Contents

Acknowledgments vii
The Editors ix
List of Contributors xi

Part I Parameters

1 “Dangerous” People: An Overview
BERNADETTE McSHERRY and PATRICK KEYZER 3

2 An International Human Rights Perspective on Detention
Without Charge or Trial: Article 9 of the International Covenant
on Civil and Political Rights
RONLI SIFRIS 13

3 The International Human Rights Parameters for the Preventive
Detention of Serious Sex Offenders
PATRICK KEYZER 25

4 Legal Limitations on the Scope of Preventive Detention
CHRISTOPHER SLOBOGIN 37

Part II Policy

5 Sexual Offender Commitment Laws in the USA:
The Inevitable Failure of Misusing Civil
Commitment to Prevent Future Sex Crimes
JOHN Q. LA FOND 51

6 Sexually Violent Predator Laws: Going Back
to a Time Better Forgotten
JOHN PETRILA 63

7 Sexual Violence, Gender Politics, and Outsider Jurisprudence:
Lessons from the American Experience in Prevention
ERIC S. JANUS 73

8 The Preventive Detention of Insanity Acquittees: A Case
Study From Victoria, Australia
IAN FRECKELTON 83

9 The Preventive Detention of Suspected Terrorists:
Better Safe than Sorry?
BERNADETTE McSHERRY 97
Part III Prediction

10 Toward Research-Informed Policy for High-Risk Offenders With Severe Mental Illnesses
   JENNIFER SKEEM, JILLIAN PETERSON, and ERIC SILVER
   111

11 Assessing and Managing Violent Youth: Implications for Sentencing
   LORRAINE JOHNSTONE
   123

12 Violence Risk Assessment: Challenging the Illusion of Certainty
   DAVID J. COOKE and CHRISTINE MICHE
   147

Part IV Practice

13 The Role of Forensic Mental Health Services in Managing High-Risk Offenders: Functioning or Failing?
   LINDSAY THOMSON
   165

14 Case Managing High-Risk Offenders With Mental Disorders in Scotland
   ALEX QUINN and JOHN CRICHTON
   183

15 The Scottish Approach to High-Risk Offenders: Early Answers or Further Questions
   INNES FYFE and YVONNE GAILEY
   201

16 The Assessment and Sentencing of High-Risk Offenders in Scotland: A Forensic Clinical Perspective
   RAJAN DARJEE and KATHARINE RUSSELL
   217

17 Managing High-Risk Personality Disordered Offenders: Lessons Learned to Date
   CAROLINE LOGAN
   233

Part V Conclusions

18 “Dangerous” People: The Road Ahead for Policy, Prediction, and Practice
   BERNADETTE McSHERRY and PATRICK KEYZER
   251

Appendix A: Table of Cases
   255
Appendix B: Table of Statutes
   259
References
   263
Index
   289
In Australia, four states enable the continued detention of serious sex offenders in prison, rather than a purpose-designed facility, after the conclusion of their prison sentences. This chapter considers two 2010 decisions of the United Nations Human Rights Committee (HRC) that have designated new parameters for the preventive detention of serious sex offenders—Fardon v Australia (2010) and Tillman v Australia (2010). In Fardon and Tillman, the HRC found that the detention regimes in two (and by implication all) of the Australian states that adopt the continued detention in prison approach violate human rights enshrined in the International Covenant on Civil and Political Rights (ICCPR): the prohibition against arbitrary detention (Article 9), the guarantee of due process (Article 14), and the prohibition on the retroactive infliction of punishment (Article 15).

This chapter explores these decisions and their significant implications in the context of the preventive detention of serious sex offenders. To date, the response of the Australian states to the challenge of managing serious sex offenders after the conclusion of their prison sentences has been, in a great many cases, to subject these offenders to further imprisonment. The HRC has said that this practice is inconsistent with international human rights, and Australia must take steps to change this practice. Significantly, the HRC has also said that Australian policies must not be characterized by further retribution but should emphasize rehabilitation in the community. I explore the implications of the HRC’s approach for contemporary Australian practice, particularly when courts order supervision in the community. It is clear that the Australian regimes will require significant reform to comply with the human rights criteria set out in the HRC’s decision.

Continued Detention in Prison: Is It Punitive?

In Australia, four of the six states have enacted legislation that authorizes the Supreme Court of each state to order the continuing imprisonment of a serious sex offender (referred to as continuing detention) after the conclusion of their prison term if the offender is judged to be an unacceptable risk to the community if released:

- Dangerous Prisoners (Sexual Offenders) Act 2003 (Queensland; Qld), sec. 50
- Dangerous Sexual Offenders Act 2006 (Western Australia; WA), sec. 17
- Crimes (Serious Sex Offenders) Act 2006 (New South Wales; NSW), sec. 20
- Serious Sex Offenders (Detention and Supervision) Act 2009 (Victoria; Vic), sec. 42

The procedure contemplated by the legislation bears little resemblance to a criminal trial (Keyzer et al. 2004). The legislation does not require courts to be satisfied that the risk that a person will represent to the community meets the criminal standard of proof, beyond reasonable doubt. That is the standard required in United States civil commitment statutes.
v Hendricks 1997: 353; Kansas v Crane 2002; see John Petrila, Christopher Slobogin and Eric Janus’s chapters in this volume). Instead, a civil standard of proof applies in three of the four Australian states that have adopted this approach (see NSW, sec. 17(2); Qld, sec. 13; WA, sec. 7). The courts in these states must be satisfied to a “high degree of probability” that the offender is likely to commit a further sexual offence. In Victoria, the Supreme Court may determine “that an offender poses an unacceptable risk of committing a relevant offence even if the likelihood that the offender will commit a relevant offence is less than a likelihood of more likely than not” (Vic, sec. 35(4); emphasis added).

The Australian preventive detention systems do not require a finding of mental illness or mental abnormality as is the case with detention regimes in the United States (see Christopher Slobogin’s chapter in this volume). As Queensland Attorney-General Robert Welford said in his Second Reading Speech introducing the Dangerous Prisoners (Sexual Offenders) Bill to the Queensland Parliament on 3 June 2003:

The scheme of this bill is however not part of the sentencing process but a separate process for detaining persons who are seriously dangerous, convicted, violent sex offenders and whose risk of reoffending demands that the community be protected. It is akin to the detention authorised under mental health laws, except that the protection provided to the public by this new law is founded not on the mental illness of a person but on a different though equally sound principle of public policy. That principle is the priority that must be given to protecting the public, our families and children from the serious danger that a person, having already been convicted and imprisoned for committing offences of a violent sexual nature, poses to the community because of their propensity for committing such an offence again.

The other Australian states have likewise included no requirement that an offender be found to have a mental abnormality, let alone a mental illness (McSherry and Keyzer 2009).

A repeat sex offender named Robert Fardon brought a constitutional challenge to the Queensland legislation. Fardon was serving a 14-year sentence for rape, sodomy, and unlawful assault on a female committed in October 1988 when he was subjected to an order under the Queensland regime. It was argued on behalf of Fardon that Australian courts cannot authorize the civil commitment of a person to prison; imprison a person on the basis that they are at risk of reoffending in the future; imprison a person for putatively therapeutic reasons without a finding of mental illness; authorize punishment, by way of reimprisonment, of a class of prisoners; or authorize double punishment (Keyzer et al. 2004; McSherry 2005).

It was argued that although there are no express constitutional principles protecting due process in the Australian Constitution it would be repugnant to the role of any institution called a court to imprison a person twice for a crime for which they have already been tried and punished. This argument had succeeded in an earlier case involving legislation that named a particular offender and engineered his reimprisonment without a criminal trial (Kable v Director of Public Prosecutions (NSW) 1996: 96–97, 106, 120, 132; Gray 2005; Keyzer 2008).

A majority of the High Court rejected these arguments in Fardon v Attorney-General (Qld) (2004: 592, 597, 610, 647, 654), holding that Queensland’s legislation was valid on the ground that it was enacted for the “non-punitive” purpose of rehabilitating sex offenders, and therefore did not effect double punishment. Chief Justice Gleeson characterized the legislation as authorizing preventive detention, not punitive detention (2004: 592). Justice McHugh stated that

the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment. (p. 597)
Justice Gummow, with whom Justice Hayne agreed (p. 647), pointed out that

the making of a continuing detention order with effect after expiry of the term for which
the appellant was sentenced in 1989 did not punish him twice, or increase his punishment
for the offences of which he has been convicted. (p. 610)

Justices Callinan and Heydon stated that

the Act, as the respondent submits, is intended to protect the community from predatory
sexual offenders. It is a protective law authorising involuntary detention in the interests
of public safety. Its proper characterization is as a protective rather than a punitive enact-
ment. (p. 654)

The foundation for the conclusion reached by the majority was that in a constitutional sys-
tem that does not have a bill of rights, it is appropriate to be guided by the legislature’s descrip-
tion of its policy objectives in determining whether a law is constitutionally valid. The legislation
was intended to protect the community, and it was asserted that further detention of serious sex
offenders adjudged to be a high risk to the community if released from prison would achieve that
objective. Since no principles of “due process” are constitutionally enshrined in Australia, the
characterization of the legislation as punitive arguably had no bearing on the resolution of the con-
stitutional question whether the law was a valid act of the Queensland Parliament. Chief Justice
Gleeson observed (p. 586):

There are important issues that could be raised about the legislative policy of continu-
ing 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 lib-
erty arise. This case, however, is not concerned with those wider issues.

Justice Kirby, in the sole dissenting judgment, adopted the written submissions of
Fardon and emphasized that civil commitment to prison of those who have not been con-
victed of a crime is repugnant to the exercise of judicial power. In particular, he stated (2004:
636–7):

Simply calling the imprisonment by a different name (detention) does not alter its true
character or punitive effect. Least of all does it do so in the case of an Act that fixes on
the subject’s status as a “prisoner” and “continues” the type of “detention” that previously
existed, that is, punitive imprisonment. Such an order, superimposed at the end of judicial
punishment for past crimes, must be distinguished from an order imposing imprisonment
for an indeterminate period also for past crimes that is part of the judicial assessment of
the punishment for such crimes, determined at the time of sentencing. There, at least, the
exercise of judicial power is addressed to past facts proved in a judicial process. Such a
sentence, whatever problems it raises for finality and proportionality, observes an histori-
cally conventional judicial practice. It involves the achievement of traditional sentencing
objectives, including retribution, deterrence and incapacitation applied prospectively. It
does not involve supplementing, at a future time, a previously final judicial sentence with
new orders that, because they are given effect by the continuation of the fact of imprison-
ment, amount to new punishment beyond that already imposed in accordance with law
(internal references omitted).

It is difficult to understand how the majority of the Australian High Court reached the
conclusion that the Queensland law was not punitive in nature, given that the detention
authorized by the legislation takes place in a prison. As Justice Kirby also observed in his dissenting judgment (pp. 643–4):

The Act under consideration includes amongst its objects “care” and “treatment” of a “particular class of prisoner to facilitate their rehabilitation” (DPSOA, s 3). However, in the scheme of the Act, this object obviously takes a distant second place (if any place at all) to the true purpose of the legislation, which is to provide for “the continued detention in custody … of a particular class of prisoner” (section 3(a)). If the real objective of the Act were to facilitate rehabilitation of certain prisoners retained in prison under a “continuing detention order,” significant, genuine and detailed provisions would have appeared in the Act for care, treatment and rehabilitation. There are none. Instead, the detainee remains effectively a prisoner. He or she is retained in a penal custodial institution, even as here the very prison in which the sentences of judicial punishment have been served. After the judicial sentence has concluded, the normal incidents of punishment continue. They are precisely the same.

In 1974, the Australian High Court had stated that its members “cannot understand how … imprisonment, either with or without hard labour, can, however enlightened the prison system is, be regarded as otherwise than a severe punishment (Power v The Queen 1974: 627; see also Witham v Holloway 1995). Similarly, in Kable v Director of Public Prosecutions (NSW) (1996), a majority of the High Court indicated that one of the grounds of constitutional invalidity in that case was that the legislation inflicted punishment in prison without a predicate criminal trial (Gray 2005; Keyzer 2008).

Within the narrow moral compass of Australian constitutionalism, the decisions of the majority justices were perfectly open to them. Still, it is remarkable that the justices in the majority in Fardon v Attorney-General (Qld) decided to resolve the case, at least in part, on the basis that prison is not punitive if a legislature says that it is not. A prison does not stop being punitive because a parliament characterizes its purpose as non-punitive (Keyzer 2008). Australian prisons are, on any sensible view, punitive environments. They are often characterized by overcrowding, substandard facilities, and climactic extremes. There is a lack of appropriate accommodation for differently classified inmates, particularly people who are mentally ill or have intellectual disability (Edney 2000). Psychiatric services are often inadequate or unavailable (Pereira 2001). Australian prisoners are routinely denied human rights (Edney 2002).

Even if Australian prisons were characterized by decent conditions, they would still be punitive. It may be acknowledged that there is no generally accepted theory of punishment, but there is no doubt that imprisonment is one variety of it. The deprivation of liberty in punitive conditions is what makes prison punitive. At any rate, the question of whether a person’s circumstances are properly characterized as punitive ought not be definitively resolved by the legislature authorizing the detention. The question must always be resolved by reference to the actual facts of a situation. In constitutional democracies, the power to determine the facts upon which the exercise of judicial power depends is always a matter for the courts (Wilson v Minister for Aboriginal and Torres Straits Islander Affairs 1996: 10–11).

It is plain that the Australian law of civil liberties has been retarded by the absence of a constitutionally entrenched (let alone a statutory) bill or charter of rights (O’Neill 1987). In the present context, this has meant that unlike in countries where constitutional or supranational guarantees of civil rights and liberties impose some conditions on system design, the Australian states have had carte blanche when it comes to the preventive detention of high-risk
offenders. This has allowed them to produce systems that (Keyzer et al. 2004; McSherry and Keyzer 2009)

- authorize the reimprisonment of a person without a fresh crime;
- authorize the reimprisonment of a person without a criminal trial;
- punish a person twice for a previous offence;
- distort sentencing principles by effectively lengthening them, breaking the nexus between community censure as a component of a sentence and the crime for which a sentence is imposed;
- distort sentencing principles by altering the deterrence value of a sentence, rendering sentences for sex offences, essentially, indeterminate;
- remove certainty from sentencing; and
- disturb the calculation of proportionality that takes place in sentencing by creating a system that enables them to be lengthened indefinitely.

The United Nations Human Rights Committee Decisions

In 2010, the HRC handed down its decisions in response to two communications brought by prisoners incarcerated under the Queensland and New South Wales regimes: Fardon v Australia (2010) and Tillman v Australia (2010). Ken Tillman was serving a 10-year sentence for sexually assaulting a minor when he was subjected to an order under the New South Wales regime. Both Fardon and Tillman filed communications with the HRC in 2007, and the HRC delivered its views in March 2010.

The communications both raised arguments that the regimes inflict arbitrary detention contrary to Article 9(1), double punishment contrary to Article 14(7), and a retroactive infliction of further punishment contrary to Article 15(1) of the ICCPR. Australia is a signatory to the ICCPR and its First Optional Protocol, which allows its citizens to make communications to the HRC to determine whether Australia (or its states) have breached the ICCPR. The HRC admitted the communications and decided that they should be determined on their merits.

Arbitrary Detention

Article 9 of the ICCPR provides that “no one shall be subjected to arbitrary arrest or detention.” Fardon and Tillman pointed out that the HRC and the House of Lords have described this as a fundamental human right (Kurt v Turkey 1997: para. 122, 123; A v Secretary of State for the Home Department 2004: para. 36). It is also a principle of customary international law (Lillich and Hannum 1995: 136), and a well-established principle of the common law (see the cases referred to by Justices Brennan, Deane, and Dawson in Chu Kheng Lim v Minister for Immigration 1992: 25–28).

In their communications, Fardon and Tillman pointed out that the HRC had previously stated that detention will be arbitrary and contrary to Article 9 if it is not reasonable, necessary in all the circumstances of the case and proportionate to achieving the legitimate ends of the state party (A v Australia 1997: para. 9.2, 9.4; C v Australia 2002: para. 8.2; Baban v Australia 2003: para. 7.2; D and E v Australia 2006: para. 7.2; Bakhtiyari v Australia 2003: para. 9.2 and 9.3; de Morais v Angola 2005: para. 6.1; Taright v Algeria 2006: para. 8.3; Shafiq v Australia 2006. See also A v Secretary of State for the Home Department 2004: per Lord Bingham). The HRC has stated that the “drafting history of article 9, paragraph 1” of the ICCPR “confirms that ‘arbitrariness’ must be interpreted broadly to proscribe detention that is inappropriate, unjust and unpredictable” (in van Alphen v The Netherlands 1990: para. 5.8). The sanctity of personal liberty has been recognized as requiring the strict construction of provisions authorizing exceptions to that
principle (see *van Alphen v The Netherlands* 1990: para. 5.8). This provision does not prohibit state parties to the ICCPR from authorizing their courts to order indefinite sentences that contain a preventive component (*Rameka v New Zealand* 2002: para. 7.2 and 7.3; Keyzer and Blay 2006). But, importantly, if a state party is able to achieve its legitimate ends by less invasive means than that of detention, detention will be considered to be arbitrary.

Fardon and Tillman argued that although there can be no doubt that the objective of rehabilitation and treatment of sex offenders is a legitimate one, the use of re-imprisonment to achieve it is not reasonable, nor is it necessary or proportionate to that objective (Keyzer 2009a). Australia could provide special facilities for offenders requiring preventive detention, in the cases where that is required (Keyzer and Coyle 2009).

The HRC, in an 11–2 ruling, upheld Fardon’s and Tillman’s complaints that the Queensland and New South Wales legislation respectively was (and, at the time of writing, presently is) contrary to Article 9. Before setting out the HRC’s reasons, it is convenient to outline Fardon’s and Tillman’s arguments under Articles 14 and 15 of the ICCPR. Article 14(7) prohibits double punishment, and Article 15(1) prohibits the retrospective infliction of punishment.

**Double and Retrospective Punishment**

In *Rameka v New Zealand* (2002), a case in which an indefinite sentence including a “preventive” component was under challenge, four members of the HRC, in a minority opinion, had observed:

> It is the very principle of detention based solely on potential dangerousness that [we] challenge, especially as detention of this kind often carries on from, and becomes a mere and, it would not be going too far to say, an “easy” extension of a penalty of imprisonment … While often presented as precautionary, measures of this kind in question are in reality penalties, and this change of their original nature constitutes a means of circumventing the provisions of articles 14 and 15 of the ICCPR.

The principles enunciated by the four members of the HRC in their minority opinion in *Rameka v New Zealand* (2002) applied directly to the circumstances of Fardon and Tillman (Keyzer and Blay 2006). Fardon and Tillman adopted the minority’s remarks in *Rameka’s* case and argued that the Queensland and New South Wales legislation inflicts double punishment and a retrospective increase in their punishment.

Australia, for its part, advanced the following argument in its submissions to the HRC in defense of the state regimes (Keyzer 2009b):

> The complainant argues that the mere fact that the detention takes place in a prison gives it a predominantly punitive character and that detention would need to take place in a special mental facility or hospital to avoid this … The Australian Government submits that this is not the case. As stated above, the complainant has access to the best available rehabilitative resources and facilities within the prison system. This enables the government to achieve the dual goals of ensuring the safety of the community through detention in a secure facility and rehabilitation by providing the individual with the most appropriate therapy.

The HRC observed that Australia had pointed to what it characterized as the “stringent test” to be applied by a court: that a court must be satisfied to a “high degree of probability” that the offender is likely to commit a further sexual offence. The court could take into account psychiatric reports and other evidence, including evidence relating to the likelihood of recidivism, the offender’s willingness to participate in rehabilitation programs, and any patterns of offending.

Australia argued that a supervision order would be inappropriate for Fardon or for Tillman, “for reasons of safety of the community and his own protection.” In prison, Fardon and Tillman
would have access to rehabilitation services that they would not have access to in the community. Australia argued that detaining these men for the purpose of ensuring they had access to rehabilitative programs was reasonably proportionate to the rehabilitative objectives of the legislation. Furthermore, the legislation contemplated periodic independent review by a court (Tillman v Australia 2010: para. 4.4).

A majority of 11 of the 13 members of the HRC did not accept this submission. The HRC declined the opportunity to apply Article 14(7), concluding instead that the New South Wales and Queensland preventive detention regimes (and by implication, the functionally identical regimes of Western Australia and Victoria) were inconsistent with Articles 9, 14, and 15 of the ICCPR. The HRC accepted the arguments of Fardon and Tillman that they were subject to the same regime of imprisonment as if they had been convicted of a criminal offence (for example, Tillman v Australia 2010: para. 5.3). Fardon and Tillman argued that their cases differed fundamentally from the Rameka decision and decisions of the European Court of Human Rights (Mansell v United Kingdom 1997; De Wilde, Ooms and Versyp v Belgium 1971; Iribarne Pérez v France 1995), in which courts had ordered the imprisonment of a person for preventive reasons at the time of sentencing. The imposition of further imprisonment after a person has served their original sentence constituted double punishment. This reimprisonment was independent of the initial criminal trial, took place after completion of a finite sentence, and without a finding of criminal guilt or any fresh crime. Furthermore, the HRC observed (in Tillman v Australia 2010: para. 5.5, and in like terms in Fardon v Australia 2010):

Mr Tillman reiterates that he neither disputes the lawfulness of his continuing detention order, nor the legitimacy of the legislative objective to protect the community from harm. Mr Tillman disputes that utilization of re-imprisonment to achieve the objectives of the CSSOA, in particular the objective of rehabilitation. He claims that rehabilitation can only be tested when a person has (some) liberty .... He maintains that imprisonment is not necessary to achieve the legitimate objective of rehabilitation of a person in the interest of the protection of the community, which could be achieved by psychiatric and psychological services in a community setting which balances the safety of the community with the rehabilitative needs of the former offender. He submits that the CSSOA inflicts arbitrary detention contrary to article 9, paragraph 1, of the Covenant because it inflicts imprisonment on the basis of what a person might do rather than on what a person has done.

After setting out the arguments put by Fardon and Tillman, the majority of the HRC stated it had come to the conclusion that the continuing detention of these men under the Australian regimes was arbitrary and therefore violated Article 9(1) of the ICCPR. This was so “for a number of reasons, each of which would, by itself, constitute a violation” (2010: para. 7.4):

(1) Mr Tillman has already served his 10 year term of imprisonment and yet he continued, in actual fact, to be subjected to imprisonment in pursuance of a law which characterizes his continued incarceration under the same prison regime as detention. His purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law.

(2) Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. Mr Tillman’s further term of imprisonment was the result of Court orders made, some 10 years after his conviction and sentence, in respect of predicted future criminal conduct which had its basis in the very offence for which he has already served his sentence. This new sentence was the
result of fresh proceedings, though nominally characterized as “civil proceedings,” and fall within the prohibition of Article 15, paragraph 1, of the Covenant. In this regard, the Committee further observed that, since the [New South Wales Act] was enacted in 2006 shortly before the expiry of the author’s sentence for an offence for which he had been convicted in 1998 and which because an essential element in the Court order for his continued incarceration, the [Act] was being retroactively applied to the author. This also falls within the prohibition of article 15, paragraph 1, of the Covenant, in that he has been subjected to a heavier penalty “than was applicable at the time when the criminal offence was committed.” The Committee therefore considers that detention pursuant to proceedings incompatible with article 15 is necessarily arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

(3) The [Act] prescribed a particular procedure to obtain the relevant Court orders. This particular procedure, as the State party conceded, was designed to be civil in character. It did not, therefore, meet the due process guarantees required under article 14 of the Covenant for a fair trial in which a penal sentence is imposed.

The Implications of the Fardon and Tillman Decisions

The Fardon and Tillman decisions reinforce the purely utilitarian rationale for preventive detention outside the criminal sentencing context; they require a focus on the policies and practices that should be applied to achieve therapeutic and rehabilitative objectives. The Australian states, should they wish to honor the ICCPR, will need to devise new strategies for the management of released offenders that do not employ reimprisonment. In Tillman (2010: para. 7.4, and in similar terms in Fardon v Australia 2010), the HRC stated:

(4) The “detention” of the author as a “prisoner” under the [New South Wales Act] was ordered because it was feared that he might be a danger to the community in the future and for the purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the Case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The [Act], on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behavior of a past offender which may or may not materialize. To avoid arbitrariness, in these circumstances, the State party should have demonstrated that the author’s rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention.

The HRC’s use of the disjunctive word or in the last line of this quotation indicates that even civil detention regimes such as those that exist in the United States should they emerge in Australia in the light of these decisions as an alternative to the use of prison as a venue for preventive detention will need to incorporate genuine rehabilitative and therapeutic measures in order to realize the obligation arising under Article 10(3) of the ICCPR to take steps to rehabilitate offenders. Article 10(3) provides that the “penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

Australia is under no legal obligation to comply with the decisions of the HRC. The HRC’s opinions are not legally binding on the Australian government (Blay and Piotrowicz 2000). It is not a court of appeal. However neither can a state party “invoke the provisions of its internal law

http://www.routledgementalhealth.com/dangerous-people-9780415884952
The international human rights Parameters for the Preventive Detention of Serious Sex Offenders


Does it mean that, in the context of the ICCPR, a state can adopt any legislation in municipal law regarding detention, for instance, and argue that its obligations are met if such legislation is in accordance with its legal system?

Blay and Piotrowicz, after considering this question in the light of other decisions of the HRC concerning Article 9, and the Australian practice of detaining asylum seekers pending determination of their status, conclude that “the standard for assessing whether the state has in fact met its obligations remains in the domain of international law” and cannot be determined by reference to local (Australian) standards (Blay and Piotrowicz 2000: 18). In short,

the standard for assessing the state’s conduct is not to be calculated by reference only to what it does within its own jurisdiction; to do so would render the essence of its international obligations meaningless.

If the foregoing analysis is correct, then the Australian states that have adopted reimprisonment policies will now need to devise and implement policies for the management of serious sex offenders that are genuinely aimed at rehabilitation and in the community.

What Does Australia Need to Do to Comply with the Human Rights Committee’s Decisions?

It looks as if there is a lot of work ahead for the four states that have implemented these regimes. The cases indicate that (McSherry and Keyzer 2009: 70–76)

- sex offender treatment programs are only available to a limited number of prisoners;
- sex offender treatment programs are only available in a limited number of prisons;
- waiting lists are long;
- there is limited availability of sex offender treatment maintenance programs in the community; and
- sex offender treatment maintenance programs are only available in urban areas.

Administrative oversights by corrective services departments in rationing access to treatment programs would be laughable if they were not so serious. Gough v Southern Queensland Regional Parole Board (2008) illustrates the problem. In this case, a sex offender, representing himself, brought an application in the Supreme Court for judicial review of a decision by the parole board to deny him parole. Gough had been sentenced in November 2006 to four and a half years imprisonment and was given a parole eligibility date of 24 February 2008. On 25 October 2007 the parole board received an application for parole from the prisoner, who indicated that he had “continually and persistently lobbied prison authorities to be permitted to participate in appropriate intervention courses” but his pleas had “fallen on deaf ears” (at 2008: para. 2). The Supreme Court observed (at 2008: para. 6):

For reasons that are unexplained by the evidence, Queensland Corrective Services (“QCS”) did not offer the applicant one of the intervention programs that the applicant was prepared to undertake so as to enable him to commence, let alone complete, the programs prior to his application for parole being considered in late 2007 and prior to his parole eligibility date of 24 February 2008. In the result, the applicant, through no fault of his own, was unable to rely in his application to the Board upon the results of his participation in such programs. The relapse prevention plan that the applicant submitted was not enhanced by any benefits that such programs may have provided to him.

http://www.routledgementalhealth.com/dangerous-people-9780415884952
The Queensland Department of Corrective Services had provided no evidence to the Court that it was not practicable for the prisoner to enter and complete the recommended programs prior to his parole eligibility date (Gough 2008: para. 57). Yet the parole board had stated in its reasons for denying parole that the prisoner lacked insight regarding his pattern of offending behavior and that this “was to be expected, given that he had not completed any interventions” (at 2008: para. 61). Justice Applegarth concluded that the parole board erred in law by reaching its conclusion to deny parole without any regard to why the applicant had yet to complete the programs (2008: para. 72).

Other problems that have been identified with Australian preventive detention regimes include

- inadequate employment and social services;
- an absence of substance abuse relapse prevention planning (see McSherry and Keyzer, 2009: 75–76); and
- a lack of funding.

Planning for transition to the community, and the provision of community-based supports, has been poor (McSherry and Keyzer 2009: 75–83). There is a high correlation between the lack of post-release housing options and recidivism (see John Petrila’s chapter in this volume). But the cases indicate that often the housing that is available is utterly inappropriate (Attorney-General (Qld) v Fardon 2007: para. 29; Attorney-General (Qld) v Toms 2007: para. 15–16; Attorney-General (Qld) v Yeo 2007: [42]). The Queensland Department of Corrective Services has offered “accommodation” on the prison property at Wacol Correctional Centre that is located only 20 meters from the prison and is surrounded by a 10-meter-high barbed wire fence (Keyzer and Coyle 2009). Twenty-four-hour closed-circuit television and floodlights have been installed. A dog squad officer has also been placed just outside the new facility as an added security measure. All residents are given a security classification rating before moving into the precinct and are required to carry Queensland Corrective Services identification cards at all times. Similar accommodation is provided at Victoria’s Ararat Prison.

Justice Chesterman described the Wacol Prison Reserve in the following terms (Toms 2007: para. 15):

[Toms] was moved to accommodation at Wacol near the prison which was far less suitable. One of his neighbours was a notorious criminal and paedophile with whom the respondent was thrown in contact. The location is isolated and offers no opportunity for positive social interaction or employment. The respondent told Dr James that his location at Wacol made his anticipated rehabilitation into society more difficult and he found the consumption of alcohol alleviated his sense of isolation and rejection.

Therapeutic interventions do not appear to be the focus of activity in the Prison Reserve. In Attorney-General (Qld) v Currie (2009: para. 13), the director of the High Risk Offender Management Unit within the Queensland Corrective Services Department (QCS) gave evidence that whilst some initial support is offered on a case by case basis, offenders are expected to live independently and are responsible for their own reintegration activities in accordance with the conditions of their order … The precinct does not provide an intensive personal support program and does not include such activities as escorted leave.

The Supreme Court has exhorted the QCS to find better accommodation meeting the recommendations of psychiatrists “as a matter of urgency” (Toms 2008: para. 23). However, for an increasing number of prisoners there appears to be no other option for them than the Wacol Prison Reserve (see Attorney-General (Qld) v George 2009: para. 41). Developing a sensible and properly funded policy for pre-release planning and post-release housing and community
support for people who are released from prison is in the best interests of the community, and would therefore help to realize the scheme’s paramount concern for the protection of the community (Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) sec. 13(6)).

It is difficult to avoid the conclusion that the principal objective of the Australian states has been to maintain control of offenders who have served their sentences, with positive therapeutic outcomes being at best an afterthought (Fardon v Attorney-General (Queensland) 2004: 640). Indeed, this conclusion is reinforced when one considers the objects clause of the legislation in each of the states, which refers to “care, control or treatment” (Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) sec. 3). Although the courts have urged a reading of the legislation that emphasizes its therapeutic objectives, it must be recognized that the objects clause of the legislation in these states indicates that the formal intention of the legislation is the “control, care or treatment” of offenders. As the Supreme Court of Queensland observed in Attorney-General (Qld) v Downs (2008), as a matter of ordinary language, these objects must be read disjunctively. In other words, it is open to a court to make an order that has nothing to do with the care or treatment of an offender, and instead is only based on the need to control him (for example, see Attorney-General (Qld) v Lawrence 2008; Attorney-General (Qld) v Hynds 2007).

Conclusion
To respond to the HRC’s decision, the Australian government, in partnership with the four states that have adopted this technique of preventive reimprisonment, will need to work out what to do with the offenders who are currently in prison under these laws who, in the HRC’s opinion, should not be. These prisoners may have been judged to be high risk by the state Supreme Courts, so there is a need for suitable facilities that are not prisons to provide accommodation for these offenders while efforts are made to assist them with transition to the community.

Perhaps the United States civil commitment model could provide a short-term solution to this problem, and a longer-term solution for “the worst of the worst.” However the very strident criticisms of the United States systems considered elsewhere in this volume (see the chapters by Eric Janus, Christopher Slobogin, John La Fond, and John Petrila) need to be borne in mind by Australian policymakers. The HRC has expressly indicated that rehabilitation needs to be the fundamental objective, not punishment. A secure hospital incorporating a graduated release program with support in the community is warranted.

Second, state governments need to think quickly but also carefully about what they will do after that. Sooner or later most offenders are released. In addition to securing accommodation options in the community (a foundation for other community-based services), released sex offenders need access to treatment programs run by well-qualified professionals who can work with offenders so that they can learn how to reintegrate into society and live crime-free lives. Released offenders need access to employment opportunities, substance-abuse relapse-prevention programs, and to undertake healthy leisure activities. For some offenders, antilibidinal medication may also be required. Again, all of these services need to be provided by well-qualified professionals, ideally by an agency that is independent of government and committed to the maintenance of high standards. Scotland has started promising experiments in this area that are considered by others in this volume (see the chapters by Innes Fyte and Yvonne Gailey, and Raj Darjee and Katharine Russell).

Third, state governments need to review prison-based systems for sex offender treatment and risk management. There is evidence of mismanagement and also poor funding. Treatment programs are only made available to a limited number of prisoners in a limited number of prisons. Offenders should not have to beg to be included in these programs.

http://www.routledgementalhealth.com/dangerous-people-9780415884952
Plainly, the HRC’s decisions in Fardon and Tillman also have significant implications for the preventive detention of serious sex offenders in countries other than Australia, particularly those countries that have signed the First Optional Protocol to the ICCPR, which contemplates that citizens of those countries can file communications with the HRC. Further consideration of these international implications is outside the scope of this chapter, but the implications are considered to some extent in the chapter by Ronli Sifris in this volume. It is notable that neither the United States nor the United Kingdom has signed the First Optional Protocol although freedom from arbitrary detention is guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms.