



Preventive Detention of Sex Offenders: Recent Trends

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Introduction

The prospect of convicted sex offenders reoffending when released from prison has been the subject of significant community concern. This has particularly been apparent in the response to high profile cases such as the release of child sex offender, Dennis Ferguson, in Queensland in 2003 and, after a subsequent acquittal, in New South Wales in 2009. Accordingly, governments have been keen to develop ways in which sex offenders can be detained and/or supervised in order to prevent reoffending.

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 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 the 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 will outline current schemes that take away the liberty of serious sex offenders and the recent decisions of the Human Rights Committee of the United Nations which cast doubt on the legality of Australian schemes enabling post-sentence detention of sex offenders *in prison*. As a way of explaining why these schemes exist, 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 10 year sentence for sexual assault: *Attorney General for the State of New South Wales v Tillman* [2007] NSWSC 605. In the penultimate section, I will raise some of the problems with risk assessment testimony that have been highlighted predominantly by judges in Western Australia.

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 eight, 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 nine 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 eight 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 nine-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 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.

* *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

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 sexual 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 Kirby J in dissent focused on the policy issues as to why preventive detention was not constitutionally valid.

Subsequently, two petitions were made to the Human Rights Committee of the United Nations under the First Optional Protocol to the International Covenant on Civil and Political Rights (the ICCPR) claiming that Robert John Fardon and Kenneth Davidson Tillman's human rights had been abused under the Queensland and New South Wales legislation (Keyzer and Blay, 2006). In March, the Human Rights Committee handed down two decisions finding that the power to detain offenders in prison post-sentence breaches Article 9(1) of the ICCPR 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...' (*Re Fardon* 2010; *Re Tillman* 2010). This is explained more fully in the following section.

The Fardon and Tillman Communications

The main arguments raised in the *Fardon* and *Tillman* communications dealt with the right to liberty under Article 9(1) and the right not to be punished again for an offence under Article 14(7) of the ICCPR. The Human Rights Committee made a number of observations in both decisions concerning Article 9(1) and did not consider it necessary to examine the matter separately under Article 14(7).

It should be noted that the fact that the majority of the High Court ruled in *Fardon's* case that the Queensland legislation was constitutional is irrelevant to a determination as to whether or not continuing detention in prison is arbitrary and a breach of Article 9(1) of the ICCPR. The Human Rights Committee has indicated in past decisions that to avoid being arbitrary, detention must be (a) 'reasonable', (b) 'necessary in all circumstances of the case' and (c) 'proportionate to achieving the legitimate ends of the State party' (Keyzer, 2009). Additionally, if a State can achieve its purpose through less invasive means than detention, detention may be considered arbitrary (Keyzer, 2009).



The main argument on this point raised in the communications was that continued detention in prison is a disproportionate response to the aim of rehabilitating sex offenders and that supervision in the community should be viewed as a less invasive means of achieving this end.

Eleven out of the 13 member Human Rights Committee agreed that both schemes were in violation of Article 9(1). They pointed to four significant factors leading to their conclusion:

- (1) The continued detention in prison ‘amounted to a fresh term of imprisonment which...is not permissible in the absence of a conviction’ (*Re Fardon*, 2010: at 7.4(1); *Re Tillman*, 2010: at 7.4(1)).
- (2) Because imprisonment is penal in nature, both Fardon’s and Tillman’s continued detention in prison amounted to a ‘new sentence’ and thus they were the subject of a heavier penalty than that applicable at the time the offences were committed. This is prohibited under Article 15(1) of the ICCPR (*Re Fardon*, 2010: at 7.4(2); *Re Tillman*, 2010: at 7.4(2)).
- (3) The procedures under the Acts, being civil in nature, did not meet the due process guarantees under Article 14 of the ICCPR ‘for a fair trial in which a penal sentence is imposed’ (*Re Fardon*, 2010: at 7.4(3); *Re Tillman*, 2010: at 7.4(3)).
- (4) Because of the problematic nature of the concept of feared or predicted dangerousness, ‘the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise’. Accordingly, the onus was on the State to demonstrate that rehabilitation could not have been achieved by ‘means less intrusive than continued imprisonment *or even detention*’ (my emphasis, *Re Fardon*, 2010: at 7.4(4); *Re Tillman*, 2010: at 7.4(4)).

In both decisions, the Human Rights Committee requested that the State provide it with information within 180 days as to the remedy taken to give effect to its views. These decisions are not legally binding (Blay and Piotrowicz, 2000) and they are in some ways irrelevant because Fardon was released on a supervision order in 2007



(*Attorney-General v Fardon* [2006] QSC 299) and Tillman was released on a supervision order in 2008 (*State of New South Wales v Tillman* [2008] NSWSC 1293). On 14 May 2010, Fardon was sentenced to 10 years imprisonment for raping a woman on the Gold Coast in 2008 (O'Loan, 2010) and Tillman has been charged with breaching his supervision order (Freckelton and Keyzer, 2010).

What the decision will mean for preventive detention schemes in Australia is open to debate. Freckelton and Keyzer (2010) point out that the Human Rights Committee's reasoning echoes that of Kirby J's dissenting judgment in *Fardon's* case. They argue that the 'Australian states that have adopted re-imprisonment policies will now need to devise and implement risk management policies aimed at rehabilitation in the community'.

The use of the words emphasised above, referring to less intrusive means than continued imprisonment 'or even detention', indicates that building specifically designed post-sentence detention centres for sex offenders may still violate Article 9(1) of the ICCPR, although this was not the subject of the *Fardon* and *Tillman* communications. This point has particular relevance for Victoria given that section 21 of the Victorian *Charter of Human Rights and Responsibilities* echoes Article 9(1) of the ICCPR.

In examining the case law dealing with preventive detention schemes, judges have shown a preference for supervision orders over continuing detention orders. For example, in *Francis* [2006] QCA at [39], the Queensland Court of Appeal stated:

If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order... .

It would seem then, at the very least, that the *Fardon* and *Tillman* communications will reinforce supervision in the community as the 'default setting' for preventive detention schemes in Australia.



Expert Evidence of Risk and the (Mis)use of Actuarial Tools

The Human Rights Committee pointed out in both the Fardon and Tillman communications that assessing the risk of future reoffending is very difficult. The Committee stated:

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. (*Re Fardon*, 2010: at 7.4(4); *Re Tillman*, 2010: at 7.4(4)).

There is a burgeoning academic literature criticising the use of actuarial tools in the courtroom setting (McSherry and Keyzer, 2009; 29-32). In particular, the use of actuarial tools in relation to assessing the risk of *individual* offenders has been the subject of growing criticism (Hart, Michie and Cooke, 2007; Cooke and Michie, 2009; Doyle and Ogloff, 2009; Ogloff and Doyle, 2009; Cooke, 2010).

Patrick Keyzer and I are currently analysing the case law on preventive detention schemes across Australia and it is interesting to note that despite the existence of critical debate in the academic literature concerning risk assessment tools, in the majority of cases, expert evidence on risk has been accepted without question.

It has been mainly in Western Australia that some members of the judiciary have been concerned with the use of actuarial risk assessment scales in relation to preventive detention. 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 with 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 10 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], Blaxell J 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 journals ... 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) 169 A Crim R 379, Hasluck J 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 Hasluck J's critical appraisal of actuarial tools in *Director of Public Prosecutions for Western Australia v Mangolamara* [2007] WASC 71. However, McKechnie J's broad approach was narrowed on appeal in *Director of Proescutions (WA) v GTR* [2008] WASCA 187. Acting Justice of Appeal Murray 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 skepticism 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. This is one area that could do with further attention particularly in the wake of the Fardon and Tillman communications.



Conclusion

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 Fardon and Tillman communications, while not binding, are very important because 'deliberate non-compliance with the decisions can only lower Australia's standing and credibility in the international community' (Freckelton and Keyzer, 2010).

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 a growing skepticism of risk assessment methods reflected in the academic literature on forensic risk assessment. 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.

Ultimately, the liberty of the person is a fundamental human right and should not be breached without proper ethical and legal justification. It can be argued following the Fardon and Tillman decisions by the Human Rights Committee that supervision in the community should be the default setting for community protection and it is now up to governments to explore options in this regard, rather than rely on continued imprisonment regimes as the primary 'solution'.



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