the court must be satisfied on the balance of probabilities that when the offender would otherwise be released from custody, he or she 'would be a danger to society, or a part of it' due to one or more of the following factors:

- the exceptional seriousness of the offence

- the risk that the offender will commit other indictable offences
- the character of the offender and in particular —
    - any psychological, psychiatric or medical condition affecting the offender
    - the number and seriousness of other offences of which the offender has been convicted
    - any other exceptional circumstances (*Sentencing Act* 1995 (WA), s 98(2)).

2.3.3 Special indefinite detention schemes for sex offenders

Special provisions exist in Queensland and South Australia for the indefinite detention of sex offenders. In Queensland, this operates alongside the power to order an indefinite sentence under the *Penalties and Sentences Act* 1992 (Qld). These same schemes also allow the relevant Attorney-General to apply for an order for continuing detention during the term of imprisonment (although it appears that this power has never been exercised). In this respect they operate in a similar way to post-sentence preventive detention schemes.

In Queensland, a convicted sex offender may be detained indefinitely where there is evidence from two medical practitioners, one of whom must be a psychiatrist, that the offender is incapable of exercising proper control over his or her sexual instincts and that this incapacity is capable of being cured by continued treatment (*Criminal Law Amendment Act* 1945 (Qld), s 18). It must also be necessary for the offender to be detained in prison after the expiration of the sentence in order to continue treatment. If such evidence is available, the Attorney-General can apply to the Supreme Court for a declaration that the offender be detained at the Governor's pleasure.

Issues with this scheme include that it does not apply to those who are capable of controlling their instincts, but choose not to, nor does it apply to those who are incapable of being cured (Explanatory Memorandum*, Dangerous Prisoners (Sexual Offenders) Bill* 2003 (Qld), 2).

This legislation has also been described as being 'archaic and out of touch with community standards' (Queensland, Parliamentary Debates, Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General and Minister for Justice)).

In 2005 in South Australia, a scheme similar to the Queensland regime was extended to apply not only to those incapable of controlling their sexual instincts but also to those **unwilling to control** such instincts. Section 23 of the *Criminal Law (Sentencing) Act* 1988 (SA) was cast in similar terms to the Queensland provision, but this was amended by the *Statutes Amendment (Sentencing of Sex Offenders Act)* 2005 (SA).

Although this law allows the Attorney-General to apply to the Supreme Court for an offender already serving a sentence to be detained indefinitely once that sentence has expired (*Criminal Law (Sentencing) Act* 1988 (SA), s 23), this option does not appear as yet to have been exercised. Instead, as with other forms of indefinite detention schemes, applications tend to be made after conviction and prior to sentence so that the Supreme Court can deal with the question of sentence at the same time as it deals with the question of indefinite detention (s 23(6)).

2.3.4 The legality of indefinite detention regimes

Australian courts have upheld the lawfulness of schemes for indefinite detention at the time of sentence. In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 486, the majority of the High Court noted that it is possible for Parliament to set up a scheme for indefinite detention. Similarly, Justices Toohey and McHugh in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97 (Toohey J), 121-122 (McHugh J) accepted that State legislatures may enable State courts to impose indefinite sentences upon those found guilty of an offence.

In *R v Moffatt* [1998] 2 VR 22, the Victorian Supreme Court confirmed the legality of the Victorian indefinite sentence provisions, noting that the ability to pass such a sentence was tied to a finding of guilt for an offence and that a person was deprived of liberty because of what he had done rather than because of what he **might** do (at 251). However, Justice Hayne also emphasised that the power to order indefinite imprisonment should be exercised sparingly (at 255).

2.3.5 Indefinite detention in practice

While indefinite detention provisions have been held to involve a valid exercise of sentencing powers, the High Court has also signalled that a cautious approach should be taken to the evidence upon which orders of indefinite detention are based (See for example *Thompson v The Queen* (1999) 165 ALR 219).

The High Court in *McGarry v The Queen* (2001) 207 CLR 121, held that there must be more evidence presented to the sentencing judge than simply a risk that the offender will reoffend before an order for indefinite detention can be made. The court discussed the difficulties in determining whether an offender was ‘a danger to society or part of it’, concluding that more was needed than a risk — even a significant risk — that an offender will reoffend before indefinite detention can be ordered (at 129).

The effect of this and other High Court decisions is that before an offender can be reckoned ‘a danger to society’, there must be comprehensive evidence from

mental health professionals at the sentencing hearing of a risk of future offences that are grave or serious for society as a whole, or for some part of it.

2.3.6 Issues

One of the perceived benefits of indefinite sentencing over post-sentence detention is that it is more transparent. The offender knows *at the time of sentencing* that he or she is being placed on an indefinite sentence and a nominal term is set which triggers the system of periodic review. In comparison, preventive detention orders are made at the point when an offender has almost completed his or her original prison sentence. The difficulty is that, without a proper risk assessment at the point of sentencing, the sentencing judge may not be in a position to assess the risk that an offender might pose upon his or her release. Many states that have indefinite sentencing regimes have also introduced preventive detention and extended supervision schemes.

Ideally, indefinite sentencing should allow for the early assessment of risk so that measures can be taken to treat the offender in prison in the hope of working toward rehabilitation. However this is dependent on whether any initial risk assessment is followed up by the provision of appropriate programs in prison. This may not be occurring because indefinite sentences have a nominal period, rather than a non-parole period. It appears that in practice, while a non-parole period in a conventional sentence 'triggers' the provision of the sex offenders' program, the nominal period set as part of an indefinite sentence does not always do so.

3. Chapter Three: Management during sentence

3.1 Introduction

This chapter considers two areas for the management of high-risk offenders during sentence — the ability to supervise offenders through the granting of parole and prison-based sex offender treatment programs which may aid in the rehabilitation of offenders.

Parole

All Australian jurisdictions have legislation dealing with parole as set out in Table 2.

Table 2: Australian Parole Provisions

Jurisdiction	Act	Sections
ACT	*Crimes (Sentence Administration) Act* 2005	Chapter 7
Cth	*Crimes Act* 1914	Part 1B, Div 5
NSW	*Crimes (Administration of Sentences) Act* 1999	Part 6
NT	*Parole of Prisoners Act* 1971	S 5
QLD	*Corrective Services Act* 2006	Chapter 5
SA	*Correctional Services Act* 1982	Part 6
Tas	*Corrections Act* 1997	Part 8
Vic	*Corrections Act* 1986	Part 8, Div 5
WA	*Sentence Administration Act* 2003	Ss 13-48

The main purpose of parole is to supervise the reintegration of offenders into the community. Usually an Adult Parole Board determines whether offenders should be released into the community at the expiry of the non-parole period. The membership of the Adult Parole Board includes judges and members who are appointed to represent the community's interests.

The Adult Parole Board generally meets with offenders early on during their prison sentences to ensure that offenders undertake appropriate programs aimed at helping them reintegrate into the community. When deciding whether to release an offender on parole, the Board considers the protection of the community, the rights of victims, the intentions of the sentencing body and the needs of the offender.

Taking the Victorian Adult Parole Board as an example, in the period 2004-2005, the Board considered 7,515 cases, interviewed 1,674 offenders in prison and made 1,538 parole orders (Adult Parole Board of Victoria 2005: 4). Parole was denied in 159 cases and parole orders cancelled in 456 cases. Of the parole orders cancelled, 258 were because of a failure to comply with the conditions of parole and 198 because of further conviction and sentence.

Parole orders include a number of conditions such as instructing parolees when to report, requiring them to stay within the relevant State or Territory and preventing them changing address or employment without the permission of a community corrections officer.

Parole Boards are able to impose onerous conditions of parole, including curfews, strict conditions about place of residence, requirements to attend treatment programs, random substance testing and restrictions upon where the person may go and with whom he or she can associate.

The main advantage of the parole system is that it ensures offenders are supervised and supported during reintegration into the community. It is based on the notion that supervision in the community is conducive to rehabilitation and that this is preferable to releasing an offender unconditionally and without any support when the full sentence of imprisonment has been served. However, there is ultimately an unpredictable risk of reoffending by any particular offender.

New South Wales has established a Serious Offenders Review Council to assist in the management of serious offenders in prison, including decisions made concerning parole. The Council is an independent statutory body created by the *Crimes (Administration of Sentences) Act* 1999 (NSW). The Council's functions include providing advice on the security classifications, placement and case management of prison inmates classed as 'serious offenders'. The Council also advises the New South Wales Parole Authority concerning the release of serious offenders and provides reports about these offenders to the Supreme Court and the Minister for Justice.

The parole system is based on the premise that there are adequate services to assist parolees to reintegrate into the community. The Chairperson of Victoria's Adult Parole Board, the Honourable Justice Murray Kellam AO, has pointed out that 'community mental health services that are available to parolees are scarce and do not provide the level of safety the community requires, let alone the level of psychiatric support required by many offenders who suffer from psychiatric and psychological problems' (Adult Parole Board of Victoria 2005: 6). For parole to work properly there is a need for adequate resourcing for appropriate accommodation such as 'half-way houses' and support services.

In the case of serious sex offenders, their participation in sex offender treatment during their sentence is likely to be one of the issues taken into account by the relevant Parole Board in determining if an offender should be granted parole. Consequently, any delays in providing offenders with access to treatment

ultimately may have an impact on the likelihood of an offender being granted parole.

3.2 Sex offender treatment programs

An exclusively penal approach cannot address all the factors that lead to reoffending and some behaviour may not be amenable to change without coexisting options for treatment. Most Australian jurisdictions have some form of prison-based sex offender treatment program (Lievore 2004; Lievore 2005). Many programs reflect a cognitive-behavioural treatment approach delivered by individual and/or group therapy. This approach focuses on changing sexual behaviours, modifying any cognitive distortions and assisting offenders to overcome social difficulties (Marshall & Barbaree 1990).

Participation is open to all eligible offenders and, while treatment is voluntary, many offenders participate with the aim of obtaining parole. In general, the programs are greater than 100 hours in length, are facilitated by psychologists and are delivered over an extended period of time (Howells et al. 2004).

There has been little research that systematically evaluates treatment programs and no definitive results regarding the efficacy of them (Lievore 2005: 296). However the prevailing view, supported by meta-analyses (see for example Hall 1995), support their continued refinement, development and implementation.

It has been pointed out by Denise Lievore (2005) that programs may need to be tailored for different types of sex offenders. For example, 'what works' for some child sex offenders may not work for rapists. Group therapy is less costly to run and may help offenders learn that their behaviours and problems are not unique, but may raise issues for offenders not willing to share their experiences (for example of being abused themselves) with other sex offenders.

It was suggested by Kevin Howells et al. (2004) that:

- Most jurisdictions excluded offenders denying responsibility for the offence, but did not provide alternative treatment options for them.
- Some types of sex offender such as those who had carried out sexual murders were excluded from sex offender treatment programs, but were not referred to violent offender programs because of the sexual nature of their crimes.
- There were differing opinions as to whether adult and child sex offenders should be placed in the same treatment group.

Part of the problem with measuring the efficacy of treatment programs appears to be caused by the low base rate of sex offender recidivism. A review of studies examining recidivism rates by Karl Hanson and Monique Bussière (1998) suggested that only 13.4 percent committed a new sexual offence within

four to five years. This makes it difficult for researchers to find a significant treatment effect.

Attitudes to treatment programs by members of the focus groups conducted as part of this project are explored in chapter six.

3.3 Expert evidence concerning sex offender treatment programs

There is some reason to believe that the courts will be circumspect in considering expert evidence concerning whether an offender has engaged in a sex offender treatment program. In *Attorney-General for the State of Queensland v Fardon* [2006] QSC 275, Lyons J pointed out that Robert Fardon had completed 26 weeks out of 45 weeks of a sex offender treatment program in 1994 and 1995, but had then refused to participate because it involved group work revealing details of his own sexual abuse to other prisoners (at para [56]). Fardon gave two reasons as to why he had not completed the program:

> One was that they didn't have any qualifications with regard to counseling or any other availability of seeing whether you are under stress or acknowledging that there was problems with you and the second was that there was no confidentiality (at para [56]).

Fardon said he believed that over 30 years, he had seen 30 different people who all wrote reports based on his file from 30 years ago (at para [59]). On the basis of this evidence, Lyons J held that Fardon's reluctance to participate in sex offender treatment programs in prison did not indicate an inability to undertake other forms of treatment or to enter into a therapeutic relationship (at para [62]).

In *McGarry v The Queen* (2001) 207 CLR 121, a majority of the High Court considered expert evidence led in support of a decision to impose an indefinite sentence on Michael McGarry on the basis that he was 'a danger to society or part of it'. The trial judge had made the order and the Court of Appeal had upheld it on the basis of the offender's criminal record and a 'sex offender's treatment report' signed by a social worker and written for the Sex Offenders Treatment Unit of the Ministry of Justice. In their joint judgment, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ were highly critical of this report. They indicated (at 129) that more was needed in such reports than simply a mention of a risk that an offender will reoffend. Kirby J, who was also highly critical of the report, went further by stating that reports should only be provided by those 'with psychiatric, psychological or similar qualifications' (at 144).

In *Attorney-General for the State of Queensland v Toms* [2006] QSC 298, Chesterman J was scathing in his criticism of a prison psychologist's 'deeply flawed' report (at para [45]) that contained not only 'a serious dishonesty', but

also a ‘readiness to indulge in speculation that the respondent had indulged in paraphiliac behaviour’ when there ‘was no such evidence’ (at paras [35], [38]).

In the light of these cases, it appears that there is a need to reassess the connection between sex offender treatment programs and the evidence based on them in applications for indefinite or continued detention.

3.4 Issues

Imprisonment can provide the impetus to encourage sex offenders to participate in treatment while delivering punishment for wrongdoing. Treatment programs may aid rehabilitation and mitigate the effects of prolonged imprisonment.

However, sex offender treatment that is mandated by the Adult Parole Board or undertaken purely for the purpose of parole may not lead to any real behavioural change.

The timing of the provision of sex offender programs may be vital to potential rehabilitation. It appears that many offenders only participate in treatment programs towards the end of their sentence as parole approaches or even after parole has commenced (McSherry 2006: 22). The Chairperson of Victoria’s Adult Parole Board has pointed out that some parolees who are ordered to attend sex offender programs do not do so until some months after their release (Adult Parole Board of Victoria 2005: 6). As a matter of fairness, high-risk offenders should be given an opportunity to participate in rehabilitation programs as soon as possible after their sentence commences. Delaying the provision of sex offender programs and other rehabilitation programs until shortly before an offender is eligible for parole may be ‘too little, too late’. It appears beneficial for resources to be provided to ensure that high-risk offenders are assessed prior to sentencing or as early as possible thereafter, so that an appropriate treatment regime can be put in place as soon as possible during an offender’s prison sentence.

A further issue relates to treatment programs and expert evidence. Robert Fardon’s concern regarding confidentiality in sex offender treatment programs, mentioned above, is an important one. Expecting an offender to build a therapeutic relationship with a mental health professional who is able, or even compelled, to reveal details of that treatment in court proceedings does not augur well for rehabilitation. A better scenario may be for a division to be made between those mental health professionals who provide clinical services and forensic mental health professionals who are not involved with the treatment programs, but who are able to make assessments of offenders for the courts.

4. Chapter Four: Post-sentence preventive detention and supervision

4.1 Introduction

Since the early 1990s, various state governments have been concerned with how best to manage a small number of high-risk offenders whose term in prison was about to end.

Five Australian states have introduced legislation enabling the supervision of sex offenders in the community and the High Court has held in *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 that post-sentence preventive detention relating to a **class** of offenders may be constitutional if certain criteria are met. Such schemes now exist in Queensland, New South Wales and Western Australia.

This chapter provides an overview of the operation of these schemes. Chapter six discusses some of the practical problems that have arisen with the Queensland scheme in more detail.

4.2 Post-sentence preventive detention

4.2.1 Introduction

Post-sentence preventive detention involves detaining offenders after they have already served their full sentence for the particular offence or offences that they committed. Because the offender has already been punished for the crime, the purpose of such schemes should not be to further punish the offender. The accepted purposes of preventive detention schemes are generally the protection of the community and/or the rehabilitation of the offender.

Queensland, Western Australia and New South Wales now have legislative schemes in place, aimed at sex offenders, which allow for post-sentence preventive detention in prison. The purposes of the legislation that sets up the preventive detention scheme in each of these jurisdictions are as follows:

In Queensland, the purposes are:

- to ensure adequate protection of the community
- to provide continuing control, care or treatment of a particular class of prisoners to facilitate their rehabilitation (*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 3).

In Western Australia, the purposes are:

- to ensure adequate protection of the community
- to provide for the continuing control, care or treatment of persons of a particular class (*Dangerous Sexual Offenders Act* 2006 (WA), s 4).

In New South Wales, the purposes are:

- to ensure the safety and protection of the community
- to facilitate the rehabilitation of serious sex offenders (*Crimes (Serious Sex Offenders) Act* 2006 (NSW), s 3).

The following sections outline the operation of these schemes.

4.2.2 The offences for which a preventive detention order is available

In June 2003, the Queensland Parliament enacted the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). This applies to offenders serving a period of imprisonment for a **serious sexual offence**, whether or not the person was sentenced to imprisonment before of after the commencement of the Act. A serious sexual offence is defined as an offence of a sexual nature involving violence or against children (Schedule to Act).

In Western Australia, the *Dangerous Sexual Offenders Act* 2006 (WA) also applies to offenders under sentence of imprisonment for a **serious sexual offence** (s 8(1)). A serious sexual offence is defined as a sexual offence under the *Criminal Code* where the maximum penalty that may be imposed is seven or more years (*Evidence Act* 1906 (WA), s 106A). This includes sexual offences against children, aggravated indecent assault, sexual penetration without consent and sexual offences on mentally impaired persons.

In New South Wales, the *Crimes (Serious Offenders) Act* 2006 (NSW) applies to those who are serving a sentence of imprisonment for a **serious sexual offence or for an offence of a sexual nature** (s 6(1)). This is broader than the Queensland and Western Australian schemes as it encompasses indecent acts and other specified offences, such as bestiality, where the punishment is less that seven years imprisonment.

Serious violent offences are included in the Victorian indefinite sentencing scheme and the serious offender provisions. However they are excluded from the post-sentence extended supervision scheme in Victoria and post-sentence supervision and detention schemes in New South Wales, Queensland and Western Australia.

4.2.3 Applications for preventive detention orders

In all three States, the application period is restricted to the last six months of the prisoner's term of imprisonment. The Queensland scheme provides that this is 'to ensure that the prisoner is able to take full advantage of any opportunities for rehabilitation offered during the term of imprisonment' (Explanatory Memorandum, *Dangerous Prisoners (Sexual Offenders) Bill* 2003 (Qld): 5).

In Queensland and New South Wales, the State Attorney-General may apply to the relevant Supreme Court for the continuing detention of an offender currently serving a period of imprisonment for a serious sexual offence (*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 5; *Crimes (Serious Offenders) Act* 2006 (NSW), s 6). In Western Australia, the Director of Public Prosecutions may file an application (*Dangerous Sexual Offenders Act* 2006 (WA), s 8), although the Attorney-General also has the power to do so (s 6(1)). In order for the Attorneys-General or the Director of Public Prosecutions to make the decision as to whether or not to apply for a preventive detention order, there are internal procedures for ensuring that the appropriate cases are referred to them. By way of example, the procedural stages in the Queensland scheme will be examined.

In Queensland, an interdepartmental committee — the Serious Sexual Offenders Review Committee — was established to refer cases to the Attorney-General for consideration of whether to make an application for preventive detention in a particular case. The Committee comprises senior officers from the Queensland Corrective Services, Department of Justice and Attorney-General and the Queensland Police Service and is chaired by the Deputy Director-General, Correctional Operations.

The Serious Sexual Offenders Review Committee meets monthly to review eligible prisoners and obtain legal advice from Crown Law as to the prospects of success of an application under the Act. The review occurs when the prisoner is 18 months from full time discharge. The Crown Solicitor makes a recommendation to the Attorney-General who decides whether to proceed with an application. Eligible prisoners are those in custody serving a sentence of more than two years' imprisonment that includes a period for a serious sexual offence.

4.2.4 Criteria and standard of proof for making an order

In the Queensland, Western Australia and New South Wales schemes, the Supreme Court is the body who makes the decision about whether an offender should be placed on a Preventive detention Order.

In Victoria, for a court to make an extended supervision order it must be satisfied, **to a high degree of probability**, that the offender is likely to commit a sexual offence if released in the community after serving a prison sentence (*Serious Sex Offenders Monitoring Act* 2005 (Vic), s 11(1)).

In *TSL v Secretary to the Department of Justice* [2006] VSCA 199, Callaway AP stated that the phrase 'high degree of probability' is not used in the sense of a standard of proof such as the 'balance of probabilities' or 'beyond reasonable doubt' but is linked to the word 'likely'. He interpreted s 11(1) to mean that the court must be satisfied that there is a high degree of probability that the offender **will commit a relevant offence**.

In the Queensland preventive detention scheme, the Supreme Court must be satisfied to a **high degree of probability** that the offender is a '**serious danger to the community**' (*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13). This is defined as meaning that there is an 'unacceptable risk that the offender will commit a serious sexual offence' if released from custody or if released from custody without a supervision order being made (s 13(2)). In practice, this operates as a two-tiered system—if the Court decides that the offender is a serious danger to the community, the Court must then decide whether a supervision order would be sufficient to protect the community or whether it is necessary to make an order for preventive detention. In making its decision, the court must have regard to:

- psychiatric reports and other assessments
- information indicating any propensity to commit serious sexual offences
- whether there is any pattern of offending
- the offender's background
- the need to protect members of the community and
- any efforts by the offender to address the cause of the offending behaviour (s 13(4)).

In making its decision, the Supreme Court will not treat a continuing detention order and a supervision order as equivalent options. In *Attorney-General (Qld) v Francis* [2006] QCA 324 at para [39] the Queensland Court of Appeal said that:

> The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.

In addition, in *Attorney-General (Qld) v Van Dessel* [2006] QCA 285, the Queensland Court of Appeal held that supervision orders can only be made for a finite period.

In Western Australia, the Supreme Court must be satisfied '**by acceptable and cogent evidence'** and 'to **a high degree of probability**' that the offender is a **serious danger to the community** (*Dangerous Sexual Offenders Act* 2006 (WA), ss 7(1)–(2)). A 'serious danger to the community' has the same meaning

as in the Queensland legislation (s 7(1)) and the criteria for making the order are the same (s 7(3)).

In New South Wales, the Supreme Court must be satisfied 'to a **high degree of probability**' that the offender is likely to commit a further serious offence if he or she is not detained **and** that 'adequate supervision will not be provided by an extended supervision order' (*Crimes (Serious Offenders) Act* 2006 (NSW), s 17(2)–(3)). The criteria for making the order are similar to those in Queensland, but the safety of the community is set out first (s 17(4)(a)) and there is specific reference to statistical material as to the likelihood of 'those with histories and characteristics similar to those of the offender committing a further serious crime' (s 17(4)(d)).

4.2.5 The duration of preventive detention orders

In the Queensland and Western Australian schemes preventive detention orders are indefinite *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 14; *Dangerous Sexual Offenders Act* 2006 (WA), s 25). In New South Wales, a continuing detention order expires at the end of the period specified in the order, or if not specified, within five years of the date it was made (*Crimes (Serious Offenders) Act* 2006 (NSW), s 18(1)). This does not prevent an application for a second or subsequent continuing detention order being made (s 18(3)).

4.2.6 Civil versus criminal processes

The scheme for preventive detention in New South Wales provides that the proceedings are **civil** in nature and are therefore to be conducted in accordance with the law relating to civil proceedings (*Crimes (Serious Sex Offenders) Act* 2006 (NSW), s 21).

In comparison, the Western Australian scheme makes it clear that proceedings under the Act are **criminal** in nature (*Dangerous Sexual Offenders Act* 2006 (WA), s 40).

In *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, the decision that the Queensland legislation conferred jurisdiction upon the Supreme Court which was not repugnant to, or incompatible with, its integrity as a court, was based on the premise that the proceedings were **civil** in nature. Making proceedings **criminal** in nature changes the way in which proceedings are conducted, for example the way in which evidence is gathered and led.

4.2.7 The role of mental health professionals

In all three states, the respective Supreme Courts may make an order that the offender undergo examinations by two psychiatrists. In Queensland and Western Australia, the psychiatrists examining the prisoner must prepare

reports indicating the level of risk that the prisoner will commit another serious sexual offence and the reasons for that assessment (*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 11; *Dangerous Sexual Offenders Act* 2006 (WA), s 37). In New South Wales, there is no direction as to what should be included in the reports. The criteria for making post-sentence preventive detention orders make it clear that the respective Supreme Courts may also take into account other assessments by psychiatrists, psychologists or registered medical practitioners.

4.2.8 Review and appeal processes

4.2.8.1 Review

In Queensland and Western Australia, there is a process for 'annual review' of the order for preventive detention (*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 27*; Dangerous Sexual Offenders Act* 2006 (WA), s 29). However the Attorney-General's application for an annual review must be *filed* within one year of a previous court order for continuing detention - an argument that the annual review must *have taken place* within a year of a previous order being made was rejected by Philippides J in *Fardon v Attorney-General for the State of Queensland* [2006] QSC 005.

If there are exceptional circumstances, the Supreme Court can grant leave to an offender for an early review (*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 28*; Dangerous Sexual Offenders Act* 2006 (WA), s 30). Early review can only be granted after the first annual review has taken place. At the time of writing no such application had been made.

The Attorney-General can also apply to have an order rescinded or a supervisory regime amended. In *Attorney-General for the State of Queensland v Foy* [2006] QSC 143*,* these powers were assumed in an application by the Attorney where the respondent had breached conditions of a supervision order. The power to rescind an order on the application of a prisoner also seems to have been assumed to exist in *Fardon v Attorney-General for the State of Queensland* [2006] QSC 005.

In the Queensland scheme, the issue for consideration on review is whether the prisoner is still a serious danger to the community in the absence of an order for supervision or preventive detention.

4.2.8.2 Appeal

In Queensland, the Attorney-General or the offender concerned has a right of appeal against a court decision (*Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 31). In Western Australia, the Director of Public Prosecutions and the offender concerned have a right of appeal against a court decision (*Dangerous Sexual Offenders Act* 2006 (WA), s 34).

In New South Wales, the Attorney General or the offender can apply at any time for the variation or revocation of a continuing detention order (*Crimes (Serious Offenders) Act* 2006 (NSW), s 19(1)) and the Commissioner of Corrective Services must provide the Attorney General with an annual report on the offender (s 19(2)). Unlike Queensland and Western Australia where the orders are indefinite, in New South Wales, a continuing detention order expires at the end of the period specified in the order or, if not specified, within five years of the date it was made (s 18(1)). This does not prevent an application for a second or subsequent continuing detention order being made (s 18(3)). An appeal against a decision may be made to the Court of Appeal within 28 days of the date the decision was made or by leave of the Court of Appeal (s 22).

4.3 Post-sentence supervision in the community

Post-sentence supervision involves an order being made as an offender reaches the end of his or her prison sentence, which requires the offender to be subject to ongoing supervision in the community on their release. In recent years, five Australian states have introduced schemes which enable the post-sentence supervision of sex offenders in the community. These provisions are set out in Table 3.

Table 3: Provisions for the Post-sentence Supervision of Sex-Offenders

Jurisdiction	Act	Section(s)
NSW	*Crimes (Serious Sex Offenders) Act* 2006	6 to 13
Qld	*Dangerous Prisoners (Sexual Offenders) Act* 2003	13
SA	*Criminal Law (Sentencing) Act* 1988	24
Vic	*Serious Sex Offenders Monitoring Act* 2005	5
WA	*Dangerous Sexual Offenders Act* 2006	17(1)(b)

The procedure for applying for post-sentence supervision of sex offenders in Queensland, Western Australia and New South Wales follows that of applications for post-sentence preventive detention outlined in the previous section.

Section 24 of the *Criminal Law (Sentencing) Act* 1988 (SA) allows the Director of Public Prosecutions to apply to the Supreme Court for an order releasing a sex offender 'on licence'. This enables conditions to be made with which the offender must comply.

The Victorian scheme of extended supervision orders set out in the *Serious Sex Offenders Monitoring Act* 2005 (Vic) commenced on 26 May 2005. The main purpose of the scheme is to enhance community protection (s 1).

The Secretary to the Department of Justice may apply to the Supreme or County Court for an extended supervision order of up to 15 years (s 14) in relation to 'serious sex offenders'. The definition of 'serious sex offenders' includes those serving a prison sentence for a wide range of offences against children including rape, indecent assault, the possession of child pornography, as well as other offences including bestiality or loitering near schools (s 3(1) and Schedule). The definition does not include sexual offences committed against adults. The application must be accompanied by an assessment report by a psychologist, psychiatrist or specified health service provider (ss 6-7). A court may only make an extended supervision order if it is satisfied, to a high degree of probability, that the offender is likely to commit a sexual offence if released in the community after serving a prison sentence (s 11(1)).

An extended supervision order contains a number of conditions including that the offender:

- not commit an offence
- report to and receive visits from the Secretary or nominee
- not move to a new address without prior written consent
- not leave Victoria without permission and
- obey any instructions given by the Adult Parole Board such as when the offender must be at home and places that the offender must not visit (s 15).

The court making an extended supervision order must undertake a review of the order no later than three years after it was made and thereafter at intervals of no more than three years (s 21(1)(a) and (b)). The Secretary may apply for a renewal of an extended supervision order at any time while it is still in force (s 24(1)).

The offender has a right to appeal a decision to make, renew or not to revoke an extended supervision order (s 36). Similarly, the Secretary has a right to appeal a decision not to make, not to renew or to revoke an extended supervision order (s 37).

As at July 2006, nine Extended Supervision Orders had been granted by the courts (McSherry 2006: 38). Eight of these are still in place, with one having been suspended due to the person's reoffending and subsequent return to custody. Only a minority of offenders has contested the application for an extended supervision order in court — most have been made by consent. The conditions that have been imposed under Extended Supervision Orders include curfews, outings only under escort and accommodation within a temporary centre established by Corrections Victoria.

4.4 Sex offender registration

As well as some state legislation enabling supervision in the community, all Australian jurisdictions now have processes for registering sex offenders in order to monitor their movements on release from prison. In 2000, New South Wales was the first Australian jurisdiction to introduce a system for registering sex offenders under the *Child Protection (Offenders Registration) Act* 2000 (NSW). This provided the impetus for the establishment of a national scheme and all Australian states and territories now have introduced legislation requiring sex offenders on release from prison to register with the Australian National Child Offender Register (ANCOR). This requires the offender to notify police of their address, places they frequent, car registration and other personal details. Registered sex offenders are prohibited from child-related employment such as working in schools, clubs, associations and movements that provide services or conduct activities for children, religious organisations, fostering children and baby sitting or child minding services arranged by a commercial agency. Table 4 sets out the main legislation in this area.

Table 4: Australian National Child (Sex) Offender Register

Jurisdiction	Act	Section	Register
ACT	*Crimes (Child Sex Offenders) Act* 2005	117–122	Child Sex Offenders Register
NSW	*Child Protection (Offenders Registration) Act* 2000	19–19B	Child Protection Register
NT	*Child Protection (Offender Reporting And Registration) Act* 2004	64–68	Child Protection Offender Register
Qld	*Child Protection (Offender Reporting) Act* 2004	68–74	Child Protection Register
SA	*Child Sex Offenders Registration Act* 2006	60-63	Register of Child Sex Offenders
Tas	*Community Protection (Offender Reporting) Act* 2005	42-45	Community Protection Offender Register
Vic	*Sex Offenders Registration Act* 2004	62–66D	Sex Offender Register
WA	*Community Protection (Offender Reporting) Act* 2004	80–84	Community Protection Offender Register

Sex offender registers assist police in monitoring the whereabouts of sex offenders and facilitate the investigation and prosecution of any further offences. However, maintaining such registers can be resource intensive and add a level of complexity to the conditions imposed in supervising sex offenders under other orders. A balance also needs to be struck between such legislation targeting high-risk offenders and casting the net too broadly. While access to information in the Register is restricted and persons with access must not

disclose personal information, concerns may also be raised that registration may lead to 'vigilantism' if the addresses of sex offenders are leaked to the public.

4.5 Constitutional issues regarding preventive detention

Constitutional law issues have arisen in Australia in relation to continued detention legislation. These issues focus on whether decisions to deprive individuals of their liberty under continued detention schemes are incompatible with the concept of judicial power set out in the Commonwealth Constitution.

The first High Court challenge to continued detention arose in relation to the *Community Protection Act* 1994 (NSW) which was aimed at the preventive detention of Gregory Kable who had been sentenced to a minimum of four years imprisonment for the manslaughter of his wife. Section 5 of that Act enabled the Supreme Court of New South Wales to make an order detaining Kable in prison if it was satisfied that he was 'more likely than not to commit a serious act of violence' and that it was considered appropriate for the 'protection of a particular person or persons in the community generally' that he be held in custody.

The constitutional validity of this Act was challenged before the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The majority (Toohey, Gaudron, McHugh and Gummow JJ with Brennan CJ and Dawson J dissenting) held that the Act was incompatible with the principles underlying Chapter III of the Commonwealth Constitution (which deals with the judicature) and was therefore invalid. The majority held that the *Community Protection Act* 1994 (NSW) compromised the integrity of the judicial system created under Chapter III because it obliged the Supreme Court of New South Wales to exercise a non-judicial function. The constitutional issues raised in *Kable's* case were very narrow and the High Court did not consider policy issues relating to the continued detention scheme.

The justices in the majority referred to different formulations of the relevant principles, but all of them referred to constitutional integrity or public confidence. Toohey J held that because the legislation required the court to perform a non-judicial function in making a preventive detention order when there was no offence and no finding of guilt, it diminished public confidence in the integrity of the judiciary (at 98). Gaudron J focused on the fact that the legislation was aimed at an individual, the rules of evidence did not apply in significant respects and it deprived Kable of liberty on the basis of a guess as to whether, on the balance of probabilities, he would commit a serious act of violence. In her opinion, these factors meant the legislation compromised the integrity of the judicial system (at 107).

McHugh J was of the opinion that the legislation made the court an instrument of a legislative plan, initiated by the executive government and vested with a jurisdiction purely executive in nature. This conferral of non-judicial power meant that an ordinary reasonable member of the public could conclude that the court was not independent of the executive arm of the state (at 117, 119, 121). Gummow J stated that the most significant feature of the legislation was that the detention was punitive in nature, yet did not follow from any determination of guilt. He said that vesting such an authority in the court was not only non-judicial in nature, but 'repugnant' to the judicial process 'in a fundamental degree' (at 132).

The decision in *Kable's* case indicated that legislation dealing with the continued detention of an *individual* offender is unconstitutional. However, McHugh J foreshadowed that the States could make general laws for preventive detention where those laws operated in accordance with the ordinary judicial processes of the State courts (at 121). This meant that the door was left open for governments to reformulate continued detention schemes to allow for the detention of a *class* of offenders, providing there were sufficient safeguards ensuring judges were exercising judicial rather than non-judicial powers.

The Queensland scheme for continued detention was thus formulated to apply to a class of offenders and to have a number of safeguards within it. This scheme was also challenged before the High Court. The issue in *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 was limited to whether section 13 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. Section 13 empowers the Supreme Court of Queensland to make continued detention and supervision orders in relation to prisoners considered to be a serious danger to the community. Six of the judges (with Kirby J dissenting) held that section 13 of the Act was constitutionally valid. The majority judgments held that the primary purpose of the Act is not punishment, but community protection. The majority viewed this as compatible with the exercise of judicial power and distinguished the legislation from that in *Kable's* case on a number of grounds.

Gleeson CJ stated that the majority in *Kable's* case accepted that 'the appearance of institutional impartiality of the Supreme Court was seriously damaged by a statute which drew the Court into what was in substance a political exercise' (at 56). In comparison, the Queensland legislation enables a substantial judicial discretion as to whether or not to make an order, the rules of evidence and the onus of proof apply, there is a process for appeal, the hearings are to be conducted in public and 'according to ordinary judicial processes' (at 57). He concluded there was nothing in the Act to suggest that the Supreme Court was to act as a 'mere instrument of government policy' (at 57).

McHugh J also pointed out a number of differences between the Queensland legislation and the legislation considered in *Kable's* case. He stated in relation to the Queensland legislation (at 60-62):

- The Act is not directed against a particular person but all persons in a certain category.
- In determining an application under the Act, the Supreme Court is exercising judicial power in accordance with the rules of evidence.
- The Court has a discretion as to whether and what kind of order to make.
- The Court 'must be satisfied of the "unacceptable risk" standard "to a high degree of probability"'.
- The Act is not designed to punish the prisoner, but to protect the community.
- Nothing in the Act 'suggests the jurisdiction conferred is a disguised substitute for ordinary legislative or executive function', nor is there anything that would lead to a public perception that the judiciary is not acting independently.

Gummow J, with whom Hayne J largely agreed, stated that the Queensland legislation differed from that in *Kable's* case because of the necessity for the 'cogency of acceptable evidence' based on psychiatric reports and the attainment of a 'high degree of probability' that the prisoner's antecedents and diagnosis point to an unacceptable risk of committing a serious sexual offence (at 77). He also stressed that the regime of continued detention was connected to the prisoner's 'anterior conviction by the usual judicial processes' and that there were adequate means of periodic review, characteristics that 'answer the description of the general features of a judicial process' (at 81). Accordingly, the Supreme Court was able to perform its functions independently of any instruction, advice or wish of the legislature or executive (at 81).

In their joint judgment, Callinan and Heydon JJ referred to the objects of the Act, the focus of the inquiry and obligatory annual reviews in holding that the Act was properly characterised as protective rather than punitive (at 109).

Only Kirby J, in his dissenting judgment, held that section 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) conferred jurisdiction upon the Supreme Court of Queensland that was repugnant to its integrity as a court. He stated that '[i]n this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed' (at 83, footnote omitted).

A number of factors were explored by Kirby J, leading to the conclusion that the Act was invalid, such as:

- The Act's regime is based on unreliable predictions of criminal dangerousness (at 83).
- Detention under the Act is a form of civil commitment of a person to a prison that is in essence punitive: 'the imprisonment "continues" exactly as it was' (at 93).
- The detention is a form of highly selective punishment directed at 'a readily identifiable and small group of individuals' (at 98).
- The detention is a form of double and retrospective punishment on a prisoner who has completed a judicially imposed sentence (at 100).

Kirby J interpreted the principle in *Kable's* case as forbidding the imposition of functions upon a court that are inconsistent with traditional judicial process (at 87). While the New South Wales legislation had been directed at one person, according to Kirby J, the principle in *Kable's* case was not intended to be a stand-alone case. The principle could apply to a law that affects a 'small number of identifiable persons, singled out for special treatment' (at 88).

For Kirby J, the exercise of judicial power could not be separated from what might be called policy issues. Whereas the other judges were prepared to bypass such considerations, for Kirby J they went to the very heart of the exercise of judicial power.

How judges should take into account policy issues has of course been the subject of considerable philosophical analysis (see for example Campbell & Goldsworthy 2000). Gleeson CJ was careful to point out that the High Court had no jurisdiction to consider policy issues concerning the Queensland legislation (at 52-53):

> 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 these wider issues. The outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court.

The result of *Fardon's* case is that continued detention legislation will be constitutionally valid providing a number of safeguards are met. However, while the majority did not consider policy issues, it is important to canvass these in the context of the development of international human rights. Policy issues are explored in chapter seven.

5. Chapter Five: Overseas models

5.1 Introduction: Medical versus criminal justice approaches

The framework for approaching the supervision and treatment of high-risk offenders differs according to whether a medical or criminal justice model is taken. This chapter outlines some of the models available in the United Kingdom and the United States in this regard.

Australia currently uses a criminal justice model for the management of sex offenders. This sees sex offending as analagous to other types of offending and holds sex offenders responsible for their actions. It recognises that sexually deviant conduct is still intentional conduct (Morse 2003: 167).

This is not to say that the criminal justice model is not concerned with treatment issues. One of the purposes of sentencing law is to establish conditions within which the rehabilitation of the offender may be facilitated as an aim of the sentencing process. As with all offenders, treatment aimed at behavioural modification, as well as social support mechanisms, may aid in reducing recidivism.

The criminal justice model is also present in the regimes already established and being developed in the United Kingdom. However, as shall be explored in this chapter, there has been considerable resistance by the mental health profession to moves toward the preventive detention of dangerous people with severe personality disorders.

In comparison to the criminal justice model, the ‘sexual predator’ laws in the United States are based on a medical model which views sex offenders as mentally ill, with diagnosable sexual disorders. Canada toyed briefly with this model, with what was termed ‘psychiatric gating’ — the practice of certifying offenders for involuntary admission into a psychiatric facility under civil mental health legislation on their impending release from prison (Henry 2001; Hannah-Suarez 2005). However, this practice appears to have disappeared in Canada in favour of the use of sentencing provisions for dangerous offenders.

The sexual predator laws have also attracted a great deal of criticism from mental health professionals. These criticisms are outlined below.

5.2 Options in the United Kingdom

5.2.1 Indeterminate sentences and release on licence

Section 225 of the *Criminal Justice Act* 2003 (UK) enables a judge to make a sentence of imprisonment that is for an indeterminate period on the basis of the protection of the public. The court must be of the opinion that there is a 'significant risk to members of the public of serious harm occasioned by the commission by [the offender] of further specified offences'. Section 227 also enables an extended sentence for certain violent or sexual offences where there is a significant risk of serious harm to the public.

Schedule 18 of the *Criminal Justice Act* 2003 (UK) allows for an offender who has been given an indeterminate sentence under sections 225 or 227 to be released 'on licence'. This refers to a system of supervision by a parole officer and conditions may be attached to the licence. The offender can subsequently apply to the Parole Board for the discharge of the licence. The Board must be satisfied that it is no longer necessary for the protection of the public that the licence should remain in force before it can be discharged.

Section 2 of the *Crimes (Sentences) Act* 1997 (UK) provided for mandatory life sentences for those committing a second serious violent or sex offence 'unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so'. This has now been replaced by s 109 of the *Criminal Courts (Sentencing)* Act 2000 which is couched in similar terms.

An empirical investigation conducted by Ralph Henham (2001) into the use of indeterminate and extended sentences found that there was a judicial reluctance to use such provisions partly because they require judges to weigh up complex medical evidence regarding future behaviour with conventional legal factors relating to aggravation and mitigation. These findings are similar to those of Elizabeth Richardson and Arie Freiberg (2004) in relation to the lack of use of indeterminate sentences in Victoria.

In addition to indeterminate sentences, the *Sex Offenders Act* 1997 (UK) introduced a system of notification of information to the police by those who have committed certain sexual offences. Such information includes notification of any change of address. This system was revised in Part 2 of the *Sexual Offences Act* 2003 (UK) which requires annual notification and enables the police to check the fingerprints and take a photograph of the offender each time a notification is made.

Sections 104 to 113 of the *Sexual Offences Act* 2003 (UK) enable the police to apply to a sheriff or magistrate for a 'sexual offences prevention order'. The effect of such an order is to prohibit the offender from doing anything described in the order and it lasts for a period of not less than five years (s 107(1)). Such an order generally allows for prohibitions on the offender's movements.

5.2.2 Supervision in the community

Sections 20 and 21 of the *Crime (Sentences) Act* 1997 (UK) enable the Parole Board to make 'release supervision orders' for sex offenders and violent offenders respectively. These supervision orders enable the making of certain conditions relating to the offender's release and specify that the offender is under the supervision of a probation officer (s 16).

Sections 67 and 68 of the *Criminal Justice and Court Services Act* 2000 (UK) make it mandatory for arrangements to be put in place for the purpose of assessing and managing the risks posed by violent or sex offenders. These arrangements are generally referred to as 'multi-agency public protection arrangements' (National Probation Service 2004). The agencies involved are operated by justice and social care bodies and their primary focus is to establish arrangements for assessing and managing the risks posed by violent and sex offenders. There are requirements for these agencies to monitor the arrangements and to prepare and publish an annual report on their operation.

National guidelines published in 2003 require that the management of offenders should be conducted at one of three levels:

Level 1: This involves a single agency, usually the relevant probation service, which manages the offender without active or significant involvement of other agencies.

Level 2: This requires the involvement of more than one agency and may involve management plans that are not complex and do not need senior management by senior agency members.

Level 3: This involves a Multi-Agency Public Protection Panel, which manages offenders who pose the highest risk of causing serious harm or whose management is so problematic that multi-agency co-operation at a senior level is required (DSPD Programme 2006).

At present, there is no system of preventive detention in place which allows for sex offenders to be kept in prison after the expiry of their sentence.

5.2.3 Extended parole in the community

In 1988, the United Kingdom introduced a power for a court to impose extended parole for violent and sexual offenders (*Crime and Disorder Act* 1998 (UK), s 58; reenacted as section 85 of the *Powers of Criminal Courts (Sentencing) Act* 2000 (UK)). This sentence is available for crimes committed after 30 September 1998. An extended sentence, as it is known, consists of a custodial term (the term the court would have otherwise imposed) and a further extension period during which the offender is on parole (in the case of sexual offences, up to 10 years and 5 years for violent offences).

In Scotland, an extended sentence may be imposed in circumstances where the court intends to make a determinate sentence of imprisonment and considers that the period for which the offender would otherwise be subject to parole would 'not be adequate for the purpose of protecting the public from serious harm from the offender' (*Criminal Procedure (Scotland) Act* 1995, s 210A). Scotland has increased the maximum period for which the extension period could apply for violent offences from 5 to 10 years (*The Extended Sentences for Violent Offenders (Scotland) Order* 2003). In England and Wales the criteria are slightly broader, allowing for such a sentence to be imposed where the period for which the offender would otherwise be subject to parole 'would not be adequate for the purpose of preventing the commission by him [or her] of further offences and securing his [or her] rehabilitation' (*Powers of Criminal Courts (Sentencing) Act* 2000, s 85(1)(b)).

While this form of order may avoid some of the criticisms of post-sentence supervision by virtue of being made at the point of sentencing, such an order is likely to suffer from similar problems as those identified with longer than proportionate sentences. These problems include predicting in advance the possible risk an offender may pose to community safety, some years after he or she was first sentenced.

5.2.4 Proposed preventive detention of dangerous people with severe personality disorders

Preventive detention has been very much on the agenda in the United Kingdom in recent years in relation to the category of 'dangerous people with severe personality disorder', but proposals to bring such people within the mental health care system has met with strong resistance, particularly from the medical profession.

In 1998 the Government appointed an Expert Committee, chaired by Professor Genevra Richardson, to review mental health legislation. The objective of the Committee was to produce proposals for reform which would pursue the aim of non-discrimination on grounds of mental disorder (Richardson 2002). The Report of the Expert Committee (1999) recommended a system that would provide a 'single pathway' to compulsory treatment, whether in hospital or in the community. It also recommended that, as far as possible, a new Act should be based on notions of autonomy and non-discrimination.

The government was unconvinced by the Expert Committee's emphasis on patient's autonomy, preferring to focus instead on the 'degree of risk' necessary to invoke involuntary commitment powers (Richardson 2002: 462). In July 1999, the United Kingdom Home Office and the Department of Health released a consultation paper, followed by a White Paper, proposing the preventive detention of dangerous people with severe personality disorder (Department of Health 1999; Department of Health 2000). These papers reflected the Government's rejection of most of the recommendations of the Expert

Committee, although it also adopted others such as a broad definition of mental disorder and a single gateway to treatment.

Dangerous people with severe personality disorders were defined by the Department of Health (2000: 13) as individuals who:

- show significant disorder of personality;
- present a significant risk of causing serious physical or psychological harm from which the victim would find it difficult to recover, e.g., homicide, rape, arson; and in whom,
- the risk presented appears to be functionally linked to the personality disorder.

The proposal was for such individuals to be subject to indefinite detention in a mental health facility even though they may not have committed an offence. The *Dangerous People with Severe Personality Disorder Bill* 2000 (UK) enabled an order for 'Dangerous Severe Personality Disorder' to be made by the courts in criminal as well as civil proceedings.

This proposal attracted a great deal of criticism. It was described by Paul Mullen (1999: 1147) as 'ethically and professionally indefensible' and S M White (2002: 98) stated it was 'morally reprehensible'. Further, it was pointed out by Nigel Eastman (1999) that many categorised as dangerous would be detained for management purposes rather than for treatment, since many would be untreatable. He expressed concern that health professionals would thus be acting as public protectors rather than as therapists.

Subsequently, a draft *Mental Health Bill* 2002 (UK) was circulated for comment. The Bill does not mention the category of dangerous people with severe personality disorder at all. Instead, Clause 6 permits compulsory detention of those with 'mental disorders' (defined very broadly in clause 2) in the mental health system for treatment. If a patient is thought to pose 'a substantial risk of serious harm to others', clause 6 requires that the treatment is required to be necessary for the protection of those people. Criticising the Bill, Luke Birmingham (2002) commented that the drive to detain dangerous people on the basis of unsound mind was beginning to lose favour and that the Bill's steps toward preventive detention could mean that some individuals with severe mental disorders could miss out on treatment. The 2002 Bill was not passed, but a further *Mental Health Bill* 2004 (UK) was circulated for comment.

The Joint Committee on the Draft Mental Health Bill was appointed by the House of Commons and the House of Lords on 22 July 2004 to examine the 2004 Bill. The Committee published a report in March 2005, which concluded that the Bill was 'fundamentally flawed'. In March 2006, the Government announced that it was dropping its proposal for an entirely new Mental Health Act (Department of Health 2006). Instead, it would concentrate on amending the 1983 Act.

While possible reforms to the mental health system continue to be debated, a program for the management and treatment of dangerous people with severe personality disorders has nevertheless been developed by the Home Office, the Department of Health, the Prison Service and the National Health Service. This program is aimed at people who have committed a violent and/or sexual crime and have been detained under the criminal justice system or through mental health legislation.

Section 37 of the *Mental Health Act* 1983 (UK) enables a court to make a hospital order in relation to those with a 'psychopathic disorder' where the person has been convicted of an offence for which he or she could be imprisoned, other than cases where the court is required to give a life sentence, such as murder. The court must be satisfied, on the basis of the evidence of two doctors that:

- The person is suffering from mental illness, severe mental impairment, mental impairment or psychopathic disorder and
- The mental disorder is of a nature or degree that makes it appropriate for the person to be detained in hospital for medical treatment.
- In the case of psychopathic disorder and mental impairment, such treatment must be likely to alleviate or prevent a deterioration of the person's condition.

Section 46 of the *Crime (Sentences) Act* 1997 (UK) inserted a new section 45A into the *Mental Health Act* 1983 (UK) enabling the Crown Court in sentencing an offender to direct that he or she be placed in a hospital for treatment as an interim measure. If the person does not respond to treatment, he or she can be transferred to prison to complete the sentence rather than be discharged from hospital. Again, there must be evidence from two registered medical practitioners that the person is 'suffering from psychopathic disorder' and that it is appropriate for the person to be detained in hospital for treatment likely to 'alleviate or prevent a deterioration of his condition'.

Individuals are considered to meet the criteria for admission to high secure services for those with severe personality disorders if they are assessed as being more likely than not to reoffend in a manner that would result in serious physical or psychological harm to the victim. The risk of reoffending must be linked to the presence of a severe personality disorder. The dangerous persons with severe personality disorders program is currently developing services for the management and care of individuals who move on from high security units. Those who respond to treatment may progress to a unit involving a lower level of security or to a supervised placement upon release.

The experience in the United Kingdom has shown just how difficult it is to convince the medical profession that the mental health system should be used to preventively detain those considered dangerous. Assessing the risk of harm to others is a highly difficult and uncertain process (McSherry 2004; McAlinden 2001) and there are serious difficulties with the notions of treatment and

treatability of those with personality disorders (Akuffo 2004). Using the mental health system to detain indefinitely individuals who do not have a serious mental illness would also be most likely to attract strong resistance in Australia.

5.2.5 United Kingdom arrangements for the management of violent and sexual offenders

The United Kingdom has sought to improve arrangements for the management of violent and sexual offenders through the development of more coordinated responses at a local area level. These arrangements were put on a statutory footing in 2000 with the introduction of the *Criminal Justice and Court Services Act* 2000 (UK) and have been reenacted under the *Criminal Justice Act* 2003 (UK). These arrangements apply to offenders on licence (parole) subject to extended supervision and to offenders who have reached the end of their sentence but who are still considered at risk of serious offending.

Section 325 of the *Criminal Justice Act* 2003 (UK) makes it mandatory for the police, prison and probation services (acting as the 'responsible authority') in each of the local areas of England and Wales to put in place arrangements for the purpose of assessing and managing the risks posed by violent or sex offenders. These arrangements are generally referred to as 'multi-agency public protection arrangements' (MAPPA). There are requirements for these agencies to monitor the arrangements and to prepare and publish an annual report on their operation (*Criminal Justice Act* 2003 (UK), s 326). A number of other agencies are required to cooperate with the responsible authority including social services, job centres and local housing and education authorities.

5.2.6 The Scottish risk management authority

In Scotland, the MacLean Committee on Serious Violent and Sexual Offenders recommended the formation of a Risk Management Authority which would have a range of responsibilities around assessing risks posed by serious violent and sexual offenders (Maclean Report 2000). The establishment of the Risk Management Authority was one of a number of recommendations to better respond to high-risk offenders. Other recommendations included the introduction of a new form of indefinite sentence to be ordered at the time of sentence — the Order for Lifelong Restriction.

The Risk Management Authority was subsequently established by the *Criminal Justice (Scotland) Act* 2003. The purpose of the Authority is to:

- Develop policy and carry out and monitor research in risk assessment and minimisation.
- Set standards for and issue guidance to those involved in the assessment and minimisation of risk.

- Approve and monitor risk-management plans for those high-risk sexual and violent offenders who receive an order for lifelong restriction (a new form of indefinite sentencing order).

- Accredit people involved in risk assessment and minimisation and the methods and practices used in the assessment and minimisation of risk.

- Carry out education or training activities in relation to the assessment and minimisation of risk or to commission such activities (Scottish Executive 2006).

The Risk Management Authority consists of a Convenor and four Board members appointed by the Scottish Ministers on a part time basis. There is also a Chief Executive Officer and ten staff members.

The new provisions providing for Orders for Lifelong Restriction came into force in Scotland on 20 June 2006. The scheme provides for the lifelong supervision of high-risk violent and sexual offenders both in prison and subsequently on licence in the community.

One of the challenges for courts in making indefinite sentencing orders is the quality of information available at the point of sentencing. Under the Orders for Lifelong Restriction scheme introduced in Scotland, once a court determines that certain risk criteria may be met, it is required to make a Risk Assessment Order. The risk criteria (*Criminal Procedure (Scotland) Act* 1995*,* s 210E) are

> that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.

The Risk Assessment Order provides for a risk assessor accredited by the Risk Management Authority to carry out a risk assessment and to prepare a Risk Assessment Report, the purpose of which is to assist the court to make an informed decision about the level of risk an offender poses to the community. If on the basis of this report and other evidence, the court is satisfied on the balance of probabilities that certain risk criteria are met, it must impose an Order for Lifelong Restriction (s 210F).

A major benefit of the Scottish approach is that it enables the offender to know from the start of the sentence what is in store in relation to risk management in prison as well as out in the community. It also enables treatment plans to be developed with the individual offender in mind.

5.3 US schemes for post-sentence civil commitment

A number of states in the United States of America have enacted what are generally termed 'sexual predator' laws. These enable the civil commitment of sexual offenders at the completion of a criminal sentence under a 'mental health' model. Instead of preventive detention in prison, the offender is usually committed to a hospital, secure facility or a mental health facility of the relevant State Department of Corrections. The nature of the detention is constitutionally required to be preventive, not punitive, and the detention must be accompanied by some method of treatment. In the United States, unlike Australia, prisons cannot be used for the detention of persons who are subject to civil commitment as this has been held to conflict with the due process requirements of the United States Constitution (*Kansas v Hendricks* 521 US 346 (1997)). Much of the literature that analyses post-sentence preventive detention regimes in the United States is concerned with issues and questions arising from these constitutional requirements, which, for that reason, has less relevance to Australia (see for example Corrado 2006).

With that caveat, the experience of the various States of the United States is instructive because it provides a useful point of comparison to the criminal justice model adopted in the Australian jurisdictions considered in this report.

Most schemes are based on the legislation enacted by the State of Washington, the first of its type (Robinson 2001: 1431), or by the State of Kansas, whose legislation was subjected to a failed constitutional challenge (Nieto 2004: 3). The Washington legislation enables the commitment of 'a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or a personality disorder which makes the person likely to engage in predatory acts of sexual violence'. In the Washington legislation, mental abnormality is defined as 'a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts' (1990 Washington Laws 71.09.020(2)). 'Personality disorder' is not defined. In the majority of States with 'sexually violent predator' legislation, the State must prove its case beyond reasonable doubt (Fitch & Hammen 2003: 29).The person has a right to a trial by jury. The term of commitment under the various State 'inpatient' regimes is indeterminate (except in California, which has a two-year, renewable term).

The process for preventive detention is typically characterised by the following components:

- It commences when an offender convicted of a sexually violent offence is scheduled for release by virtue of serving their sentence.
- The person is assessed to determine whether they meet the statutory definition of a sexually violent predator.

- Based on the outcome of the assessment, the county or state attorney must decide whether there is sufficient evidence to file the case.
- After a case is filed a court or tribunal must determine whether probable cause exists and if so the offender is taken into custody.
- Following a determination of probable cause a trial is held to decide whether the offender is a sexually violent predator.
- If the court or jury finds that the offender is a sexually violent predator he or she is committed to a state facility for control, care and treatment until such time as he or she no longer poses a risk to the community.

The similarity between the United States regimes and the Queensland model is plain. One key difference between the United States approach and the Queensland approach is the constitutional requirement of treatment. A comparison of the California and Texas regimes is appropriate, since they represent the two principal mental health models ('inpatient' and 'outpatient' respectively).

5.3.1 California

Introduced in 1996, California's sexually violent predator legislation (*California Codes: Welfare and Institutions Code,* sections 6600 – 6609) embraces a five stage inpatient therapy program (outlined below) that allows for supervised release after the sexually violent predator patient has completed a therapy regime. Sexually violent predators are currently housed at Atascadero State Hospital, a secure facility for mental health treatment after they have been committed under the legislation (Nieto 2004). A separate facility, Porterville State Hospital, is used to house sex offenders with intellectual disability and there are plans underway for the construction of a 1,500 bed facility to supplement Atascadero (Peckenpaugh & Petersilia 2006).

Commitment proceeds after a person is found to be a sexually violent predator by a court or jury under section 6604: 'If the court or jury determines that the person is a sexually violent predator, the person shall be committed for two years to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility…'. The two year commitment sentence may be renewed (section 6604.1(a)) and the sexually violent predator is entitled to petition the court for conditional release on an annual basis (section 6605) (for discussion, see Sreenivasan et al. 2003). Once committed, the sexually violent predator is provided with programming by the State Department of Mental Health, which affords the person with treatment for his or her diagnosed mental disorder (section 6606(a)). If treatment is refused, then the sexually violent predator is offered the opportunity to comply on at least a monthly basis. However, amenability to treatment is not necessary nor does the treatment have to be successful. Treatment is more specifically referred to in section 6606 (c) which provides:

> The programming provided by the State Department of Mental Health… shall be consistent with current institutional standards for the treatment of sex offenders, and shall be based on a structured treatment protocol developed by the State Department of Health. The protocol shall describe the number and types of treatment components that are provided in the program, and shall specify how assessment data will be used to determine the course of treatment for each individual offender. The treatment shall also specify measures that will be used to assess treatment progress and changes with respect to the individual's risk of re-offense.

The Department of Mental Health has since created the Sexual Offender Commitment Program that offers both inpatient treatment for committed sexually violent predators and outpatient treatment for sexually violent predators that qualify for conditional release (California Department of Mental Health 2006). The inpatient program implements the structured protocol in section 6606 (c) and consists of five phases which use cognitive behavioural techniques with a relapse prevention component. The cognitive behavioural model requires ongoing and thorough assessment of patient needs and treatment progress. It is designed to first help offenders identify the factors that place them at risk for sexual violence and assists them in developing coping responses to risk factors in order to reduce the potential for relapse. Treatment also includes individual therapy sessions, couples/family counselling, behavioural reconditioning and educational training activities. The program does not claim to cure sexually violent predators, but rather the strategy aims to manage the risk of reoffending and towards this end the program implements the following phases:

(i) **Treatment Readiness Phase**: this phase is for patients who have not committed themselves to actively working towards changing their thoughts or behaviour and is primarily educational.

(ii) **Skill Acquisition Phase**: the second phase is for patients who have made a commitment to change their behaviour that preceded their offences and includes a full assessment and offence specific treatment components.

(iii) **Skill Application Phase**: the third phase is for patients who have acquired skills in core program areas (victim awareness, cognitive restructuring, sexual arousal modification, identifying and coping with high risk situations) and who need to apply and reinforce such skills.

(iv) **Discharge Preparation Phase**: the fourth phase is for patients who have been identified as ready to prepare detailed plans for conditional release and community treatment. After completing these four phases, patients may finally qualify for conditional release on an outpatient basis.

Once granted conditional release, it is intended that sexually violent predators enter community treatment and supervision under a Conditional Release Program. The program is based on the containment model of sex offender

treatment that seeks to hold patients accountable by the use of the sexually violent predator's own internal controls developed during the various treatment phases and the use of external controls such as polygraph, surveillance and electronic monitoring such as global positioning. At any stage of their commitment however sexually violent predators can petition the court for conditional or unconditional release, before they have completed their therapy, but only where the Director of Mental Health determines that the person's diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community (ss 6607 and 6608 (a)).

The effectiveness of the post-1996 California regime has not been independently evaluated. The most recently published study of the Californian sex offender treatment and evaluation project involved a follow-up study of people treated under a regime that was in place before 1996 (Marques et al. 2005). There are no disaggregated statistics available regarding recidivism rates for sex offenders in California. It has been observed by Marcus Nieto (2004: 35):

> Available data on specialized sex offender treatment and intervention programs still does not conclusively tell us what works and what does not work. We do know that in some situations specialized sex offender treatment is better than no treatment, identifying individual risk factors is important in preventing relapses, and completing treatment or therapy is vital for sex offenders in preventing recidivism. California data is not helpful at this time in examining the effects of sex offender treatment on recidivism rates. However, there are enough sex offenders currently in specialized parole treatment programs to begin comparing the effects of treatment on preventing re-offending to those sex offenders not receiving treatment. This would be helpful to state policy-makers.

At the time of writing, a referendum on a proposal to require global positioning system tracking for all 'high risk' sex offenders, Proposition 83, was on the ballot in California (Peckenpaugh & Petersilia 2006). (In California, citizen-initiated referenda can direct legislative change).

5.3.2 Texas

Unlike California, Texas has adopted a treatment model that emphasises outpatient treatment as opposed to inpatient treatment (Bailey 2002). Introduced in 1999, the Texas sexually violent predator legislation (*Title 11 Chapter 841*: sections 841.001 to 841.147) embraces an outpatient treatment program once sexually violent predators have been committed under sections 841.061 and 841.062. Outpatient treatment is coordinated by a case manager and it must continue until the person is considered no longer likely to engage in predatory sexual behaviour.

Section 841.082 imposes a number of requirements upon the conditions of commitment which include:

- requiring the person to reside in a particular location
- prohibiting contact with victims or potential victims
- prohibiting the use of alcohol
- participation in a course of treatment
- tracking supervision
- prohibition on changing residence without authorization and, if appropriate
- establishment of a child safety zone (section 841.082 (a)).

Responsibility for administering care and treatment was delegated to the Interagency Council on Sex Offender Treatment in 1999. Section 841.007 provides that the Council is responsible for providing appropriate and necessary treatment and supervision through the case management system. The Council's responsibilities include:

- comprehensive case management supervision
- residential housing requirements
- intensive sex offender treatment
- global positioning satellite tracking
- anti Androgen medication
- mandated penile plethysmography (a penile plethysmograph measures changes in blood flow in the penis in response to audio and/or visual stimuli)
- biennial examinations
- restricted transportation, and
- substance abuse testing.

The main difference in treatment models between Texas and California (and other 'inpatient' States) is the environment in which the committed sexually violent predator receives therapy. The Council on Sex Offender Treatment, of the Texas Department of State Health Services (2005a) claims that the

> prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment for this population are very different than traditional treatment modalities…Use of an outpatient program, in which treatment is mandated in Texas, can potentially provide for more long-term community safety than inpatient programs.

Another benefit of outpatient treatment is reduced cost. The Council on Sex Offender Treatment, of the Texas Department of State Health Services claims

that its outpatient program is significantly less expensive than the costs of prosecuting and defending a new crime, county jail housing, lengthy incarceration, medication and treatment. The annual cost of outpatient treatment is estimated to be $30,000 per year per client whilst the annual cost of inpatient treatment is estimated to be between $70,000 and $125,000 per year per client (2005b). It is notable that Nieto (2004: 38), in his analysis of the Californian legislation, cites a figure of $59,500 per annum as the estimated annual financial cost of detaining and processing sexually violent predators under the Californian regime.

The Texas program, like the Californian program, has not been subjected to any sustained, independent and scholarly review and analysis. However, the Texas program has clear advantages over an 'inpatient' approach, including reduced cost and the recognition of the importance of liberty. This regime adopts the 'least restrictive alternative' approach, with the potential for graduated responses depending on assessments of offender risk.

5.4 Summary: the Overseas Models Considered

The Scottish model of orders for lifelong restriction has only recently come into place and it is too early to measure this model's effectiveness. Many of the models in the United Kingdom are reflected in existing Australian schemes, although the model of multi-agency public protection arrangements may well be worth developing in Australia.

What is clear from the overseas literature is that any move to use the mental health system to 'warehouse' certain groups of individuals will be fraught with difficulties (Petrunik 2003). For example, the United States models of civil commitment of sex offenders into the mental health system after release from prison has been criticised on a number of grounds.

First, sex offenders do not clearly fit within the boundaries of the mental health system, which is to detain and treat those with an identifiable mental illness. It has been pointed out by Denise Lievore (2005) that the belief that the majority of sex offenders are mentally ill is not supported by research. The term 'paedophile' has been conflated to mean 'sex offender' in general parlance, whereas 'paedophile' is used much more narrowly in the American Psychiatric Association's Fourth Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) to refer to the 'paraphilia' (a sexual deviation) of being sexually attracted primarily or exclusively to children. Only a subset of sex offenders are diagnosed with this form of sexual deviation.

Mental health professionals in the United States have criticised the insertion of the term 'mental abnormality' in mental health legislation to bypass the mental illness debate and to encompass a broad group of sex offenders (Winick & La Fond 2003). For example, psychiatrist Paul Appelbaum (1997) has stated in relation to the criteria in the Kansas statute that 'it makes it likely that those

offenders committed under this statute will be a heterogeneous group diagnostically similar only in the fears they arouse among authorities as their release approaches.'

Secondly, the use of civil commitment legislation to encompass the detention of sex offenders has been criticised as representing nothing more than the transferral of preventive detention from the criminal to the civil system (Schneider 1995). In this regard, Herbert Sacks (1997), then President of the American Psychiatric Association, stated in this regard:

> The civil commitment of sexual predators to a mental hospital for purposes of social control is an abuse of the mental health care system. It saddles already underfunded public mental hospitals with a potential lifetime warehousing of people whom the state says do not have a mental illness, only a 'mental abnormality'.

Thirdly, the 'inpatient' medical model may ironically undermine treatment efforts for sex offenders who do not have a diagnosed mental illness. For example, Bruce J Winick (2003: 321) has pointed out that labeling individuals as violent sexual predators communicates to them that they are mentally abnormal in ways that prevent them from controlling their behaviour and may undermine the potential of any treatment offered. By concentrating treatment endeavours for mental abnormality after imprisonment, there are disincentives for sex offenders to take advantage of prison treatment programs and may take resources away from them. Having a system whereby sex offenders are forced to undergo mandatory treatment in mental health institutions after their sentence may also have a negative impact on mental health professionals. Coercive treatment programs raise ethical problems and are more concerned with social control than working in the best interests of the individual concerned.

Fourthly, the use of the civil mental health system to detain sex offenders after the expiry of their sentence has been criticised as violating civil rights. In this regard, J Andres Hannah-Suarez (2005) has argued that the Canadian practice of 'psychiatric gating' is fraught with possible violations of sections 7 and 12 of the Canadian *Charter of Rights and Freedoms*. Section 7 of the Canadian Charter protects against the deprivation of liberty in violation of principles of fundamental justice, and section 12 protects against cruel and unusual treatment or punishment. While the United States Supreme Court held in *Kansas v Hendricks* 521 U.S. 346 (1997) that the Kansas sexual predator laws were constitutional and do not constitute punishment or unwarranted preventive detention, this was a 4:3 majority decision. The subsequent case of *Kansas v Crane* 534 US 407 (2002) has narrowed the circumstances by which sex offenders can be civilly committed (Cornwell, 2003).

Fifthly, inadequate focus has been placed on the potential for restorative justice alternatives to the civil mental health model of managing sex offenders (Petrunik 2003; McAlinden 2006).

Sixthly, the medical model approach has significant resource implications. The use of the mental health system to detain sex offenders may limit the availability of resources for the treatment of individuals with mental illnesses who have not offended.

The attempt in Victoria to use the mental health system to detain Garry David after the expiry of his sentence resulted in a great deal of criticism by mental health professionals and this endeavour was abandoned in favour of enacting preventive detention legislation (Greig 2002). It appears unlikely that the medical model approach would find support from those working in the mental health system.

A criminal justice approach to managing sex offenders also has problems. The criminal justice system does not and cannot provide a perfect guarantee against crime and it is impossible to contrive a perfect risk-free society through the law alone. The main purpose of the three existing Australian schemes of preventive detention is to ensure the adequate protection of the community, with only the New South Wales legislation focusing on rehabilitation (the Queensland and Western Australian models refer to the continuing control, care **or** treatment of offenders). The current schemes have only been operating in Australia for a very short period of time and it is difficult to find measures to establish whether they are indeed effective in relation to community protection. What preventive detention schemes aim to avoid is not harm, but *potential* harm which is empirically difficult to establish (Zdenkowski 1997).

Finally, what is clear from this Chapter is that the 'inpatient' civil commitment models developed in the US States should not be followed because of these endemic problems. However, the Scottish model of orders for lifelong restriction, the Texas model of community treatment and the use of multi-agency partnerships and restorative justice techniques merit further investigation, to determine if they could lower recidivism rates in Australia.

6. Chapter Six: Practical issues

6.1 Introduction

In order to compare the different schemes for managing sex offenders, three focus groups were carried out in Adelaide, Melbourne and Brisbane. Each focus group consisted of representatives from criminal justice agencies, support groups for prisoners, legal practitioners and forensic mental health professionals involved in the different legislative regimes. Ethics Approval was obtained from Monash University's Standing Committee on Ethics in Research involving Humans (Approval No 2005/927LIR) and from the University of Technology, Sydney Human Research Ethics Committee (Approval No 2006-003A) to conduct the focus groups.

The Adelaide focus group concentrated on the practical issues related to the regime of indefinite detention at the time of sentence for sex offenders under section 23 of the *Criminal Law (Sentencing) Act* 1988 (SA), while the Melbourne group discussed practical issues in relation to the new monitoring provisions under the *Serious Sex Offenders Monitoring Act* 2005 (Vic) and the Brisbane group focussed on post-sentence preventive detention under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld).

The four main questions for each group were:

- What expectations (hopes and fears) did you have for the relevant scheme and have they been borne out?
- What are some of the practical issues that have arisen in implementing the scheme?
- What are some of the issues relating to assessing the risk of future harm to the community?
- In an 'ideal' world, how should sex offenders be managed?

This chapter sets out the responses of the focus groups to these questions and then examines some of the practical issues raised by the case law in relation to the Queensland scheme of post-sentence preventive detention.

6.2 Focus Groups

6.2.1 Adelaide – Indefinite Sentences for Sex Offenders

As set out in chapter two, the *Statutes Amendment (Sentencing of Sex Offenders Act)* 2005 (SA) amended section 23 of the *Criminal Law (Sentencing)*

Act 1988 (SA) to enable judges to pass sentences for indefinite detention in relation to those incapable of controlling their sexual instincts and those unwilling to control such instincts.

The Attorney-General can apply to the Supreme Court for an offender already serving a sentence to be detained indefinitely once that sentence has expired (*Criminal Law (Sentencing) Act* 1988 (SA), s 23), but thus far, the applications under this section have been made after conviction and prior to sentence.

Section 20B of the *Criminal Law (Sentencing) Act* 1988 (SA) also enables a court to declare a person to be a 'serious repeat offender'. However it became clear that many of the focus group participants were unaware of this section because it was rarely (if ever) used and the discussion concentrated on the s 23 scheme.

Ten people took part in the Adelaide focus group including two psychologists familiar with treating sex offenders, two members of the Legal Services Commission, a member of the Attorney-General's Department, a member of the Office of the Director of Public Prosecutions, a former member of Corrections who now works as a criminologist, a criminal law academic and two criminal law barristers.

In relation to the expectations participants had for this scheme, many mentioned they feared that the provisions would be overused. It seems that since the 2005 amendments, there has been a marked increase in section 23 applications and there was a perception that the Crown was testing the boundaries of the 'unwilling to control instincts' criteria. One participant raised human rights concerns and argued that the scheme offended against Australia's obligations under international instruments. He was of the opinion that the scheme was simply a reaction to public policy issues and was a way of pretending to do something when there was really no effort to rehabilitate or treat offenders. His fear was that the scheme had gone to the absolute extreme of doing nothing to change people's behaviour.

A further common 'fear' was that 'false positives' could occur during risk assessment, thus broadening the scope of indefinite detention. Another was the possibility that the Attorney-General could apply for indefinite detention at the end of the offender's sentence. This was seen to be unfair as the person had already been punished through the deprivation of liberty. One participant said that he feared that the scheme raised the potential for political interference, given that the Attorney-General could bypass the Office of the Director of Public Prosecutions. There was relief expressed that the Attorney-General had never made an application under section 23. Rather, the applications were made by the Office of the Director of Public Prosecutions.

One of the 'hopes' for the scheme was that it wouldn't be used too often because the courts had discretion and judges were usually very cautious concerning passing indefinite sentences. The representative from the Office of the Director of Public Prosecutions said that two applications last year had been

rejected by judges and there was a concern that it might be very difficult to convince the judiciary that offenders should be declared incapable or unwilling to control their instincts.

In relation to the practical issues that had arisen in implementing the scheme, one participant pointed out that there was no discretion as to whether or not the application goes to the Supreme Court. Previously, the matter had gone before a magistrate who made the decision as to whether it was appropriate to send it to the Supreme Court. Now, the magistrate must send the matter to the Supreme Court as soon as section 23 is mentioned. It was thought that the previous procedure enabled a certain amount of necessary 'filtering', such that the behaviour of exhibitionists or those with mental disabilities were not seen as being encompassed by the section 23 criteria.

One participant said that there were no set guidelines as to making section 23 applications and this made it difficult to identify offenders who should be the subject of indefinite detention.

A number of participants raised issues with the scheme depending on mental health professionals to assess the risk of future harm to the community. One participant who works with a sex offender treatment program said that past offending is probably the best predictor of future offending, but that the dynamic or changeable factors are the ones that should provide the focus for rehabilitation. Another participant mentioned that assessments based on the dynamic factor of volitional impulse control were fraught with difficulties. A number of participants raised the concern that it would be unfair to make a risk assessment for the purpose of section 23 and then leave it at that. Rather, reassessments should occur at regular intervals.

A psychologist involved with treating offenders said his role had changed with the new legislation because psychologists had been pulled up into the front line in giving evidence, whereas in the past, it was mainly psychiatrists who had been the 'gatekeepers'. He said there was a concern that psychologists had to make sense of s 23 without any legal training and there was pressure to tailor their evidence in relation to the 'unwilling to control instincts' criterion. He said the latter was not well defined and very broad. Some of his colleagues were concerned with the ethics of giving evidence when the methodology of risk assessment was so shaky. Some had said they felt like agents of social control rather than members of a profession dedicated to helping others.

There was some concern expressed about the timing of the risk assessment. If a person was facing an indefinite sentence, it was very difficult to work out whether they would be capable of controlling their instincts in fifteen or twenty years' time.

Another issue raised regarding treatment was that all the resources seemed to be going towards programs for high-risk child sex offenders, with the result that a whole range of sex offenders, from flashers and peeping toms to serial rapists, had no dedicated treatment resources.

In relation to how sex offenders should be managed in an ideal world, some participants were of the opinion that the focus should be on supporting offenders in the community. It was pointed out that despite the rhetoric of locking people away and throwing away the key, most offenders are released into the community. It was no use releasing someone without any intervention as it was all too easy for offenders to revert to their previous way of life. Some were of the opinion that supervision in the community was the real answer. One participant mentioned having a system of release on licence whereby the offender could be under supervision and treatment in the community in the same way that certain persons with mental illnesses are made subject to community treatment orders. That is, such offenders should be given a proportionate sentence, but then instead of simply releasing them on parole, they could be released on a stricter regime with more resources for case management and treatment.

Other participants pointed out that proper treatment programs throughout a person's prison sentence would go some way toward lowering recidivism rates. Ideally, a program should be developed for the individual and that individual should be treated decently and humanely. There needed to be proper treatment plans along the lines of those under mental health legislation.

One participant spoke of diversionary programs based on restorative justice principles for cases where the victim does not want the offender prosecuted but treated.

While many participants mentioned the need for management of a small number of high-risk sex offenders, none thought that indefinite detention in prison without treatment was an appropriate scheme. One participant said that, while some offenders had committed horrendous crimes, taking away a person's liberty for an indefinite time that could be up to twenty or thirty years was an appalling thing to do to a human being.

Overall, there was a recognition that there existed a small number of people who posed a real risk to the community, but indefinite detention on its own was not the best way in which to manage them.

6.2.2 Melbourne – Extended Supervision Orders

As outlined in chapter four, the Victorian scheme of extended supervision orders set out in the *Serious Sex Offenders Monitoring Act* 2005 (Vic) commenced on 26 May 2005. This enables the Secretary to the Department of Justice to apply to the Supreme Court or County Court for an extended supervision order of up to 15 years in relation to 'serious sex offenders'. An extended supervision order contains a number of conditions including restrictions as to where the person must live and places that the offender must not visit.

Ten people took part in the Melbourne focus group including two forensic psychiatrists, a member of Victoria Legal Aid, a member of the Department of Justice, two members of the Office of Public Prosecutions, a Crown Prosecutor, a member of the Adult Parole Board, a member of Victoria Police and a member of the Law Institute of Victoria.

In relation to the expectations participants had for this scheme, many mentioned that because the threshold set for relevant offenders was low, they feared the scheme would apply too broadly. There was also the fear that supervision in the community could lead to vigilante action and, because sex offenders are so despised, the scheme could be the slippery slope that leads to the demonisation of other groups.

On the other hand, one participant thought that it 'wouldn't necessarily be a bad thing' if the scheme was extended to very serious offenders in other realms. It was important to be very careful with who was being targeted and to do so in such a way as to ensure certain serious offenders are less likely to commit ongoing offences against the community.

Some hopes expressed in relation to the scheme was that it might lead to the development of effective treatment programs in prison and a better sense of what can be done to manage people in the community safely. On the other hand, it was suggested that if the aim of the legislation was to assist with the rehabilitation of the offender, it was doubtful that supervision was the most appropriate method of achieving this.

In relation to the practical issues relating to the implementation of the scheme, concern was expressed that the supervision scheme is expensive and resource intensive, particularly given that extended supervision orders can be up to fifteen years and are renewable. There are currently approximately ten offenders on extended supervision orders and if more are supervised, increased resources would be needed for a period of time much longer than for parole.

There was considerable concern that the scheme amounted to de facto preventive detention as two offenders concerned remained resident within, or just outside, the walls of Ararat prison. It was suggested that this scenario had not been in the minds of the legislators when the scheme was developed. One participant said that of approximately ten offenders subject to extended supervision orders, a third had an intellectual disability and were residing at forensic services which meant that for all practical purposes they might as well be in jail. They really had no freedom at all.

One participant pointed out that applications under the Act were not being contested, but that offenders were accepting them in the hope that they would get more limited orders than if they argued against the applications.

There were also issues raised concerning the conditions that can be imposed in extended supervision orders. Orders can contain highly restrictive conditions which severely limit an offender's opportunity for normal day-to-day interaction.

Concerns were expressed that offenders who have completed parole and are subsequently placed on an extended supervision order may find the conditions more onerous than their parole conditions. Restrictive conditions may continue to punish the offender through the deprivation of liberty rather than aiding in rehabilitation and reintegration into the community. One participant pointed out that the number and degree of conditions of an extended supervision order have the potential to effectively transform it into a form of preventive detention.

There was unease expressed that because conditions can be imposed on an offender who is subject to an extended supervision order under the *Sex Offenders Registration Act* 2004 (Vic) as well as the *Serious Sex Offenders Monitoring Act* 2005 (Vic) and by the Adult Parole Board, this had led to confusion by offenders as to which conditions apply.

Concerns were also raised about the significant problem of finding suitable accommodation for offenders who are on extended supervision orders. Some offenders are socially isolated and do not have family support. Other offenders might have offended within their family, which means that even if their family is willing to offer accommodation it may not be appropriate to send them back to this environment. Where offenders are housed inside prison grounds, supervision orders may, in effect, operate more like a form of preventive detention.

An issue was also raised with the process in relation to suspected breaches of conditions of extended supervision orders. It was suggested that the process is too cumbersome in comparison to the process for responding to breaches of parole.

In relation to risk assessment and mental health professionals' involvement with the scheme, similar views to the Adelaide group arose concerning the possibility of 'false positives'. One participant said there had been huge leaps forward in risk assessment techniques, but they were used as a way of shifting responsibility from policymakers to clinicians. What to do with high-risk offenders was in reality a social, rather than a scientific, question.

There was also some discussion about current treatment practices and the inappropriateness of clinical psychologists who run sex offender treatment programs being the ones asked to select offenders who might be subject to these applications and then giving evidence in proceedings. It was suggested that it might be more appropriate to keep clinical and forensic roles separate. There was also some suggestion that the tabloid pressure to lock people up for long periods of time and the resulting government pressure to push certain people forward for the scheme was underestimated.

There was considerable criticism of the current practice of 'housing' sex offenders together for periods of up to eight years as this seemed to reinforce and even exacerbate antisocial attitudes.

In relation to the 'ideal' situation, a number of participants said that treatment must be the focus from the very beginning of an offender's sentence and be tailored towards the individual. Having programs throughout the whole of the prison term made more sense than concentrating resources towards the end of a sentence. It was important that the system be geared towards some form of rehabilitation and if more resources were put into the corrections system, it might be unnecessary to have such intensive supervision in the community. While preventive detention schemes may be politically popular, a broad based approach whereby all sex offenders or potential sex offenders get early risk assessment and early treatment would be much more effective in lowering offending rates.

One participant suggested that the issues could be reframed as a public health debate rather than a correctional debate. That way, primary, secondary and tertiary intervention practices could be developed to target dynamic factors that may lead to offending.

All participants agreed that there was a small group of offenders who needed some form of monitoring, but a recurring theme was the necessity for early intervention and treatment.

6.2.3 Brisbane – Post-Sentence Preventive Detention

As set out in chapter one, the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) represented the first attempt to detain people on the grounds of dangerousness *after* the offender's sentence had expired. It has now been in operation for over three years. As explored in chapter four, it allows for continued detention in prison as well as for supervision in the community.

Six people attended the Brisbane focus group including a solicitor for the Crown, a member of Legal Aid Queensland, an academic, a social worker, a former member of Corrective Services and a psychiatrist.

In relation to original expectations for the scheme, many participants mentioned that they thought it would cast a very wide net and that it would result in a number of offenders being held indefinitely in custody, but had been surprised that the applications made under the Act had been relatively small in number and that judges were preferring to make community-based, rather than custodial, orders. It was suggested that the scheme was now operating with a degree of efficiency after initial implementation problems.

One participant mentioned that her fear concerning the Act was that it would not actually offer safety to the community because it was not accompanied by adequate preventive treatment programs in the community.

Three participants thought that the Act was an overreaction to fears concerning a particular individual and that it had been rushed through Parliament without adequate discussion. One participant stated that it was really just a cover up for

the lack of infrastructure to combat sex offences in the community. There was also mention of the failure to adequately define the scope of the Act in the sense of the individuals it should cover.

In relation to practical issues, one participant stated that there had been a cumbersome process that involved a number of departments looking at the files of virtually all sex offenders to determine who should be subject to an application. There was little or no preparation in the way of protocols as to how this should be done. This process caused changes to security classifications of some prisoners with some being forced into higher levels of security that then impinged on the ability of agencies to provide them with access to services and reintegration into the community.

Concerns were also raised that some individuals were getting supervision orders in the community whereas others who could be classified at a lower risk of reoffending were being detained in prison.

A lack of proper accommodation for those being supervised in the community was also viewed as highly problematic. One offender had been placed in a high drug use area and others had to be resettled due to community concerns. There was a suggestion that those making supervision applications did not have proper information about what resources could be provided in the community.

Some participants raised the issue of problems with predicting future behaviour and how difficult it is to determine who should be made subject to continued detention orders. Risk assessment techniques may be unreliable and the offenders who are being made the subject of applications for continued detention or supervision are generally institutionalised long term prisoners. There was concern that while risk assessments may be necessary for treatment purposes, it was another matter entirely to use them as the basis for taking away a person's liberty.

Treatment within the prison environment was viewed as inadequate. Sex offender treatment programs were generally based on group participation which may not be the best way to treat certain sex offenders. Sometimes, because of their backgrounds, such offenders have an intense distrust of people in general and group therapy does nothing to alleviate this.

In relation to an 'ideal' way of managing sex offenders, one participant mentioned that an individual case-managed approach would be effective. Most offenders want extra help, but often there is simply no place for them to go. Others spoke about a system of gradual community reintegration with adequate support.

One participant suggested that legislative schemes are based on the fiction that there are no low risk sex offenders. Some sex offenders only offend once or commit relatively minor offences, yet are viewed in the same way as high-risk offenders. It would be better to devote resources to managing the high-risk offenders throughout the term of imprisonment than simply assume everyone

was at a high risk of reoffending. Some participants spoke of the importance of intervention approaches at the beginning of the sentence rather than leaving matters until the end of the sentence.

Another participant suggested that resources should go into treatment programs rather than psychological assessments for the courts. It was also suggested that the English model of 'multi-agency partnerships' would assist in managing sex offenders in the community.

In all, as with the other focus groups, participants in the Brisbane group had a number of concerns with the post-sentence continued detention and supervision schemes and again mentioned the need for treatment from an early stage rather than schemes that start too late toward the end of a sentence.

The next section examines further practical problems arising from the Queensland scheme as reflected in the developing case law.

6.3 Post-Sentence Preventive Detention – The Queensland Case Law

There has been an insufficient number of cases decided under the New South Wales and Western Australian regimes to determine whether significant problems have arisen in those jurisdictions. After approximately three and a half years of operation, it is possible to discern a number of problems with the practical operation of the Queensland legislation. These problems are explored in this section.

6.3.1 Administration of Post-Sentence Preventive Detention

There is now judicial recognition that the administration of the present Queensland system requires reform. This was made clear by Mackenzie J of the Supreme Court of Queensland in *Attorney-General (Qld) v Francis* (2005) 158 A Crim R 399. A detailed account of the case is important in order to draw out the contextual issues that should inform the modification and future development of preventive detention policies (Keyzer & O'Toole 2006).

This case was an 'annual review' application pursuant to s 27 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). On 13 August 2004 Byrne J ordered that Francis be detained for an indefinite term for care, control and treatment (*R J Welford, A-G for the State of Qld v Francis* [2004] QSC 233).

An application for an 'annual review' of that order as required by the Act was heard on the second, third, fourth and 24 November 2005. On 21 December 2005 Mackenzie J ordered that Francis continue to be subjected to Byrne J's order (*Attorney-General (Qld) v Francis* (2005) 158 A Crim R). However it was

clear that Mackenzie J was dissatisfied with the administration of the Queensland legislation over the period since the first detention order was made.

Mackenzie J noted that Justice Byrne's 'strenuous efforts' to develop a plan for Francis and ensure that it was capable of being implemented had not been followed. Mackenzie J drew specific attention to an exchange that Byrne J had with counsel for the Attorney-General in which he opined that 'if there isn't a government commitment to facilitate the plan, then it is a question whether I should order his continuing detention to give effect to it' (*Attorney-General (Qld) v Francis* (2005) 158 A Crim R 399 at 404). Mackenzie J went on to outline how the plan had not been implemented (at 407). His Honour then made the following remarks (at 407):

> While there seems to have been an expectation that the General Manager of the Correctional Centre for the time being where the respondent was confined would be the coordinator, there was no evidence before me that the function was ever performed in the way envisaged by Byrne J. Two of the problems, in so far as evidence with regard to implementation of the plan is concerned, are firstly, that it is not obvious that there was a clear grasp in the department of the importance of a single person having responsibility for overseeing the process of putting the plan into effect. The need for someone with authority to do so which was fundamental to the plan was either not understood or was disregarded in favour of collective oversight of it. Secondly, it is not obvious, either, so far as the evidence goes, that there was a clearly defined understanding within the department of what was required to be done; some of those making reports were unaware of the existence of the plan.

MacKenzie J went on to state (at 408) that it was difficult to justify protracted incarceration of a person because of the lack of administrative procedures to rehabilitate him. He concluded (at 429)

> The reason for raising the issues just discussed is not to make gratuitous criticism of the Department. It is to raise an important issue, that unless procedures exist for this special class of prisoner, the difficult question of drawing the boundary between making a continuing detention order which involves further imprisonment, or a supervision order, which does not, will have to be addressed more acutely than is necessary in this case.

The Supreme Court cannot impose binding conditions on a continuing detention order, but must rely on undertakings given by departmental representatives (*Attorney-General (Qld) v Francis* (2005) 158 A Crim R 399 at 403). In light of Mackenzie J's comments in *Francis'* case, it is necessary that government departments that are involved in the administration of this regime develop a better coordinated working relationship with each other. A memorandum of understanding between the relevant departments to coordinate therapeutic responses and the work of corrective services, therapists and the Attorney-General's Department in response to Court orders (and, indeed, anticipating them) should be developed as a matter of urgency. Certainly,

prisoners should not be placed in a position in which their chance to have liberty in a risk assessment context is affected by departmental oversights (see for example *Attorney-General for the State of Queensland v Twigge* [2006] QSC 107 at paras [14]-[15]).

A memorandum of understanding might require the Department of Corrective Services to develop a database of sex offenders due for release and involve sentence management teams in conducting reviews based on completion of sex offender treatment programs and other suitable activities recommended by appropriately independent experts. Further, information about sex offender release dates and management plans could be shared with the officers in Crown Law dedicated to the task of bringing prosecutions under the Act. The procedural fairness principles outlined in the next section and in chapter seven of this report would require that the prisoners and their legal representatives be fully informed of all these processes and recommendations.

6.3.2 Procedural Fairness Issues

A number of cases demonstrate the problems created by rushed applications being made late in the sentencing term of a prisoner.

In *A-G Qld v Watego* (2003) 142 A Crim R 537, the Queensland Court of Appeal dismissed an appeal from a decision of Muir J (*A-G v Watego* [2003] QSC 367) that a prisoner had been denied procedural fairness. Muir J's decision was on the basis that the Attorney-General's application was made so close to the prisoner's release date that the prisoner had only a day in which to deal with the issues. McMurdo J dismissed an application by the Attorney-General for the same reason in *Attorney-General v Nash* (2003) 143 A Crim R 312, a case with substantially similar facts.

In *Attorney-General for State of Queensland v Foy* [2004] QSC 428, Fryberg J dismissed an application for an interim detention order in circumstances where one of the two psychiatric reports had not been prepared as required. In addition, the Attorney-General had notified the respondent only days before the hearing that the Attorney would be seeking the respondent's continued detention during the period of an adjournment during which the respondent's solicitors would be making efforts to find suitable accommodation. Fryberg J criticised an affidavit filed by the Attorney-General that was 'ostentatiously silent' as to the reasons for a four-and-a-half month delay in bringing the application, placing the respondent in a position in which he had to defend an application on the day before he was due for release. The respondent was released on undertakings.

In *Attorney-General for the State of Queensland v G* [2004] QSC 442, Fryberg J chastised the applicant for the delay in bringing the application, 'nearly four months after it could have been filed', and concluded that 'in the absence of any serious attempt to explain the delay' the respondent should not be subject to an

interim detention order, but only a risk assessment order, pending a final hearing.

These cases raise concerns about the manner in which applications were made by the Attorney-General under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) and the procedural fairness issues that necessarily arise in late applications (see also *Welford, Attorney-General v Francis* [2004] QSC 128 at paras [3]-[17]). Questions of fairness also arise in bringing applications late in a prison term (Keyzer & O'Toole 2006).

Since those cases were heard, as pointed out in 4.2.3, an interdepartmental committee — the Serious Sexual Offenders Review Committee — has been established to refer cases to the Attorney-General for consideration as to whether or not to make an application for preventive detention in a particular case. The review by the Committee now occurs when the prisoner is 18 months from full time discharge and any relevant cases are referred by the Committee to Crown Law no later than 12 months before the custodial end date. This enables timely applications to be made.

The New South Wales legislation addresses the difficulties that emerged in *A-G Qld v Watego* (2003) 142 A Crim R 537 and *A-G v Nash* (2003) 143 A Crim R 312 by truncating procedural fairness at the interim detention order stage. As McClellan CJ at CL explained in *Attorney-General for New South Wales v Gallagher* [2006] NSWSC 340 at para [45]:

> The scheme of the New South Wales legislation is quite different [to the Queensland legislation]. As I have already indicated, [in New South Wales] the matter must be determined by reference to the material tendered by the Attorney-General and a decision made upon the assumption that the matters in the supporting documentation are proved. Accordingly, at the interim detention order stage there is little or no opportunity for the defendant to bring evidence or test the evidence of the Attorney-General. The argument is confined to whether or not the material tendered by the Attorney-General supports the making of an order.

In light of the seriousness of the consequences to a prisoner who is unsuccessful in defending an application for an interim detention order, the deprivation of liberty in a prison, a legislative 'solution' that truncates procedural fairness at the interim hearing stage entails a serious incursion on traditional principles. The importance of these principles of procedural fairness is further discussed in chapter seven.

6.3.3 Provision for supervised release pending a continuing detention order hearing?

Imposing a requirement that applications be made well before the release date will also deal with a second problem that has arisen in both Queensland and

Western Australia. In *Attorney-General (Qld) v W* (2004) 148 A Crim R 393 at 397, Douglas J, in another case involving an application made in the concluding weeks of a prisoner's sentence, said that it was 'incumbent upon the Attorney-General to make an application' for a risk assessment order, in lieu of an application for a supervision order, 'significantly in advance of the scheduled release date of the prisoner'. This was because, as Blaxell J of the Supreme Court of Western Australia later observed, judges making interim orders under the Western Australian legislation are faced with the 'stark choice' (*Director of Public Prosecutions for Western Australia v Williams* [2006] WASC 140 at para [38]) of ordering release or continued detention. Justice Blaxell has described this regime as flawed 'in that it does not allow in an appropriate case for a respondent to be subject to supervised release during [the] interim period' (at para [38]).

The flaw identified by Justice Blaxell was also apparent in the Queensland legislation, but the *Justice and Other Legislation Amendment Act* 2005 has since inserted section 8(2)(b)(i) into the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) which now allows the Supreme Court to make an interim supervision order. Before that amendment, some judges of the Supreme Court of Queensland took undertakings from prisoners, or contemplated the taking of undertakings (see *Attorney-General for State of Queensland v Foy* [2004] QSC 428; *A-G v Fardon* [2003] QSC 331 at para [72]; *Attorney-General (Qld) v W* (2004) 148 A Crim R 393 at 397). Moynihan J, the only judge who was invited to address an express submission by counsel that undertakings are indeed allowed under the legislation, declined to accept that submission (*Attorney-General for the State of Queensland v Fardon* [2005] QSC 137 at paras [24]-[27]).

It is clear that in some cases, judges of the Supreme Courts of Queensland and Western Australia have formed a view that release under supervision pending a continuing detention order hearing best serves the interests of justice. In light of the majority of the High Court and Queensland Court of Appeal's observations that the character of the detention authorised by the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) is not punitive but preventive (*Fardon v Attorney-General (Qld)* (2004) 210 ALR 50; *Attorney-General (Qld) v Francis* [2006] QCA 324 at para [31]), this flaw in the Western Australian legislation requires clarification and rectification.

6.3.4 Problems with service absence affecting risk assessments and the availability of supervision orders

The difficulties that have emerged from the failure to co-ordinate services and programs for prisoners were observed in section 6.3.1 above. However difficulties have also emerged in the development and co-ordination of post-release arrangements.

In *Attorney-General (Qld) v Francis* [2006] QCA 324, the Court of Appeal allowed an appeal from a judgment of a trial judge who had made a continuing

detention order partly on the basis that the Department of Corrective Services would not provide sufficient resources for the effective supervision of the prisoner upon his release. The Court of Appeal concluded that the trial judge had erred in considering the absence of evidence that the resources would not be provided. The Court of Appeal stated at para [39]:

> The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.

Because of the Court of Appeal's preference for the least restrictive alternative of a supervision order over a continuing detention order, the onus is on the Attorney-General to prove that a supervision order would not suffice. In *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 at para [28], McMurdo J (at para [50]) pointed out that the Act 'employs the relative concept of an acceptable risk, rather than the absolute concept of no risk'.

The Court of Appeal's decision in *Francis'* case has thrown light on the absence of sufficient, suitable services for prisoners. There is little doubt that this problem has previously had a material impact on judicial assessments of risk under the legislation, and the availability of best outcomes.

In *Attorney-General of the State of Queensland v Pearce* [2005] QSC 314, one of the factors influencing Atkinson J in making a continuing detention order rather than a supervision order was the unavailability of a secure nursing home facility for the 84 year old offender.

In *Attorney-General for the State of Queensland v Robinson* [2006] QSC 328, a prisoner who was previously determined ineligible for post-prison community-based release programs came to the conclusion of his sentence with what Lyons J called 'no certainty as to where he will go or what he will do upon release' (at para [48]). Robinson could lead no evidence 'of any social network or support other than the Department of Corrective Services' and it 'is this vacuum which poses the very real difficulty in this particular case' because it increased the risk of release (at paras [91] and [92]). A continuing detention order was made.

In *Attorney-General for the State of Queensland v Fardon* [2006] QSC 336, a draft supervision order developed by the respondent in conjunction with the Department of Corrective Services was opposed by the Attorney-General for several reasons, each of which was related to the practical problems associated with obtaining suitable post-release services — practical problems that were identified in the evidence of corrective services officials themselves. In that case, Lyons J made a supervision order containing 32 conditions rather than a

continued detention order. The Attorney-General then appealed to the Queensland Court of Appeal.

In *A-G (Qld) v Fardon* [2006] QCA 512, the Court of Appeal dismissed the Attorney-General's appeal against Lyons J's decision to grant Robert Fardon a supervision order. It was noted by McMurdo P (at para [19]) that the courts had long been concerned with the lack of a graduated release scheme from the prison to the community. Further, she stated (at para [23]) that there was no explanation as to why the assistance proposed of counseling and post-release employment aid had not been offered to the prisoner over the past three years since the matter had first been raised by White J (in *Attorney-General v Fardon* [2003] QSC 379). She also pointed out (at para [23]) that the assistance was not really a program that would truly integrate Fardon into the community.

Williams JA also observed (at para [32]) that the change in Fardon's classification from 'low' to 'moderate' had occurred despite any untoward conduct on the part of the prisoner and that this had frustrated 'any real attempt to provide for the gradual release referred to by all the examining psychiatrists'. White J agreed with the remarks of Williams JA and added at para [40]:

> Legislation providing for the detention of a person after the expiration of sentence is, in our system of justice, a drastic step and if particular treatment is likely to prove beneficial to enable or prepare a prisoner for release into the community it is concerning that this is not facilitated by the executive or the legislature.

If the objective of the supervision order regime available under the Queensland and Western Australian legislation is the protection of the community then it is obvious that appropriate post-release programs and services need to be supplied. Effective transition planning by prisoners and service providers needs to be done in the months and in the years leading up to release.

6.3.5 Access to legal representation and the services of expert witnesses

In ordinary criminal proceedings, the Crown bears the cost of all prosecutions and defence teams can seek their costs in successful proceedings. The question of costs is a matter of discretion under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and a diversity of approaches is apparent.

In *A-G (Qld) v Francis* [2006] QCA 425, the Queensland Court of Appeal (Keane and Holmes JJA and Dutney J) considered an application by the appellant for the costs of senior counsel for that appeal. It was argued that the usual rule in civil proceedings, that costs follow the event, should be applied. It was argued (at para [3]) that 'the prospect of an adverse award of costs may have a sobering effect on the readiness of the respondent to oppose the making of supervision orders, while the refusal of an order to a successful detainee may impede a detainee's ability to obtain legal representation'. The Court of Appeal

held that the hearing involved the determination of a matter of the public interest, not the vindication of private interests. The Court stated (at para [5]) that it would 'clearly be unjust' to require a detainee to pay the costs of unsuccessfully contending for either supervised or absolute release. So while an order for costs could be made under the Act, the discretion as to costs ought to be exercised having regard to the circumstances of the case. The Court concluded (at paras [7] and [8]):

> It is true that the appellant was successful on appeal in obtaining an order for supervised release. That is a substantial, but not decisive, factor in the appellant's favour. On the other hand, the Attorney-General was obliged to initiate and to pursue the review proceedings. The position adopted in the proceedings by the Attorney-General was not adopted irresponsibly and was not clearly untenable. Indeed, the Attorney-General succeeded at first instance. It is also relevant here that the appellant agitated a number of grounds of appeal, most of which were rejected by the Court.
>
> The consideration that the Court will not be disposed to treat "success" as a sufficient warrant for making an order for costs against an unsuccessful party may, to some extent, constitute a disincentive to legal representation being made available to a detainee on a speculative basis, but that consideration is, in our view, of less weight than the undesirability of accepting that "success" should be thought to generate a prima facie entitlement to an award of costs in proceedings under the Act.

On this basis, the Court of Appeal made no order as to the costs of the appeal.

It is difficult to see how this decision, which yields the practical result that counsel for the Attorney-General is paid and counsel for the prisoner is not, could produce any other result than providing a disincentive for counsel at the private bar to represent people subject to applications under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). This has a clear impact on the prospects of equality before the law.

While at the time of writing all prisoners who have been the subject of applications under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) have received legal representation, this cannot be guaranteed without suitable funding arrangements. In June 2006, the Supreme Court of Western Australia released a person in respect of whom an application for a continuing detention or supervision order had been made because he had no legal representation at the date of the preliminary hearing (*Director of Public Prosecutions for Western Australia v Paul Douglas Allen also known as Paul Alan Francis Deverell* [2006] WASC 160).

Funding should be extended not just to ensure legal representation but to ensure that prisoners have the opportunity to engage expert witnesses who can critically review the work of the court-appointed psychiatrists. Ample time must be provided to ensure that this can be done, since there are few people with sufficient and relevant forensic experience, and even fewer who are willing to

take on this sometimes challenging but enormously significant role (both of these problems emerged in *A-G v Nash* (2003) 143 A Crim R 312).

In light of the very serious consequences of an unsuccessful defence under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) and the judicial acknowledgment that proceedings under the regime are a matter of public interest (see also *Fardon v Attorney-General for the State of Queensland* [2006] QSC 005 at para [37]), further consideration of issues relating to the resourcing of the defence is warranted.

6.4 Summary of Practical Issues

The members of the focus groups carried out in Adelaide, Melbourne and Brisbane were all agreed that there exists a small group of high-risk offenders who need intensive management. However, the theme that strongly emerged was that indefinite detention and post-sentence continued detention and supervision schemes were not sufficient on their own and raised numerous practical problems. The provision of adequate services and treatment programs for high-risk offenders was seen as of the highest priority rather than preventive detention on its own.

In relation to the Queensland scheme, it is evident from the review of these cases conducted above that more time is generally needed to process such applications, in spite of the apparently strict time periods for the processes contemplated by the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (Keyzer & O'Toole 2006). It is recommended that the regulation-making power under the Act be used to spur applications earlier in the sentence of affected prisoners, to ameliorate procedural fairness problems and prevent the prospect of detention continuing during the period when a risk assessment is being conducted in circumstances where a supervision order is appropriate.

The regulation-making power could require all applications under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) to include an affidavit from the Department of Corrective Services that clearly outlines the response made to the recommendations of the justices administering the scheme. This might act as a stimulus to better performance of the government departments involved, and would ameliorate the serious concerns expressed by Mackenzie J in *Francis'* case.

Overall, it is clear from the practical perspective that more effort and resourcing is required for suitable treatment programs and services both within prisons, to ensure that continuing detention orders have a rehabilitative effect rather than a merely punitive effect, and in the post-release environment, to ensure prisoner reintegration into the community and to reduce the risk of recidivism.

7. Chapter Seven: Policy Issues

7.1 Introduction

Legislative schemes for the preventive detention and supervision of high risk offenders raise a number of policy issues, particularly in relation to international human rights and traditional legal principles. The way in which preventive detention schemes are structured is also dependent on whether a medical or a criminal justice approach is taken.

This chapter will explore the relevance of human rights issues to preventive detention regimes, placing particular emphasis on:

- principles of criminal process
- the principles of proportionality and finality in sentencing
- 'rule of law' principles
- double jeopardy and the principle of double punishment
- the principles that detention should only follow a finding of criminal guilt, and
- retrospective operation of law.

It will then turn to an analysis of the two main approaches to preventive detention regimes, the medical model and the criminal justice model and the implications these two approaches have for the structure of preventive detention regimes.

7.2 The relevance of human rights

In the Supreme Court of New South Wales decision of *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374 at 376, Mahoney JA pointed out that preventive detention schemes 'may infringe — and certainly will create the danger of infringement of — the basic human rights which should underlie the laws of a modern democratic society'.

The *Universal Declaration of Human Rights* recognises the 'inherent dignity and inalienable rights of all members of the human family' and sets out a series of rights as 'a common standard of achievement for all peoples and all nations'. Australia has signed several international treaties that set out economic, social and cultural rights, such as the right to education, as well as the better known civil and political rights such as the right to a fair trial. A number of these international human rights have been implemented into Australian domestic law, particularly by the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

Sometimes a balance needs to be struck between competing rights because the rights of one person may represent a threat to another. For example, there

is case law balancing the right of an accused to a fair trial against the right to privacy of complainants in sexual assault trials (See for example, *MM v Her Majesty Advocate* [2004] ScotHC 60). In a similar way, the protection of the community must be balanced against the maintenance of individual rights such as the right to liberty.

The rights of prisoners and their entitlement to fairness in legal procedures are consolidated in a number of international instruments such as the United Nations *Standard Minimum Rules for the Treatment of Prisoners* and the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The most relevant Covenant to preventive detention schemes is the *International Covenant on Civil and Political Rights* (ICCPR) to which Australia is a signatory (Signed 18 December 1972, Ratified 13 August 1980). The relevant provisions in this Covenant are discussed later. The United Nations has also set out a number of rights for victims in its *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Adopted by General Assembly resolution 40/34 of 29 November 1985).

Any infringement of the ICCPR is not directly enforceable in Australian courts because the Covenant has not been incorporated into Australian law. However, an individual whose rights have been allegedly abused can now petition the Human Rights Committee of the United Nations under the provisions of the *First Optional Protocol* to the ICCPR which came into force in Australia on 25 December 1991. It is important to note that Robert Fardon, who was the first person to be detained in prison under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), has made such a petition to the Human Rights Committee (Keyzer & Blay 2006). While the 'views' of the Human Rights Committee are not legally binding, they are taken seriously by most State parties.

Article 9(1) of the ICCPR provides:

> Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.

What the term 'arbitrary' means in this passage is open to debate. On a narrow meaning, the Article could mean that arbitrary detention denotes not according to legislative procedure. However, Claire Macken (2006) has argued that arbitrary detention means more than 'unlawful' detention. It imposes an additional higher requirement above unlawfulness. That is, 'arbitrary' could be taken to mean unreasonable or unjust. Exploring the background *travaux préparatoires* of the ICCPR, Parvez Hassan (1973) reveals that the drafters gave a distinct meaning to the word. He points out (at 179) that in the Report of the Third Committee, the majority stated that an arbitrary act was one which violated justice, reason *or* legislation.

The *Human Rights Act* 2004 (ACT) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) enshrine some of the human rights set out in the ICCPR such as the right of every person to liberty and security (ACT: s 18; Vic: s 21(1)) and the right not to be subjected to arbitrary arrest or detention (ACT: s 18(1); Vic: s 21(2)).

There is no explanation in the ACT Act or the Victorian Charter as to what is meant by arbitrary detention, but an argument could certainly be run that it means unjust or unreasonable detention. Whether preventive detention schemes are unjust or unreasonable is open to debate and is explored more fully below.

The ACT Act and the Victorian Charter recognise the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person (ACT: s 19(1); Vic: s 22(1)) and that a person must not be tried or punished more than once for an offence (ACT: s 24; Vic: s 26). This principle is explored further below. A person who is detained without charge must also be segregated from others convicted of offences, except where reasonably necessary (ACT: s 19(2): Vic: s 22(2)), and must be treated in a way that is appropriate for a person who has not been convicted (ACT: s 19(3); Vic: s 22(3)).

Other principles recognised by the ACT Act and the Victorian Charter include the principle against retrospective criminal laws, including the principle that a penalty must not be imposed on a person for an offence that is greater than the penalty that applied at the time when the offence was committed (ACT: s 25; Vic: s 27). The principle against retrospectivity is explored further below.

All of these rights need to be taken into account when considering options for the supervision and detention of high-risk offenders and, unless there are exceptional circumstances, any new legislative scheme should be compatible with them.

Schemes such as extended supervision and preventive detention orders are not necessarily incompatible with human rights set out in the ICCPR and in the ACT Act and Victorian Charter, provided necessary protections are put in place. That is, any preventive detention scheme needs to have safeguards to ensure any limits on the human rights outlined above are by the least restrictive means to achieve the purpose of community protection. The following sections analyse some of the main rights and legal principles that need to be taken into account in this regard.

7.2.1 The relevance of principles of criminal process

Procedural fairness, including the right to a fair hearing, is a fundamental principle of Australian law. It provides legitimacy to the criminal justice process by maintaining a balance between the coercive powers of the State and the human rights of citizens of the State (Bronitt & McSherry 2005: 94).

Article 14 of the ICCPR guarantees the general right, in both criminal and civil proceedings, to a 'fair and public hearing by a competent, independent and impartial tribunal established by law'. It then specifies a number of procedural safeguards such as the presumption of innocence. The criminal standard of proof — 'beyond reasonable doubt' — occupies a central place in legal and popular culture.

The right to a fair hearing is also enshrined in the ACT Act and the Victorian Charter, which provide that a person charged with a criminal offence or party to a civil proceeding has the right to have the charge or proceeding decided 'by a competent, independent and impartial court or tribunal after a fair and public hearing' (ACT: s 21(1): Vic: s 24(1)).

The principle of procedural fairness is relevant to any scheme that seeks to supervise or preventively detain high-risk offenders because it requires that there are safeguards to ensure that hearings carried out under the scheme operate in a way that is fair to the person being detained or supervised. Such safeguards could include periodic reviews, rights of appeal and access to an independent tribunal.

Given that imprisonment is the most serious consequence of a judicial decision, procedural fairness requirements must be taken into account in the post-sentence preventive detention context (*A-G Qld v Watego* (2003) 142 A Crim R 537).

As outlined in chapter six, two cases have considered the requirements of procedural fairness in relation to the Queensland scheme of preventive detention (*A-G Qld v Watego* (2003) 142 A Crim R 537; *A-G v Nash* (2003) 143 A Crim R 312). Both cases have held that procedural fairness requires that prisoners have adequate time to prepare for their hearings, to instruct counsel, to analyse quantities of evidentiary material and to make arrangements for witnesses to give evidence. In *A-G Qld v Watego* (2003) 142 A Crim R 537, the Queensland Court of Appeal dismissed an appeal against a decision to dismiss an application for preventive detention. The application had been brought against the prisoner within a very short period of time before his release. Because of the prisoner's detention and the problems he faced to secure legal representation, the court dismissed the application on the basis that the prisoner was denied procedural fairness as he did not have appropriate time to prepare a sufficient defence. In *A-G v Nash* (2003) 143 A Crim R 312, an application for preventive detention was also brought only days before the release date of the prisoner. As in *Watego's* case, the court dismissed the application on the basis that the prisoner was denied procedural fairness.

One uncertainty that operates in this area relates to the status of the principles of procedural fairness as a source of restriction on regulatory power (as distinct from executive power). The doctrine of procedural fairness is derived from the common law — there is no Bill of Rights in Australia and therefore no expressly entrenched constitutional requirements of due process applicable in this

context. Notwithstanding this, principles of procedural fairness have been applied by the High Court within the framework of its constitutionally-entrenched jurisdiction to issue 'constitutional writs', and in *Fardon's* case a number of the majority judges analysed the Queensland law in terms of its consistency with 'judicial process', inferring that a 'judicial process' can be identified against which such legislation can be tested.

The contours of 'judicial process' are as yet indistinct, but it may be observed that a majority of the High Court in *Fardon's* case emphasised that the retention of the application of rules of evidence under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) was of some significance to a conclusion that the 'process' authorised by the Act was appropriately 'judicial'. It is conceivable that inappropriate variations to the rules of evidence that adversely affect procedural fairness under such regimes might warrant judicial reconsideration of the constitutional validity of post-sentence preventive detention regimes.

It appears that the rules of evidence are also of great importance to hearings concerning preventive detention. A majority of the High Court in *Fardon's* case emphasised that the retention of the application of rules of evidence under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) was relevant to the interpretation of the powers under the Act as judicial rather than executive in nature.

The boundaries of procedural fairness in relation to preventive detention are still unclear. It may be that they will develop in line with general criminal proceedings such that a court may have the power to stay proceedings until legal representation is available (*Dietrich v The Queen* (1992) 177 CLR 292). What is certain is that procedural fairness must be taken into account in relation to judges hearing applications for preventive detention.

7.2.2 The principles of proportionality and finality in sentencing

The principle of proportionality provides that the type and extent of punishment should be proportionate to the gravity of the harm and the degree of the offender's responsibility. The majority of the High Court in the case of *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472-475 confirmed that proportionality is paramount in determining the sentence to be imposed, but said that this does not mean that public protection is irrelevant. The majority drew a distinction between merely inflating a sentence for the purposes of preventive detention, which is not permissible, and exercising the sentencing discretion having regard to the protection of society among other factors, which is permissible. Accordingly, an order for indefinite detention at the time of sentencing may be justified on the basis that it is commensurate to the seriousness of the offence committed.

Post-sentence preventive detention is based on what the offender **might** do in the future and is not as firmly connected to the seriousness of the offence

committed which led to the period of imprisonment, as is indefinite detention at the time of sentence. It might therefore be argued that post-sentence preventive detention offends against the principle of proportionality in sentencing (Keyzer et al. 2004).

On the other hand, because preventive detention regimes are based on what offenders might do, it could be argued that the principle of proportionality is simply irrelevant. Preventive detention is the *only* certain way to ensure that an offender will not pose any risk to the community. Questions of proportionality only arise if the detention is seen as punitive and the majority of judges in *Fardon's* case did not consider preventive detention to be so categorised. This issue is taken up later.

However, it can be argued that supervision orders available under post-sentence detention regimes are susceptible to a type of proportionality analysis, if risks are known. If a judge decides that the circumstances of a case warrant a response that is different to detention or release, a supervision order can be tailored in a way that is proportionate to risks. Thus, for example, a paedophile might be prohibited from working at a school, but might not be prohibited from other types of employment where they are less likely to have access to children.

Post-sentence preventive detention legislation that authorises imprisonment may be seen as contrary to the principle of finality of sentence (Warner 2003: 338). If an order for indefinite detention is made **at the time** of sentence, then the offender at least knows that there is a nominal term and there is a system for periodic review. By contrast, post-sentence preventive detention schemes operate at the end of the offender's sentence, leading to uncertainty as to how long the offender must remain in prison after the sentence expires.

However, this principle may be considered irrelevant if it is accepted that post-sentence preventive detention is non-punitive. Since the majority of the High Court in *Fardon* has held that the Queensland post-sentence scheme is not akin to a sentence of imprisonment, the principle of finality of sentence may be bypassed.

7.2.3 'Rule of Law' principles

There is a general principle that there should be no punishment without law. An aspect of this principle is that once a sentence has been served, offenders can be said to have 'done their time' and are entitled to freedom.

Preventive detention schemes extend the time that offenders spend in prison and arguably offend against this aspect of the rule of law (Keyzer et al. 2004: 250). Again, this conclusion depends on the proposition that preventive detention constitutes punishment. In *Fardon's* case, the majority concluded that imprisonment is not punishment if authorised for non-punitive reasons such as community protection.

Another important principle behind the rule of law is that governments should punish criminal conduct, not criminal types.

The premise for the Queensland post-sentence scheme certainly rests on the status of the person. Justice Gummow of the High Court recognised this when considering the Queensland legislation in *Fardon's* case. The very title of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) attests to this. Justice Gummow stated (at 72, emphasis added): 'The Act operated by reference to *the appellant's status deriving from [his] conviction*, but then set up its own normative structure'. Post-sentence preventive detention schemes carry the danger of detaining people because of their (prior) status as an offender. Again, however, it can be argued that preventive detention does not set out to *punish* the person because of their status, but rather, the main aim is to protect the community.

7.2.4 Double jeopardy and the principle against double punishment

The real question that underlies the principles discussed thus far is whether or not preventive detention amounts to punishment. If so, it could be argued that post-sentence preventive detention regimes offend against the principle against double punishment. Article 14(7) of the ICCPR states that '[n]o one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'. Similarly, section 24 of the ACT Act and section 26 of the Victorian Charter establishes that a person must not be tried or punished more than once for an offence. The term 'double jeopardy' has been held not only to apply to the determination of guilt, but also to the quantification of punishment (*Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 128–129; *Pearce v The Queen* (1998) 194 CLR 610 at 628).

The *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) was challenged in *Fardon's* case on the basis that the court making the order under it was '*required* to have regard to the prior offences of a person in determining whether he should be a prisoner or not in circumstances where no crime has been committed' (Keyzer et al. 2004: 250).

Justice Gummow was the only judge in the majority in *Fardon's* case to deal with this argument and he did so briefly. He found (at 72) that the Act does not breach the 'double jeopardy' rule as it relates to sentencing because it did not punish Robert Fardon twice or increase the punishment for the offences for which he was convicted.

However, it can be argued that a post-sentence preventive detention scheme dependent on a finding of guilt that involves imprisonment must be seen as a form of punishment above and beyond that of the sentence already served. Justice Kirby in his dissenting judgment was clearly of the opinion that the

Queensland legislation imposed double punishment. He said (at 101, footnotes omitted):

> Effectively, what is attempted involves the second court in reviewing, and increasing, the punishment previously imposed by the first court for precisely the same *past* conduct. Alternatively, it involves the second court in superimposing additional punishment on the basis that the original maximum punishment provided by law, as imposed, has later proved inadequate and that a new foundation for additional punishment, in effect retrospective, may be discovered in order to increase it.

As indicated above, Robert Fardon, the first person to be detained in prison under Queensland's preventive detention scheme, has petitioned the United Nations Human Rights Committee raising the issue that the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) is in breach of Article 14(7) of the ICCPR (Keyzer & Blay 2006). The Committee's view on this argument may have important repercussions as to the operation of preventive detention schemes.

Domestically, the Queensland Court of Appeal has countenanced circumstances in which a person's detention, though initially ordered for preventive reasons, could be truly punitive in operation, justifying a judicial conclusion that the executive government had repudiated its preventive objectives and a consequent refusal to make an order redetaining a person. In *Attorney-General (Qld) v Francis* [2006] QCA 324, Keane and Holmes JJA and Dutney J stated at para [31]:

> It is possible, too, that the view taken by Gummow J in *Fardon v Attorney-General for Queensland* supports an argument that executive government repudiation of the preventive objects of the Act in a particular case (as, for example, by the refusal of treatment to a prisoner clearly capable of, and amenable to, rehabilitation) could lead the court to refuse to make any order at all. If it were to appear to the court that any further detention would be truly punitive in character and, thus, contrary to the intention of the legislation, there would be no basis for the court to make an order of any kind under the Act. The conditions of further restraint upon the detainee's liberty would be out of character with the intention of the legislature: that such restraint is preventive.

In time this argument might also be advanced to restrict the availability of post-sentence preventive detention as a practical option. This seems all the more likely if the practical problems that have emerged with the administration of the Queensland regime (explored in chapter six) are not addressed.

7.2.5 Criminal detention must only follow a finding of guilt

There is a general principle that involuntary detention should only be a consequence of a finding of guilt. This principle was recognised by three justices of the High Court in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (at 27 per Brennan, Deane and Dawson JJ):

> The involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

The established exceptions to this general rule referred to in *Lim's* case are:

- the arrest and detention in custody of a person accused of a crime to ensure he or she is available to be dealt with by the courts
- the civil detention of those with a mental illness for treatment
- the civil detention of those with infectious disease for treatment and to stop the spreading of the disease and
- the 'administrative' detention of immigrants seeking refugee status to enable enquiries and a determination of their status to be made (at 33).

This principle was applied by Toohey and Gummow JJ in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 in order to strike down the New South Wales preventive detention scheme that was applicable to an individual.

The common thread running through the above exceptions to the general rule is that they have a primary purpose that is non-punitive in nature. Justice Gummow in *Al-Kateb v Godwin* (2004) 208 ALR 124 at 159 suggested that detention may contain a mixture of punitive and non-punitive traits and that it was of little assistance to label detention as one or the other.

The rationale behind the view that preventive detention does not amount to punishment is summarised by Christopher Slobogin (2006: 112) as follows:

> Criminal punishment is based solely on a conviction for an offense [sic] and can occur only if there is such a prediction. Preventive detention is based solely on a prediction concerning future offenses [sic] and can occur only if there is such a prediction. Therefore, preventive detention is not punishment.

However, it could be argued that while preventive detention schemes may omit any mention of punishment, if imprisonment is punishment, the effect of the detention is precisely that. In *Fardon's* case, Justice Kirby pointed out (at 97) that in Queensland, the preventive detention takes place in prison (not a hospital or a detention centre) and the detainee remains a 'prisoner'. Other High Court justices have supported the proposition that imprisonment is punishment.

Brennan, Deane, Toohey and Gaudron JJ stated in *Withan v Holloway* (1995) 183 CLR 525 at 534:

> Punishment is punishment, whether it is imposed in the vindication of or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines…constitute punishment.

Whether the principle that imprisonment should only be a consequence of a finding of guilt has been breached thus depends upon whether or not imprisonment is viewed as a form of punishment.

7.2.6 The principle against retrospective laws

There is a general principle that legislation which criminalises certain conduct or sets up sentencing regimes should not apply retrospectively. Article 15(1) of the ICCPR states that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'. Section 25 of the ACT Act and section 27(2) of the Victorian Charter set out the principle against retrospective criminal laws, including the principle that a penalty must not be imposed on a person for an offence that is greater than the penalty that applied at the time when the offence was committed. This is particularly salient in relation to preventive detention regimes that did not exist at the time the offender was originally sentenced.

One view of the reasons for the principle against retrospectivity was expressed by Toohey J in *Polyukhovich v The Commonwealth of Australia and Another* (1991) 172 CLR 501 at 688-689:

> Protection against retroactive laws protects a particular accused against potentially capricious state action. But the principle also represents a protection of a public interest. This is so, first, in the sense that every individual is, by the principle, assured that no future retribution by society can occur except by reference to rules presently known; and secondly, it serves to promote a just society by encouraging a climate of security and humanity.

However, this is not to say that retrospective laws cannot be made within constitutional limits or that their passage is never justified (*Polyukhovich v The Commonwealth of Australia and Another* (1991) 172 CLR 501 at 689 per Toohey J).

In *Fardon's* case, one of the reasons why Kirby J opined (at 97) that the Queensland preventive detention scheme was unconstitutional was because '[r]etrospective application of new criminal offences and of additional punishment is offensive to the fundamental tenets of our law'. In contrast, it could be argued that preventive detention schemes do not set up new criminal offences and do not impose additional punishment where the purpose of such

schemes is community protection. On this view, the principle of retrospectivity does not apply.

7.3 Summary of Policy Issues

The Queensland regime is constitutionally valid, and the Western Australian regime, modelled on the Queensland regime, is very likely to be constitutionally valid for the same reasons. The New South Wales legislation has not been constitutionally tested, but given the strong degree of similarity between it and the Queensland law, its validity can be assumed for present purposes.

Notwithstanding this, the post-sentence preventive detention regimes of New South Wales, Queensland and Western Australia challenge long-established and widely accepted principles of proportionality and finality in sentencing and the rule of law. There are significant and unresolved human rights issues raised by the use of imprisonment to detain a person after their criminal sentence has expired. Imprisonment is the most serious penalty that can be ordered by an Australian court.

For these reasons, post-sentence preventive detention regimes, especially regimes that contemplate imprisonment, should only ever be activated as a last resort and in exceptional circumstances. The court decisions analysed in chapter six appear to support this approach. Continuing detention orders under these regimes are understood by the courts as being made for the purpose of the protection of the community and the rehabilitation of prisoners. The Queensland Court of Appeal has confirmed that continuing detention orders can only be made when it has been proven that a supervision order is inappropriate, in other words, as a last resort. The Queensland Court of Appeal has also confirmed that an application for a continuing detention order may be refused or no order made at all in circumstances in which the executive government has repudiated its protective intention by failing to provide services to a prisoner, thereby converting his circumstances from civil detention to punishment.

8. Chapter Eight: Preventive detention: proposals for policy development

8.1 Introduction

Because of the practical issues including the resource implications of preventive detention schemes and in light of the uncertainty surrounding the consistency of post-sentence preventive detention in prison with international human rights principles, it is recommended that such schemes for the management of high risk offenders should be seen as a last resort.

It became clear from focus group discussions that an exclusively penal approach cannot address all the factors that lead to reoffending and some behaviour may not be amenable to change without coexisting options for treatment. This is further examined in part 8.3, which sets out possible alternatives to preventive detention that should be considered in relation to policy development.

If governments continue to rely on or develop preventive detention schemes, then the next section sets out some of the safeguards that must be developed.

8.2 Structure of Preventive Detention Schemes

Preventive detention schemes may be compatible with human rights, provided necessary protections are put in place. Any such scheme needs also to take into account the constitutional issues raised by *Fardon's* case and discussed in chapter four.

Christopher Slobogin (2006: 113-114) makes a case for three specific restrictions on preventive detention schemes.

- The nature of the liberty deprivation must bear a reasonable relationship to the harm feared.
- The duration of the liberty deprivation must be reasonably related to the prevention of the harm feared.
- To ensure that the nature and duration of the liberty deprivation is taken seriously, there must be a system of periodic review, perhaps every six months or at least annually.

The case law on the Queensland preventive detention scheme echoes that of Slobogin's first restriction. In *Attorney-General for the State of Queensland v Fardon* [2006] QSC 275, Lyons J reviewed the decisions made under the Queensland Act and stated (at [116]) that given the intrusions of the scheme on

the liberty of the subject, an order for supervised release should be preferred to a continuing detention order. This follows the Court of Appeal's statement in *Attorney-General (Qld) v Francis* [2006] QCA 324 at para [39] that 'an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional'. The Court of Appeal's recent decision in *A-G (Qld) v Fardon* [2006] QCA 512, which dismissed an appeal against Lyons J's decision to grant Fardon a supervision order, is also significant in the judges' call for graduated release programs and Williams JA's comment (at para [40]) that preventive detention is a 'drastic step' and treatment should be facilitated.

In relation to Slobogin's second restriction, the New South Wales system imposes a limit of five years on preventive detention orders, whereas such orders are indefinite under the Queensland and Western Australian schemes (*Crimes (Serious Offenders) Act* 2006 (NSW) s 18(1); *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 14; *Dangerous Sexual Offenders Act* 2006 (WA) s 25). Having a time limit imposed on preventive detention orders gives an offender a prospective release date and an incentive to work towards release. An indefinite time period may provide a disincentive for the prisoner to undertake treatment, believing that there is no prospect of release.

The third restriction in relation to periodic review has certainly been taken up by the existing preventive detention schemes in Queensland, New South Wales and Western Australia and was an important feature in the majority judgments in *Fardon's* case.

Taking into account the above discussion of *Fardon's* case, the practical issues and human rights considerations, it is essential that preventive detention schemes should have the following features.

- The scheme must be directed against individuals in a certain category.
- In determining an application under the legislation, the Supreme Court must exercise judicial power in accordance with the rules of evidence.
- The Court must have a discretion as to whether and what kind of order to make.
- The Court 'must be satisfied of the 'unacceptable risk' standard 'to a high degree of probability'.
- Offenders must have adequate time to prepare for their hearings, to instruct counsel, to analyse the evidence and to make arrangements for witnesses to give evidence.
- Resources should be available to ensure legal representation and also to ensure that prisoners have the opportunity to engage expert witnesses who can critically review the work of the court-appointed psychiatrists.

- The scheme must not be designed to punish, but to protect the community.
- Nothing in the legislation should suggest that the Court is exercising ordinary legislative or executive functions.
- There must be a system of periodic review, at the very least on an annual basis.
- There must be an appeal mechanism.
- There should be a fixed time limit for the preventive detention order (for example, a five year limit as in New South Wales).
- Preventive detention should be a last resort and a presumption inserted in the legislation in favour of the least restrictive alternative.

While these safeguards may provide some sort of balance between community safety and individual human rights, it is essential that policy-makers consider other options to post-sentence preventive detention schemes. The next section outlines some of these preferred options.

8.3 Options

It became clear from the focus group discussions set out in chapter six that individual case management at the start of an offender's sentence had the potential to be of more benefit to community safety than indefinite detention, post-sentence preventive detention and supervision schemes. The vast majority of participants were of the opinion that legislative schemes that were too focused on detention rather than rehabilitation were doomed to failure.

Many participants spoke of the need for properly resourced treatment programs and case management from the start of the offender's sentence. It was thought that offenders should be given an opportunity to participate in rehabilitation programs as soon as possible after their sentence commences. Delaying the provision of sex offender programs and other rehabilitation programs until shortly before an offender is eligible for parole was 'too little, too late'.

One alternative to post-sentence preventive detention is thus to ensure properly resourced treatment programs exist in prison *and* in the community once offenders are released. If this option is followed, it is recommended that:

- Resources should be provided to ensure that high-risk offenders are assessed prior to sentencing or as early as possible thereafter to ensure that an appropriate treatment regime is put in place as soon as possible during an offender's prison sentence.
- A division should be made between those mental health professionals who provide clinical services and forensic mental health professionals who are not

involved with the treatment programs, but who are able to make assessments of offenders for the courts.

- Wherever possible, treatment programs should be tailored to the individual offender with a case manager appointed and group therapy remaining an option, but not the *only* option.

In this regard, the Scottish model of orders for lifelong restriction is worth considering for development in Australia. It is notable that the Scottish model relates to serious violent offenders as well as sex offenders and provides for a graduated release system that could provide offenders with achievable goals for reintegration into the community.

The overseas literature indicates that any move to use the mental health system to 'warehouse' certain groups of individuals will be fraught with difficulties. However, if treatment programs are to be boosted in the community, the Texas program outlined in chapter five has clear advantages over an 'inpatient' approach, including reduced cost and the recognition of the importance of liberty.

If a graduated system of treatment were to be considered along the lines of the Scottish approach, then the Texas community-based treatment program could provide a model for moving treatment from prison towards a least restrictive community-based option.

The examination in chapter six of some of the practical problems arising from the Queensland scheme of preventive detention makes it clear that there is a lack of coordination of the different agencies involved in making applications and providing services for detained or supervised offenders. It is recommended that, at the very least, a memorandum of understanding be developed as soon as possible between the relevant departments to coordinate therapeutic responses and the work of corrective services, therapists and the Attorney-General's Department in response to court orders.

Another approach to coordination is to set up a separate body like the Scottish Risk Management Authority to:

- develop policy and carry out and monitor research in risk assessment and minimisation

- coordinate the management of individual offenders through approving and monitoring risk-management plans and

- accredit people involved in risk assessment.

Such a body could be given a major role in coordinating the agencies involved in the supervision and treatment of high-risk offenders to ensure there is adequate communication between those working in social services, job centres, accommodation services and education authorities.

8.4 Conclusion

While their numbers may be few, ‘dangerous’ offenders such as high-risk sex offenders present one of the most significant challenges for our criminal justice system. Indefinite detention, post-sentence preventive detention and supervision provide options for managing this group.

However the major theme running through the focus group discussions and the case law on the Queensland model is the urgent need for adequate services and treatment programs for high-risk offenders. Legislative regimes that aim solely to remove offenders from the community or restrict their movements are resource intensive and may not ultimately succeed in reducing recidivism rates.

As explored in chapter seven, the post-sentence preventive detention regimes of New South Wales, Queensland and Western Australia challenge long-established and widely accepted human rights principles. It is therefore recommended that such regimes be seen as a last resort and other alternatives such as the Scottish model be explored more fully in relation to the management of ‘dangerous’ offenders.

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