



## Risk Assessment for the Courts: Finding the Middle Ground

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**Professor Bernadette McSherry**  
Australian Research Council Federation Fellow  
Faculty of Law  
Building 12  
Monash University  
Clayton Vic 3800  
Australia  
Bernadette.McSherry@law.monash.edu.au

### Introduction

A range of schemes has been developed throughout history aimed at protecting society from certain 'out' groups. David Garland (1996) has referred to the concept of the 'alien other' whose dangerousness can only be addressed by removing such individuals from circulation in order to protect the public.

In our book *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (2009), Patrick Keyzer and I have explored the notion of 'precautionary politics' and have compared three different types of preventive detention schemes aimed primarily at serious sex offenders. 'Precautionary politics' plays a part in the development of 'pre-crime' preventive detention measures such as detention without charge of suspected terrorists as well as 'post-crime' measures such as the detention of sex offenders in prison or special facilities and their supervision *after* sentence.



What has been termed the ‘precautionary principle’ stems from environmental science and posits that where the risk of harm is unpredictable and uncertain and where the damage wrought will be irreversible, any lack of scientific certainty in relation to the nature of the harm or its consequences should not prevent action being taken (Sunstein, 2005). The precautionary principle ousts risk-based or evidence-based approaches to public policy and is best summed up by Australia’s former Prime Minister, John Howard (2007) who said, when asked about the preventive detention without charge of suspected terrorists: “it’s better to be safe than sorry”.

In this paper, I want to concentrate on schemes that take away the liberty of serious sex offenders and the ethics of risk assessment testimony in this regard. My position is that the concept of the ‘structured professional judgment’ approach to violence risk assessment can be ethically justifiable in determining an individual’s ‘risk needs’, but raises specific ethical problems when related to predicting future violence for the purpose of preventive detention and supervision schemes. In order to raise these issues, I will focus on the case of Kenneth Davidson Tillman who became the first person to be preventively detained in prison in New South Wales *after* the expiry of a ten year sentence for sexual assault: *Attorney General for the State of New South Wales v Tillman* [2007] NSWSC 605.

## **Case Study – Kenneth Davidson Tillman**

Kenneth Davidson Tillman is a 48-year-old Aboriginal man who was raised in an abusive family environment. Tillman and his mother were physically abused by his alcoholic father. At the age of 8, he watched his grandfather beat his grandmother to death. As a child, he was shunted between relatives and various children’s homes. For some time, he stayed with his maternal grandmother who had many sexual partners. He was sexually abused in an institutional setting and at home.

Tillman first came before the Children’s Court when he was 9 years old. He was found to be a neglected child and he was released on probation. He was made a ward of the Minister when he was 14 years old.



After committing some minor offences of dishonesty, Tillman committed his first sexual offence at the age of 15. He followed a 22 year old woman from a railway station to her home and managed to gain entry by claiming that he needed to telephone his mother. Once inside the house, he raped the woman at knife point. He was sentenced to 8 years imprisonment for that offence and was released on parole on 3 November 1980.

Tillman was subsequently convicted of a number of theft and assault offences and on 7 August 1982 while he was still on parole, he raped a 13 year old girl after drinking with her and some other people around a fire on a river bank. Tillman pleaded guilty to this offence and told the police that he had a drinking problem and that he tended to get into trouble when he drank.

While he was on bail, on 23 July 1983, Tillman digitally raped a 15 year old girl who was able to get away from him after she called for help. He served prison time for these offences as well as for other dishonesty and driving offences. In 1989, Tillman was charged with sexually assaulting the 10 year old daughter of his then girlfriend. He was sentenced to four and a half years imprisonment for this offence.

Tillman was released from custody in 1995. In 1997, he was charged with sexually assaulting the 9 year old daughter of his de facto partner while she was in hospital giving birth to their baby. While on bail for that charge, Tillman assaulted a 15 year old girl after taking her to a derelict house and holding her by the neck before letting her go. Tillman served a 10 year prison term for these offences. He maintained that he had not committed these latter offences and refused to take part in the Custody-Based Intensive Treatment program (CUBIT), a group treatment program run by the Department of Corrective Services for sex offenders.

While in prison, Tillman undertook a Bachelor of Social Science in Aboriginal Health and completed the academic requirements for the degree, save for the practical component.



In 2006, the New South Wales government enacted the *Crimes (Serious Sex Offenders) Act* which was based on Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003* and which enables serious sex offenders to be detained in prison *after* the expiry of their sentences or supervised in the community. Tillman became the first person to be detained in prison under the New South Wales legislation.

## Preventive Detention Schemes

There is no doubt that serial offenders such as Kenneth Davidson Tillman pose enormous challenges for governments. The 'better safe than sorry' approach has led to various schemes being developed aimed at protecting the community from serious sex offenders. The following table shows three different types of such schemes.

**Table 1: Three Types of Preventive Detention Schemes**

The Australian Model (Qld/NSW/WA/Vic)	The United States of America Model	The Scottish Model
Continuing civil detention in prison or supervision in the community <i>after</i> sentence has expired.	Continuing civil detention of 'sexually violent predators' in secure facilities <i>after</i> sentence has expired.	Orders for lifelong restriction of high-risk offenders <i>at the time</i> of sentence.
Court must be satisfied to 'a high degree of probability' that the individual is a 'serious danger to the community' based on whether there is an 'unacceptable risk' that the individual will commit a serious sexual offence if released.	Court must be satisfied 'beyond reasonable doubt' that the individual is a 'sexually violent predator' who 'more probably than not' will engage in predatory acts of violence if released.	Court decides 'on the balance of probabilities' whether there is 'a likelihood' that the offender will seriously endanger the lives, or physical or psychological well-being of members of the public if not subject to the order.
Two psychiatrists are required to report the level of risk that the individual will commit another serious sexual offence (Evidence from other mental health professionals may be led).	Dept of Social and Health Services accredits evaluators (usually psychiatrists or psychologists) who report whether the individual has a 'mental abnormality or personality disorder which makes the person likely to engage in predatory acts of violence'.	The Risk Management Authority accredits mental health professionals (including social workers) who report whether the risk of re-offending is high, medium or low.



Both the Australian and United States schemes come into play after the expiry of an offender's sentence. The Scottish scheme is broadest in scope because it is not restricted to sex offenders, but covers those convicted of serious violent or sex offences. This scheme is brought into play at the time of sentencing, reflecting pre-existing schemes for indefinite detention, but providing a level of treatment and staggered release into the community that is unique.

The post-sentence detention of individuals in prison raises a number of human rights issues. The Queensland legislation was found to be constitutional by a majority of the High Court in *Fardon v Attorney-General (Qld)* (2004) 233 CLR 575. Only Justice Kirby in dissent focused on the policy issues as to why preventive detention was not constitutionally valid. Subsequently, a petition was made to the Human Rights Committee of the United Nations under the First Optional Protocol to the International Covenant on Civil and Political Rights claiming that Kenneth Davidson Tillman's human rights had been abused under the New South Wales legislation. The Human Rights Committee last month handed down its decision that the legislation breaches Article 9(1) of the Convention which provides that '[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention...'

This finding raises the question as to whether it is ethical to give risk assessment testimony knowing that a person's right to liberty will be taken away. There are three possible answers to this question which I want to explore. The two extreme positions are 'always ethical' and 'never ethical' with the middle ground being 'ethical in certain circumstances'.

## **Always Ethical**

One extreme approach to the question of ethical risk assessment, is to take the stance that mental health professionals must always perform their job and leave any ethical justifications to other professionals. Thomas Grisso and Paul Appelbaum (1992, p 630) have outlined this position as being one that leaves 'questions of justification to the courts and society to determine, not the mental



health professionals'. Thus it is for Parliament to create laws restricting the liberties of individuals and for mental health professionals to comply with what is legally required of them in this regard.

The main problem with this approach is that it makes mental health professionals agents of state control, which can have dire consequences for certain groups of individuals. One example of this occurred during the Nazi era when psychiatrists were 'instrumental in instituting a system of identifying, notifying, transporting, and killing hundreds of thousands of mentally ill and "racially and cognitively compromised" individuals in settings ranging from centralized psychiatric hospitals to prisons and death camps' (Strous, 2007; see also Seeman, 2005) It also ignores the obligations placed on mental health professionals through various Codes of Ethics to comply with ethical standards and even to seek changes in laws when they are contrary to the best interests of individuals (for example, American Psychiatric Association, 2009, s 3).

## **Never Ethical**

The polar opposite of the 'always ethical' approach is to hold that it is never ethical to give risk assessment testimony. More than two decades ago, Alan Stone (1984) started a debate in the United States about the ethics of forensic psychiatry, arguing that as a matter of individual ethical commitment, he could not justify himself giving evidence for the purposes of the criminal justice system. While he did not go so far as to say that psychiatrists should *never* testify in court, he pointed out that those who did so risked violating the ethics relevant to those whose primary duty was to treat individuals.

Three years later, Gary Melton, John Petrila, Norman Poythress and Christopher Slobogin (1987, p 204) argued that, in relation to risk assessment, there is 'no specialized clinical knowledge that permits categorical, or even relative conclusions about dangerousness'. As a result, they stated (p 205) that mental health professionals 'may decide that they cannot ethically offer prediction testimony'. More adamantly, Charles Ewing (1991, p 162) has argued that '[t]he psychiatrist or psychologist who makes a prediction of dangerousness violates his



or her ethical obligation to register judgments that rest on a scientific basis'. Similarly, Eric Janus (2004, p 50) has stated that the indeterminacy of legal terms such as 'likely' or 'highly likely' require mental health professionals to 'make political judgments that determine the balance between public safety and individual liberty'.

The Royal College of Psychiatrists for the United Kingdom and the Republic of Ireland held a seminar on the ethics of giving evidence for extended sentencing purposes in 2002. It published an overview of the discussion in the *Psychiatric Bulletin* in 2005 and stated that one view aired was that 'it is not ethically part of medicine to assist the courts in increasing punishment and public protection by applying medical skills to such a purpose' (Royal College of Psychiatrists, 2005, p 75).

Refusing to engage in risk assessments for the purposes of the criminal justice system on the basis that it is unethical to do so is obviously an extreme action. Risk assessment not only informs decisions concerning the detention of offenders, but also the law relating to the civil commitment of individuals with mental illnesses, child protection and detention to prevent the spread of infectious diseases. In reality, only a few mental health professionals will take this extreme approach, but such a position does force mental health professionals to consider whether and in what circumstances giving such testimony is justifiable.

I believe that there is a middle ground between these two extreme approaches, but there remain problematic issues that need to be considered in relation to preventive detention schemes.

## **Ethical in Certain Circumstances**

One 'middle ground' approach is to extend acting for the benefit of the patient under traditional medical ethics to acting for the benefit of the offender. That is, mental health professionals should assume when accepting a call for risk assessment by the courts that there is always some prospect of treatment or benefit available for the offender concerned. This may be a less than ideal approach, however, when it is known that adequate treatment is not available.



Another approach to extending existing medical ethics is to act only where it is known that the offender will indeed receive some form of individual health benefit. Going one step further, this could mean acting only on behalf of the offender rather than for the state. This however assumes that mental health professionals will know when treatment is available and when it will be of benefit. It may also lead to a refusal to assess certain individuals who are not considered 'treatable', thus depriving them of any form of expert evidence.

A more practical approach is to use a different ethical framework for forensic psychiatry beyond that of medical ethics which attaches such importance to treatment. The Royal College of Psychiatrists refers to this as 'justice ethics' which appears to stem from Paul Appelbaum's work (1984, 1990, 1997) that forensic psychiatry should use a framework of ethics based on 'truth' rather than 'beneficence'. This approach requires the fundamental value of truth telling and respect for the individual, with the ultimate goal being to advance justice rather than to act for the benefit of the individual patient. The principle of truth telling requires testifying as to what the mental health professional believes to be true, regardless of whether this advantages or disadvantages the particular offender, but it also requires an accurate presentation of the scientific data available and the consensus of the field (Appelbaum, 2008). In relation to testimony using actuarial scales, for example, this principle would require the mental health professional to outline the limitations of the scales used (Morse, 2008).

The principle of respect for persons requires respect for the individual being assessed. In Appelbaum's words (2008, p 197) this requires that mental health professionals should not 'engage in deception, exploitation, or needless invasion of the privacy of the people who we examine or about whom we testify'.

In relation to risk assessment, Thomas Grisso and Paul Appelbaum (1992, p 631) have argued that a mid-way point is to see predictive testimony as neither ethical or unethical in itself, but the *use* of the testimony may be ethical or unethical given the variability in the types of liberty restrictions involved. This may mean that the use of risk assessment to breach an individual's right to liberty is unethical and this has been argued by some psychiatrists.



## **Unethical for Post-Sentence Preventive Detention**

Danny Sullivan, Paul Mullen and Michele Pathé are three psychiatrists working in Victoria who have questioned the ethics of requiring clinicians to assess risk for the purposes of continued coercive supervision after sentence. They have pointed out that being required to give evidence for preventive detention schemes raises the spectre of mental health professionals being ‘agents of supervision, social control and monitoring’ rather than ‘independent clinicians’ (2005, p 320).

The Royal College (2005, p 75) noted that there ‘may be an ethical argument for ensuring that disagreements regarding mental disorder and risk are considered early on at the point of sentencing when the court, rather than doctors, can decide these issues’. This suggests that it is more ethically justifiable to give evidence for the Scottish scheme which operates at the time of sentence than preventive detention schemes that operate *after* the expiry of an individual’s sentence as in Australia and the United States.

This position may run into the same problem in reality as that in relation to a complete refusal to engage in providing testimony for the criminal justice system – there will always be some mental health professionals willing to engage with legislative requirements to provide assessments of risk. However, at the very least, this position does raise the issue of mental health professionals being agents of social control and provides a starting point for distinguishing between the justifications for risk assessment for sentencing purposes within the criminal justice system as opposed to risk assessment for ‘civil’ forms of detention outside of the criminal justice system.

## **Judicial Commentary**

The first Australian scheme for preventive detention and supervision has been in operation for over six years and Patrick Keyzer and I are currently analysing some of the themes in the judicial decisions relating to preventive detention in Queensland, New South Wales and Western Australia.



While most expert evidence on risk has been accepted without question, some members of the Western Australian judiciary have been concerned with the use of actuarial risk assessment scales in relation to preventive detention. I want to examine some of the comments made in the Western Australian case law as they raise similar issues to those that have concerned Danny Sullivan, Paul Mullen and Michele Pathé mentioned above. Many of the Western Australian cases deal with indigenous offenders and it may be that as a result, there has been a greater skepticism shown towards the relevance of North American scales in such instances in comparison to other states with smaller indigenous populations.

One of the significant features of the Western Australian jurisprudence has been the focus placed on the requirement of 'acceptable and cogent' evidence under section 7 of the *Dangerous Sexual Offenders Act 2006 (WA)* and the rejection of the use of actuarial scales in this regard. Certain Supreme Court justices have criticised the use of actuarial tools that have not been validated by reference to the Western Australian population and indigenous offenders in particular. The 'Static-99' (Hanson and Thornton, 1999) which consists of ten items relating to 'static' variables such as age, persistence of sexual offending, relationship to victims and general criminality has been the focus of much of the criticism.

In *Director of Public Prosecutions (WA) v Moolarvie* [2008] WASC 37 at [41]-[44], Justice Blaxell remarked:

The evidence before me shows that various instruments or tools have been developed over the past 10 years in response to concerns that subjective clinical assessments as to the risk of sexual reoffending might be unreliable. It is also clear from a number of published articles in reputable international ... that these tools are at an early stage of development and involve an area of behavioural science which is the subject of some controversy... The 'Static 99' is one such actuarial risk assessment instrument. ... Its great shortcoming is that it does not take account of dynamic or changing factors which might increase or reduce the risk, and which would differentiate an individual offender from the group. A further drawback of the 'Static 99' (in the context of the present application) is that it purports to assess the risk of recidivism for sexual offending generally rather than for 'serious sexual offending' as defined by the Act... Yet another problem with the 'Static 99' is that it was developed for use with Canadian and English offenders of European origin. The



literature suggests that risk factors for indigenous violence may well differ from those for non-indigenous Australians and people of other cultures.

In *Director of Public Prosecutions for Western Australia v Mangolamara* [2007] WASC 71 (2007) 169 A Crim R 379, Justice Hasluck rejected psychiatric evidence based on the Static-99, the Sexual Violence Risk-20 (Boer, Hart, Kropp and Webster, 1997) and the Risk of Sexual Violence Protocol (Hart et al, 2003). He stated at [165]:

I am of the view... that little weight should be given to those parts of the reports concerning the assessment tools. In my view, the evidence in question does not conform to long-established rules concerning expert evidence. The research data and methods underlying the assessment tools are assumed to be correct but this has not been established by the evidence. It has not been made clear to me whether the context for which the categories of assessment reflected in the relevant texts or manuals were devised is that of treatment and intervention or that of sentencing.

In *Director of Public Prosecutions (WA) v GTR* [2007] WASC 318 at [111]-[112], McKechnie J suggested that none of the actuarial instruments should be used for preventive detention or supervision:

I cannot attribute significant weight to the expert psychiatric opinions as to risk. I accept that the use of one or more predictive models, with or without a clinical interview and appraisal, may be helpful in determining a counselling regime or a management strategy for an offender... Within that context there is usefulness in the models to aid the offender's rehabilitation, to customise a course of treatment or therapy, and to plan for the offender's release to the community... However, an application under the [*Dangerous Sexual Offenders Act*] requires more intense scrutiny. The respondent's liberty may be removed or curtailed because of a prediction which a judge is required to make as to future offending... While opinions based on the present predictive models may be suitable for management purposes, they lack cogency for the purposes of the [*Dangerous Sexual Offenders Act*] that little weight can be attributed to the results of assessments that rely on them.

This was obviously a very significant holding, but a natural extension of the logic of Justice Hasluck's critical appraisal of actuarial tools in *Director of Public Prosecutions for Western Australia v Mangolamara* [2007] WASC 71. However, Justice McKechnie's broad approach was narrowed on appeal in *Director of Prosecutions (WA) v GTR* [2008] WASCA 187. Murray AJA stated at [162]:

For myself, with respect, I would not, having regard to the evidence in this case, have expressed that conclusion so broadly. His Honour did not need to globally discard the predictive models insofar as they might be applied to any case, but in relation to this case, having regard to the limitations inherent in those predictive models, as noted by



McKechnie J, it seems to me that it was well open to him, in view of the lack of clinical support for the assessment made, to have reservations about the cogency of the psychiatric evidence.

Justice McKechnie in *Director of Public Prosecutions (WA) v Comeagain* [2008] WASC 235 nevertheless remained highly critical of actuarial scales, stating at [20]:

There remains an issue with all the predictive tools in that they have not yet been validated. They were developed, in part, to overcome the perceived and actual weaknesses of an unguided clinical assessment and have been embraced by professionals, psychiatrists and psychologists, as an improvement on an unguided assessment. Nevertheless, it would be an error to attribute a degree of scientific certainty to the tools simply because they deliver an arithmetical outcome. They remain unvalidated. Years will have to pass before a retrospective survey can determine whether and, to what extent, the predictive tools are reliable.

Certain Western Australian judges have thus expressed scepticism as to the use of actuarial risk assessment tools for the purpose of preventive detention and supervision. Justice McKechnie has pointed out that such tools may be useful for the purpose of customising treatment, but has doubted whether they are useful at all in the context of preventive detention.

## **Conclusion**

The focus of this conference is on principles and values in risk assessment and management. In relation to forensic risk assessment, it would seem that the principles of truth and respect for persons can provide the foundations for a 'middle ground' approach towards giving ethical testimony.

However there is still a sense of unease apparent in various quarters concerning the prediction of risk for the purposes of taking away an individual's liberty. The case of Kenneth Davidson Tillman indicates that while preventive detention for the purpose of community protection can appear to be an attractive option for governments in the context of precautionary politics, detaining an individual in prison post-sentence breaches the right to liberty. The advantage of the Scottish scheme for high-risk offenders is that it operates at the time of sentence rather than post-sentence which alleviates to some degree the ethical concerns raised by the Australian and United States schemes.



It is also important to point out that the Scottish Risk Management Authority not only accredits risk assessors, it also sets high standards and guidelines for risk assessment reports. This is not the case in Australia.

There is some scepticism of risk assessment methods reflected in the research literature on forensic risk assessment (see eg Cooke and Michie, 2009; Cooke 2010). The literature on risk for management purposes appears to be moving on from simply examining the likelihood of risk (Lewis and Doyle, 2009) towards contextual models for structured clinical judgment. While certain Western Australian judges have questioned the use of actuarial risk assessment tools in expert evidence, most of the case law across Australian jurisdictions indicates an acceptance of expert testimony without question.

The liberty of the person is a fundamental human right and should not be breached without proper ethical and legal justification. The role of mental health professionals in depriving individuals of their liberty needs to be carefully considered. Last year, in addressing the International Association of Forensic Mental Health Services conference, I referred to the ethics of risk assessment testimony as being the 'elephant in the room' that few were acknowledging. I am very grateful to the Risk Management Authority for seeing that elephant and giving us the opportunity today to debate what principles and values should guide both clinical and forensic risk management as well as testimony for the courts.



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