PREVENTIVE DETENTION LAWS
High Court validates Queensland's Dangerous Prisoners Act 2003

ANTHONY GRAY

In the case of *Fardon v Attorney-General (Qld)*,[1] the High Court declared that preventive detention legislation passed by the Queensland Parliament in 2003 was constitutionally valid. Put simply, preventive detention laws allow a person to be detained in prison, not merely because of something they have done in the past, but based on an assessment they may re-offend in future, if released. This assessment of likely recidivism may be based on a number of factors, including reports of psychiatrists, past criminal behaviour, rehabilitation, and any statement of intention by the offender. This legislation has clear national implications, with some state governments apparently planning similar-styled, electorally popular, preventive detention regimes in the light of the High Court's verdict on the issue. Such laws raise real concerns about civil liberties, and raise the issue of the role of judges in protecting fundamental rights and freedoms from attack by parliament.

Introduction to preventive detention laws

Preventive detention laws were not unknown in Australia before the passage of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('the Queensland Act'). The New South Wales Government passed similar legislation, the *Community Protection Act* in 1994 ('the NSW Act').[2] Section 5 of the NSW Act allowed the state's Attorney General to make an application regarding a 'specified' person. Originally, the legislation had general application, but in the course of its passage through parliament, it was confined to one offender only, Gregory Kable. Kable had been convicted of the manslaughter of his wife and had allegedly made threats that upon his release from prison for this offence, he would harm his wife's family. The NSW Act empowered the Supreme Court of New South Wales to make an application that Kable be detained if they were satisfied on reasonable grounds that the offender: (a) was more likely than not to commit a serious act of violence; and (b) it was appropriate for the protection of the community that the offender be detained. It is necessary to discuss the fate of the law in that case, because there are clear parallels between the legislation challenged in that case, and the Queensland Act.

In *Kable v Director of Public Prosecutions (NSW)* four of the six High Court judges struck down the NSW Act as being offensive to the *Commonwealth Constitution*.[3] A majority found that as State Courts exercised federal jurisdiction, they were part of the federal court structure. As a result, the principle of separation of powers that clearly existed in the *Commonwealth Constitution* was drawn down to state courts despite the absence of this principle in state constitutions.[4] The Court therefore found that the NSW Act offended the principle of separation of powers because it asked the Supreme Court of New South Wales, clearly a judicial body, to exercise this non-judicial power. The assessment of whether or not a person would reoffend if released from prison is an executive decision typically exercised by a Parole Board.

Of the majority judges, Gaudron J noted that while the proceedings contemplated by the NSW Act were not ordinarily known to the law, the Act attempted to dress them up 'as proceedings involving the judicial process'.[5] However, Gaudron J observed that the proceedings permit the making of an order involving:

> … a guess … whether on the balance of probabilities the appellant will commit a [further offence] … depriving an individual of his liberty, not because he has breached any law, but because an opinion is formed, on the basis of material which does not necessarily constitute evidence admissible in legal proceedings, that he 'is more likely than not' to breach a law by committing a serious act of violence.

Consequently, Gaudron J concluded that the powers given by the law involved:

> … the antithesis of the judicial process, one of the central purposes of which is … to protect 'the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained'.
>
> It is not a power that is properly characterized as a judicial function, notwithstanding that it is purportedly conferred on a court and its exercise is conditioned in terms usually associated with the judicial process … the effect of the [provision] is in my view to compromise the integrity of the Supreme Court …[6]

Justice Gaudron added:

> Public confidence cannot be maintained in the courts and their criminal processes if ... the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so.[7]

She described proceedings in the Act as 'dressed up as proceedings involving the judicial process. In so doing, the Act makes a mockery of that process, and inevitably weakens public confidence in it'.[8]

REFERENCES

1. *Fardon v Attorney-General* (Qld) (2004) ('*Fardon*')210 ALR 50.

2. The Victorian Parliament passed a similar law in 1990 to deal with an habitual violent offender, Gary David, the *Community Protection Act 1990*.

3. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (Toohey, McHugh, Gaudron, and Gummow JJ) (Brennan CJ and Dawson J dissenting).

4. Following *Clyne v East* (1967) 68 SR (NSW) 385 and *Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

5. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 108.

6. Ibid 106-7.

7. Ibid 107.

8. Ibid 108

The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)

The Queensland Act was passed on 27 June 2003. Its stated objectives are to:

(a) provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community

(b) provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.[9]

The Act applies only to those offenders who are or were in custody serving a period of imprisonment for a serious sexual offence defined as an offence of a sexual nature involving violence against children.[10] The Act has retrospective operation, applying to offenders who were sentenced to a period of imprisonment prior to the law coming into force.

Under the Act, the government may make an application that an offender remain in detention if it is satisfied the prisoner poses a 'serious danger to the community', or considers there is an unacceptable risk the prisoner will commit a serious sexual offence if released from custody, or released without condition. The court must be satisfied this risk exists through 'acceptable, cogent evidence and to a high degree of probability'. The court can consider a broad range of evidence in hearing the application.[11] The overriding factor is community protection, so presumably a court with doubts as to whether it should grant the application is encouraged to err on the side of caution. There is no reference to the rules of evidence in hearing such an application, and it seems they do not apply. Evidence that would not be admissible in 'ordinary' legal proceedings could be admitted in an application made under this legislation.

If satisfied that the offender presents an unacceptable risk of re-offending, the court has various options under the Act including further incarceration for a maximum of 12 months. At the end of this further 12 months, the Queensland Attorney General may apply for further detention of the offender on the same grounds as the first application. Alternatively, the court may order the person be released under supervision or the application should be rejected outright.

One imperative for the Queensland Act was that prisoner Robert Fardon, who had served several terms of imprisonment for a string of violent offences, was due for release from a Queensland jail on 29 June 2003. There were fears Fardon would re-offend if released from prison. Following the introduction of the Act, and an application by the Queensland Attorney General, Fardon was kept in prison. Several other applications have subsequently been made, and at the time of writing, all have been upheld.

High Court finds legislation is valid

Fardon challenged the validity of the Act in the Queensland Court of Appeal and in the High Court. Both challenges were unsuccessful and the law is likely to be used as a template for similar state regimes in the future.

These decisions were a surprise to some commentators who saw the High Court's *Kable* decision as a strong re-affirmation of judicial independence, and as 'a line in the sand' against attempts by state governments to involve state courts in the continued detention of offenders who have served their original jail terms. The effect of the *Fardon* verdicts is certainly to wash away this line. As Kirby J eloquently observed of the *Kable* decision, 'a constitutional watchdog … would bark but once'.[12]

Majority justices

In issuing his judgment in *Fardon*, Chief Justice Gleeson started with the interesting statement:

> 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 liberties arise. This case is not concerned with those wider issues.[13]

One wonders, with respect, why this case is not concerned with those wider issues. One of the reasons for the principle of the separation of powers is to avoid the situation where too much power is reposed in one body. Each arm of government is to act as a check and balance on the others. Indirectly, the separation of powers protects civil liberties. Why then is this case, which clearly raises separation of powers issues, not about civil liberties? The legislation takes away one of the most fundamental civil liberties of all — the right to liberty. Is it contrived to assess the validity of the law ignoring this fact? Some citizens look to judges to defend civil liberties from attack by powerful parliaments. They view the courts as the only institution standing between parliament and citizens and sometimes the only recourse a person may have when their civil liberties are ignored.

9. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 3.

10. Schedule to the Queensland Act.

11. This includes any other medical, psychiatric or psychological or other assessment relating to the prisoner, any evidence of a propensity on the offender's part towards violent behaviour, any pattern of violent behaviour, whether the offender has undergone rehabilitation while in prison, the prisoner's criminal history, the risk of re-offending, the need for community protection, and any other relevant matter (s 13(4) of the Queensland Act).

12. *Baker v R* (2004) 210 ALR 1, 17.

13. '*Fardon*, 52-3.

… preventive detention laws allow a person to be detained in prison, not merely because of something they have done in the past, but based on an assessment they may re-offend in future, if released.

Rather than overruling the *Kable* principle, members of the majority found points of distinction between the current law and the law invalidated by the High Court in the 1995 *Kable* decision. First, while the *Kable* law applied (in the final result) to only one offender, this legislation applied to a category of offenders. Second, while the *Kable* law required the court only be satisfied that the prisoner was more likely than not to re-offend, this legislation required the evidence to show a 'high degree of probability' that the offender would re-offend. Finally, while the *Kable* law gave the judges only two choices — continued detention or release, the Queensland law gave them three — continued detention, release, or release on condition (for example supervised release). These differences are at least real, and can be conceded.[14]

However, some members of the majority suggested differences between the Queensland and NSW Acts that cannot be conceded. This is particularly the case in the judgments of McHugh and Gummow JJ and Gleeson CJ, two of whom were in the majority in the *Kable* case in denouncing the NSW Act as invalid. How did these judges justify a different outcome in *Fardon*?

Justice McHugh found justification for the Queensland Act on the basis that 'the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders'.[15] Justice McHugh found a statement in the Act that its object was community protection persuasive in this regard.[16] While the relevant legislation in the *Kable* decision, namely the NSW Act, was also clearly based on community protection grounds, this did not lead McHugh J to conclude that the legislation was valid in that case.

Justice Gummow was persuaded by the argument that since the prisoner had been guilty of a past crime, 'there remained a connection between the operation of the Act and anterior conviction by the usual judicial processes'.[17] Again, this could have been said with regard to the legislation considered in *Kable*. However, this was not an argument that impressed the judge in *Kable* and one wonders why he relies on it in *Fardon* to justify his different view of the Queensland Act.[18]

Chief Justice Gleeson noted that the rules of evidence applied, the Attorney General bore the onus of proof, hearings were to be conducted in public, and that there was a right to appeal.[19] He also observed that each case was determined on its merits. With respect, the same may be said with regard to the *Kable* case.

None of the factors raised by these judges is relevant to distinguishing these two cases to the point of justifying a different conclusion. Some may gain the inference, when reading only the *Fardon* decision, that all of these points serve to distinguish the current case from the *Kable* precedent. However, anyone who has also read the *Kable* decision will know that these are not points on which the legislation in the two cases differs.

Dissenting Justice (Kirby J)

Justice Kirby noted that a fundamental premise of Australian law is that an individual should not be imprisoned because of their beliefs, nor for future crimes which they may or may not commit. The Queensland Act offended that fundamental principle. Liberty was the most fundamental of rights. He conceded that in strictly limited cases, the civil law provided for involuntary detention in such cases as insanity, infectious diseases, or illegal entrants to Australia, but this case should not be included within this class of exceptional cases. While there had been some attempt to dress this Act up as being civil in nature, in reality the law was punitive and therefore criminal in nature. Legislation of this kind, he found, undermined public confidence in the judiciary in a fundamental way.[20] The legislation asked a judicial body, established to exercise judicial power (in other words, the application of law to past events or conduct),[21] to exercise a power that was non-judicial in nature. This was despite the fact that unlike the *Kable* law, this law applied to a category of offenders.[22]

In Kirby J's view, this legislation was so extreme as to be reminiscent of laws passed by the Nazi Government in Germany in the 1930s in which the estimated character of a person was punished rather than the proven facts of a crime.[23]

A critique of majority view

There are numerous difficulties with the majority view upholding the validity of the preventive detention legislation, drawing on both principle and practical elements.

Principle: non-application of Kable precedent

As noted above, the supposed distinctions between the legislation impugned in *Kable* and that upheld in *Fardon* are more apparent than real. It is accepted that the *Kable* law applied to one person while the Queensland Act considered in *Fardon* applied to a category, that the standard of proof in *Fardon* was higher than the standard in *Kable*, that the *Fardon* law gave the court

14. It is true also the NSW proceedings were declared to be civil in nature, while the Queensland proceedings are not described as civil or criminal. The New South Wales Act applied whether or not the offender was incarcerated at the time of the application; the Queensland Act applies only to those incarcerated at the time of the application, and any offenders who are incarcerated after the law is passed.

15. *Fardon*, 61.

16. Callinan and Heydon JJ agreed that the purpose of the detention here was for 'community protection and not punishment'. *Fardon* 109.

17. *Fardon*, 80.

18. His Honour also noted that an appeal against a decision of the Supreme Court was possible in the *Fardon* law; he did not refer to the fact that an appeal was also possible in the *Community Protection Act 1994* (NSW), which he had found to be unconstitutional.

19. Gummow J also emphasised that the offender might appeal an adverse finding against him, but did not acknowledge that the possibility existed also in the NSW Act that he found to be unconstitutional in *Kable*.

20. *Fardon*, 95.

21. *Fardon*, 95.

22. *Fardon*, 88.

23. *Fardon*,101-2. Kirby J did not suggest that the Queensland Act was being used for political purposes.

one extra option in considering the application, that the *Kable* law applied to a person whether or not they were incarcerated while the *Fardon* law only applied to confined offenders. However, in my view, this does not mean that the *Fardon* case should fall outside the application of the *Kable* principle relating to the separation of powers. The Queensland Act confers powers that are non-judicial in nature on a judicial tribunal. As in *Kable*, this should be seen as a breach of the separation of powers, leading members of the community to question the independence of the judiciary from the Executive.

Asking judges to order the imprisonment of an offender based not (at least directly) on what that person has done but on what they may do surely creates (at the very least) uneasiness amongst members of the community. It is submitted that such a power compromises the integrity of the court to an unacceptable degree, as found by the High Court in *Kable*.

Practice: reliability of predictions of future behaviour

At the heart of regimes of this nature is the assumption that it is possible to predict with an acceptable degree of accuracy whether a person may re-offend. We need to question such an assumption and test whether it is a plausible one.

How did the High Court majority deal with such a fundamental issue in *Fardon*? Extremely briefly. At least Gleeson CJ acknowledged the problem, although he dismissed it very quickly with this observation: 'No doubt, predictions of future danger may be unreliable, but as the case of *Veen*[24] shows, they may also be right'.[25] With respect, does the fact that a prediction about the future may be right mean we can be confident that it is right? Can we be confident enough that we order the deprivation of a person's liberty on the basis of it? How would the High Court respond if the government changed the rules of criminal procedure so that in order to find a person guilty of an offence, a jury needed only to be satisfied of the likelihood of guilt on the balance of probabilities? Would the High Court find this law valid, on the basis that the assessment by the jury *may be right*? If this is the criteria for assessing the validity of criminal law, it is submitted to be a matter of very grave concern for the liberty of all Australians. I feel sure that citizens would be uneasy that their liberty could so easily be washed away by a determined parliament.

Justice Kirby found cross-disciplinary learning instructive in assessing the practicality of this aspect of the legislation, quoting Professor Kate Warner on the ability to predict future behaviour:

> An obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously over-predict. Predictions of dangerousness have been shown to have only a one third to 50% success rate. While actuarial predictions have been shown to be better than clinical predictions — an interesting point as psychiatric or clinical predictions are central to continuing detention orders — neither are accurate.[26]

While there is no doubt that the psychiatric models being used to predict future dangerousness and violent behaviour have improved over the years, one paper advocating the reliability of such a model itself claims the success rate is only 70-80%.[27] Are we comfortable removing an individual's freedom on the basis of prediction models that even their developers acknowledge have a 20-30% failure rate?[28] This level is likely to meet the 'high degree of probability' test required by the *Fardon* law. The result is likely to be that some of those who would have committed no further crimes if released are nevertheless detained in prison for a further indefinite period.

Other options: rehabilitation and original sentence

It is beyond the scope of this article to focus on why this kind of law is seen by some as desirable but some brief observations are necessary.

First, accepting that it is not possible to rehabilitate every offender and the difficulties with and reasons for criminal behaviour, have the appropriate authorities considered why Fardon was threatening violence if released? This is assuming, of course, that he was in fact threatening violence. The issue of the accuracy of the evidence on which an assessment is made about a person's likely future dangerousness is another concern. It is possible, for example, that a prison guard with a grudge against an inmate may claim wrongly that the inmate threatened future violence. This evidence might be used to support an application for that inmate's future indefinite detention. Similarly, a prison guard may threaten to make this claim in order to secure an advantage over the inmate.[29] Aged 44 at the time of the application made in relation to him, Fardon had been incarcerated for about 28 years of his life. If it was true he would have re-offended if released, this does not reflect well on our rehabilitation system in corrective services, at least as applied to this offender and to any others about whom an application is made.

24. The *Veen* case involved a convicted killer who was released from prison, only to kill further victims: *Veen v The Queen* (1979) 143 CLR 458.

25. *Fardon*, 55.

26. Kate Warner, 'Sentencing Review 2002–2003' (2003) 27 *Criminal Law Journal* 325, 338; *Fardon*, 83; see Kevin Douglas and James Ogloff, 'Multiple Facets of Risk for Violence: The Impact of Judgmental Specificity on Structured Decisions About Violence Risk' (2003) 2 *International Journal of Forensic Mental Health* 19-34; James Ogloff and Michael Davis, 'Advances in Offender Assessment and Rehabilitation: Contributions of the Risk-Needs-Responsivity Approach' (2004) *Psychology, Crime and Law* 229-42.

27. Kevin Douglas et al, 'Assessing Risk for Violence Among Psychiatric Patients: The HCR-20 Violence Risk Assessment Scheme and the Psychopathy Checklist: Screening Version' (1999) 67 *Journal of Consulting and Clinical Psychology* 917, 923.

28. Others believe the failure rate is much higher.

29. This is assuming, of course, that he was in fact threatening violence. The issue of the accuracy of the evidence on which an assessment is made about a person's likely future dangerousness is another concern. It is possible that, for example, a prison guard with a grudge against an inmate may claim wrongly that the inmate threatened future violence. This evidence might be used to support an application for that inmate's future indefinite detention. Similarly, a prison guard may make this claim in order to secure an advantage over an inmate.

One imperative for the Queensland Act was that prisoner Robert Fardon, who had served several terms of imprisonment for a string of violent offences, was due for release from a Queensland jail on 29 June 2003.

Rather than apply a band-aid solution by making applications to keep some prisoners in jail, the relevant authorities should be working on the bigger picture and trying to prevent the problem rather than dealing with it in an eleventh-hour, last-ditch fashion that offends the fundamental civil liberties we all cherish. I would have hoped the courts would have rallied against such an unprincipled step by the legislature. Many people look to judges to uphold fundamental civil liberties against periodic attack by the legislature and/or the Executive. There is often no other means of protection. It is disappointing that the court in this instance acquiesced in the intrusion, and it creates concern as to what message the decision gives to parliaments around Australia.

It is hoped the legislature is reviewing whether existing penalties for sexual offenders are adequate, particularly where sexual offenders have not been rehabilitated at the time their sentences run out. No-one wants a prisoner to be released, only to commit further crimes. This problem may provide evidence that terms of imprisonment for sexual offenders must be reviewed.

To order the original detention of an offender the court must be satisfied of the person's guilt at a very high standard of proof, that of beyond reasonable doubt. To deprive a person of their right to freedom is a grave matter which should not occur lightly. This legislation has created the anomalous situation where the standard of proof required to *continue* the detention of an offender is less than the standard of proof required to *commence* the detention of an offender. I argue the standard of proof for both original and continued incarceration should be the same. The court should have to be satisfied beyond reasonable doubt that the prisoner is likely to re-offend in order to continue imprisonment.

The counter argument to this might be that the detention is civil in nature rather than criminal. Counters could well be made to this assertion, but taking it at face value the consequence should then be that prisoners detained pursuant to the legislation be treated as civil detainees rather than part of the broader prison population (as they currently are). One might expect that civil detainees be separated from the broader prison population and given appropriate training and care specific to their needs to facilitate their eventual re-integration into society. However, these requirements are missing from the Queensland Act.

Conclusion

This kind of law is concerned, fundamentally so, with civil liberties. This legislation attacks a fundamental civil liberty, which although objectionable, does not of itself make it unconstitutional. However, the involvement of the judiciary in this crystal ball gazing process is unconstitutional. Such a power is repugnant to the judicial process in a fundamental way. Thinking members of the community would rightly be concerned about the independence and integrity of a court system in which judges are asked to order a person's detention based on an educated guess of what an offender may do if released. Of course, no-one approves of or condones what these offenders may have done in the past. However, they have served their full allotted term of imprisonment and surely have a legitimate expectation of release back into the community at that time. There are surely more palatable ways of dealing with the problem of recidivism amongst offenders than the draconian means recently approved by the High Court.

At the very least, I suggest that preventive detention laws should only apply where the criminal standard of proof has been met in terms of the likelihood of recidivism. In these unusual cases, the government should be required to segregate these detainees from the criminal prison population and to provide tailored programs to facilitate their needs and eventual release from prison.

DR ANTHONY GRAY teaches law at the University of Southern Queensland.

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email: gray@usq.edu.au

Erratum

In the December 2004 edition of the *Alternative Law Journal* in the article 'Beneath the Sea' by Natalie Bugalski, in the second paragraph under 'Background' (p 289) the sentence:

'When in 1975 Indonesia invaded East Timor and when in 1976 it claimed sovereignty over *half the island* …'

should read

'When in 1975 Indonesia invaded East Timor and when in 1976 it claimed sovereignty over *the half island* …'

We apologise to Natalie Bugalski for this error.