

Continuing Detention Orders for Sex Offenders : Future Sex Crimes

Public Defenders Criminal Law Conference 2008

Paper by Anthony Cook SC
Public Defender

The concept of preventive detention is not entirely new, but it is only in recent years that legislatures in several of the Australian States have moved to implement such regimes. In *Veen v The Queen* (no.2) (1988) 164 CLR 465, Deane J stated (at 472):

“The protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of a violent crime and who, whilst not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatrists and other experts.”

2. Most of us have grown up with the expectation that the function of courts is to make judgements about past conduct, determine whether such conduct constitutes a criminal offence and if so, determine an appropriate punishment. Even so, the involuntary detention of certain persons for special reasons is not a new practice. Regard may be had to detention in cases of mental illness, infectious diseases and asylum seekers.

3. Whilst such persons may be detained in conditions not greatly different from, or in some cases identical to, imprisonment, in theory these are not cases of punishment. The concept of detaining a person to prevent that person from committing a particular type of crime in the future is a relatively new one.

4. The first attempt to authorise the detention of a person to prevent that person from committing (further) criminal acts was the **Community Protection Act 1990 (Victoria)**. This Act was passed to detain one person, Garry David, after his term of imprisonment had expired. As his prison sentence was coming to an end in 1990, popular concern arose that he might commit violent crimes if he were released. The Victorian Parliament passed legislation special to him which allowed for a detention order of up to 6 months to be made by the Supreme Court. The trigger for the granting of an application was satisfaction by the Court, on the balance of probabilities, that Mr David was a serious risk to public safety and was likely to commit an act of personal violence if at large; see s.8.

5. Several detention orders were granted. No challenge was taken to the validity of this legislation and this chapter of Victoria's legal history came to a close when Mr David died in custody in 1993.

6. In 1994 the New South Wales Government faced a similar dilemma in the person of Gregory Wayne Kable. Mr Kable was coming to the end of his sentence for the manslaughter of his wife and had been sending threatening letters which caused something of a public outcry. The New South Wales Parliament moved swiftly and enacted the **Community Protection Act 1994** (New South Wales).

7. Unlike the Victorian Act, the New South Wales Act was intended to apply generally, at least initially. Whilst its provisions were cast in general terms, its effect was reduced by a schedule listing the persons to whom it applied. The schedule contained one name: Gregory Wayne Kable. Like the Victorian counterpart, the act allowed for the Supreme Court to make an order on the application of the Director of Public Prosecutions, if satisfied on reasonable grounds that Mr Kable was more likely than not to commit a serious act of violence; s.5 (2).

8. In 1996, the High Court declared that the New South Wales Act was constitutionally invalid; see *Kable v DPP* (NSW) 189 CLR 51. The majority accepted an argument on behalf of Mr Kable that the effect of the legislation was to compromise the integrity of the Supreme Court of New South Wales and thus infringe Chapter III of the Federal Constitution, which recognises the existence of State Supreme Courts as the repository of Federal Judicial power. As Gaudron J put it:

“The integrity of the Courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process. Particularly is that so in relation to criminal proceedings which involved the post important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences. Public confidence can not be maintained in the Courts and their

criminal processes if, as postulated by s.5 (1), the Courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so.” (107).

9. McHugh J stated:

“The Act expressly removes the ordinary protections inherent in the judicial process. It does so by stating that its object is a preventive detention of the appellant, by removing the need to prove guilt beyond reasonable doubt, by providing for proof by materials that may not satisfy the rules of evidence and by declaring the proceedings to be civil proceedings, although the Court is not asked to determine the existing rights and liabilities of any party or parties. It is not going too far to say that proceedings under the Act bear very little resemblance to the ordinary processes and proceedings of the Supreme Court.” (122).

10. Victoria implemented a new scheme by an amendment to the **Sentencing Act 1991**. The power reposed in the Supreme Court or the County Court by the amendment is an adjunct to the normal sentencing process. The court may impose an indefinite sentence upon an offender “regardless of the maximum penalty prescribed for the offence”: by s.18 A (1) (5) (6). The power is triggered, inter alia, by a prognostication proven to a “high degree of probability” that the offender is a serious danger to the community.

11. There was a challenge to the validity of the new legislation in **R v Moffatt** (1998) (2) VR 229. The Court of Appeal dismissed an argument based on the majority judgments in the case of **Kable**. The judgements in **Moffatt** emphasise the fact that the power given to the Court is essentially an extension of its powers under the regular sentencing process. Justice Winneke stated at 237:

*“The mere fact that, in the appropriate circumstances, the Court is given the power to impose a sentence of indefinite restraint cannot, in my view, be seen as such an extraordinary power that its exercise would bring the Court into disrepute. Indeed it seems to me to be implicit in the reasoning in **Kable’s** case that the investing in a Court of a power to impose an indeterminate sentence as a consequence of a commission of a serious act of violence is within the power of the State Legislatures.*

12. Justice Hayne observed that the legislation under consideration was explicitly based on the comments of Deane J in **Veen v R**.

13. A new form of such legislation later emerged. While the **Sentencing Act 1991 (Vic)** extended powers of sentencing at trial, new legislation allows for an application by the State before the expiry of a person’s sentence for an order with the effect of extending their detention. It is separate from sentence proceedings. In this State **The Crimes (Serious Sex Offenders) Act 2006 NSW** is an example.

14. Before discussing the operation of this Act it is useful to look at a challenge to the validity of the Queensland equivalent in the High Court.

15. In June 2003 the **Dangerous Prisoners (Sexual Offenders) Act 2003 (Queensland)** came into force. In the same month the Attorney General applied for an order that a Mr Fardon be detained for an indefinite period. Under s.13 (2) of that Act the Supreme Court is empowered to make such an order on satisfaction that Mr Fardon posed “an unacceptable risk” of committing particular serious offences if released or released without being subject to supervision.

16. A challenge was taken to the validity of the legislation based upon the decision of the majority in **Kable**. The challenge was unsuccessful as the majority in Fardon considered that the legislation did not impose upon the Supreme Court of Queensland a function which was incompatible with the exercise of Commonwealth judicial power under chapter 3 of the Constitution.

How does the New South Wales Act Work?

17. Section 3 in its original form provided that the objects of the legislation were:

“To provide for the extended supervision and continuing detention of serious sex offenders so as:

a) to ensure the safety and protection of the community, and

b) to facilitate the rehabilitation of serious sex offenders.”

18. This was recently amended to give primacy to the protection of the community. The proceedings are civil proceedings, however, a final order cannot be made unless the Supreme Court is satisfied "to a high degree of probability" of certain matters: section's 9 (2), 17 (2) (3). An application by the Attorney General may not be made until a defendant is in the last 6 months of his sentence: section 6 (2). The defendant must be a "sex offender" in custody for "serious sex offences".

19. Part 2 of the Act relates to extended supervision orders and Part 3 relates to continuing detention orders. Section 17 allows, on the application for a continuing detention order that a Court may decline to make such an order but make an order for extended supervision. There is no such alternative available at the interim stage. If the Attorney General makes an application only for an extended detention order then s.16 of the Act (that provision governing interim detention orders) allows only, on proof on certain matters, for the making of an interim detention order, pending a final hearing.

What must be proved at the interim stage?

20. Section 8 states:

"(1) If, in proceedings on an application for an extended supervision order, it appears to the Supreme Court:

that the offenders current custody or supervision will expire before the proceedings are determined, and

that the matters alleged in the supporting documentation would, if proved, justify the making of an extended supervision order,

the Supreme Court may make an order for the interim supervision of the offender."

21. In relation to interim detention orders the relevant provision is s.16:

"(1) If, in proceedings on an application for an continuing detention order, it appears to the Supreme Court:

that the offenders current custody will expire before the proceedings are determined, and

that the matters alleged in the supporting documentation would, if proved, justify the making of a continuing order or extended supervision order,

the Supreme Court may make an order for the interim detention of the offender."

22. Thus, the effect of s.16 is that an interim detention order may be made notwithstanding the supporting documentation, if proved, would only justify the making of an extended supervision order, not a continuing detention order. Interim supervision orders and detention orders may only be made for a period of up to 28 days. Orders may be repeated but not so as to aggregate a period exceeding 3 months.

23. s.16 (1) supports the power to make an order for "interim detention" if satisfied that the "supporting documentation, would, if proved, justify the making of a continuing detention order or extended supervision order". The operative words are "would, if proved, justify...". The Court of Appeal in Attorney General for **New South Wales v Tillman** (2007) NSW CA 119 held that the power under s.16 is a discretionary power. Even if the relevant factors were made out, the Court could still refrain, in an appropriate case, from making an interim detention order. An example of a case in which that might occur, could be where the material whilst prima facie justifying the making of an order could be shown by a defendant to be false or misleading: see **Tillman** at paragraph 39. The Court described the task assigned by s.16 in the following way:

"In determining whether the power to grant an interim order is enlivened, the Court is not involved in weighing that documentation or predicting the ultimate result. The power is enlivened if the supporting documentation would, if proved, justify the making of either category or final order bearing in mind the elevated standard of proof stated in s.17 (2) and (3). That threshold question is to be resolved without considering what evidence might be called by the offender at the final hearing. Indeed, it is to be considered without taking into account the evidence (if any) called by the offender at the interim hearing: such evidence may go to (relevant) discretionary matters, but would not cast light upon what is alleged in the Attorney General's supporting documentation." (Paragraph .98)

24. The Court emphasised that the power to order interim detention under s.16 is enlivened if the forecast order is

to be either one of detention or supervision. The Court is not required to decide which of those outcomes is more likely in determining the threshold question of whether or not to order interim detention. In **Tillman's** case Hoeben J had ordered that Mr Tillman be placed on an interim supervision order pending the determination of the final question. That decision was found to be erroneous by the Court of Appeal.

25. Pre-trial procedures are governed in each form of application respectively by ss.7 and 15 of the Act.

26. An obligation is imposed upon the Attorney General to disclose to the "offender" all material which is relevant to the proceedings. Experience to date has shown that this imposes a significant burden on lawyers acting for defendants. Commonly several boxes of material are served at very short notice. Each provision requires the Supreme Court, if satisfied that the supporting documentation would justify the making of the requisite extended order, to appoint two qualified psychiatrists to conduct separate psychiatric examinations of the "offender" and to furnish those reports to the Supreme Court, and to direct the "offender" to attend those examinations.

27. It is important that lawyers acting for persons the subject of such applications have input into who the appointed psychiatrists will be. The Attorney General will furnish a list of qualified psychiatrists and legal practitioners acting for the defendant will indicate any objections to particular practitioners on the list before an agreement is reached on the issue.

When does one order supervision?

28. An interim supervision order is only available if the final relief sought by the Attorney General is one of extended supervision under s.6 of the Act. If the Attorney General is seeking orders only that the defendant be subject to a continuing detention order then there is no power in the Court to order interim supervision.

29. This issue was canvassed by Bell J in Attorney General for the State of **New South Wales v Tillman** (2007) NSW SC 528 at par. 12. Bell J was called upon to decide whether to renew Mr Tillman's interim detention order (imposed by the Court of Appeal) pending a final hearing. The Attorney General, by notice of motion, applied to renew the interim Detention Order for a period of 28 days. Under s.16 (3) of the Act:

"[3] An order under this section may be renewed from time to time, but so as to provide for the detention of the offender under such an order for periods totalling more than 3 months."

30. The Attorney General, in response to an argument on behalf of Mr Tillman that the Court had the power to decline to make such an order and instead make a supervision order, argued that on such an application the only options available to the Court were to order interim detention or dismiss the application. The substance of the Attorney General's submission was that once either form of interim order was on foot (that is interim supervision pursuant to s.8 or interim detention pursuant to s.16) then the only power pending the final hearing was to renew that order, or release the defendant upon dismissal of the proceedings. Bell J did not decide the issue as she had determined that it would not be appropriate to order interim supervision in any event.

31. Aside from making orders, which either detain the defendant or restrict his movements, the Supreme Court makes other orders pending the final determination of the matter. These are set out respectively in ss. 7 and 14 of the Act. Section 7 deals with applications where an extended supervision order is under consideration, s. 14 where a continuing detention order is under consideration.

32. Thus far, no valid interim order has been made for supervision pending the determination of the final hearing. The only such order that has been made was declared erroneous by the Court of Appeal; see AG for the State of **New South Wales v Tillman** (2007) NSW SC 356, per Hoeben J.

Determination of applications at a final hearing

33. It is likely that the final determination of an application for either extended supervision or detention will come on quickly. The Act appears to envisage a period of no more than 3 months passing between the commencement by way of summons and the final determination: see ss.8 (3) and 16 (3). Thus far there have been no orders made for extended supervision.

34. The terms of s.9 (1) allow the Supreme Court to determine an application for extended supervision by either:

- (a) making an extended supervision order;
- (b) dismissing the application.

35. The test to be applied is couched in the following terms:

[2] An extended supervision order may be made if and only if the Supreme Court is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision.

36. Sub section (3) sets out in a non-exclusive manner a number of matters, to which the Court must have regard in making that decision. The matters include:

- a) the safety of the community;
- b) material in the form of expert opinions about the likelihood of the defendant committing a future sex offence.

(3) (d) Requires the Court to have regard to *“any statistical or other assessment as to the likelihood of persons of histories and characteristics similar to those of the offender committing a further serious sex offence.”*

37. This will confront the defendant with a form of evidence, which will effectively “profile him” with reference to characteristics he is said to have in common with a range of offenders who have re-offended after release from prison. By comparison between his characteristics and those of the studied re-offenders the author of the assessment purports to predict the risk that the defendant poses. It can be described as a judgment about the future of an individual based upon the behaviour of other persons said to share some of the characteristics that he exhibits.

38. One form of such predictive tool is “**static – 99**”. It was summarised by Bell J in *Tillman*, as follows:

“[64] The static-99 is an actuarial risk prediction instrument that is designed to estimate the probability of sexual (and violent) re-conviction for adult males who have been charged with, or convicted of, at least one sexual offence against a child or a non-consenting adult.

[65] The coding rules for the static-99 requires the assessor to allocate one point (or not) as the case may be, for each of the following ten risk factors:

- i) youth (defined as 18 to 24.99 years);*
- ii) never lived with a lover for two years;*
- iii) index non-sexual violence convictions;*
- iv) prior non-sexual violence convictions;*
- v) prior sex offences;*
- vi) prior sentencing dates (four or more sentencing dates prior to the index offence)*
- vii) convictions for non-contact sex offences (exhibitionism, possession of obscene material, obscene telephone calls, voyeurism, exposure, illicit use of the Internet, sexual harassment);*
- viii) any unrelated victims;*
- ix) any stranger victims (a person whom the offender did not know 24 hours before the offence); and*
- x) any male victims.”*

39. The defendant is given a score, which is compared to the re-offending rates of persons with the same or higher score. The higher the score, the greater the risk posed by the defendant is said to be. Typically, Corrective Services personnel perform the process of scoring a particular defendant. An obvious limitation to this calculus is that it does not inform the Court as to the actual likelihood of the specific person re-offending. Rather, it informs the Court as to the percentage of persons sharing like characteristics who actually re-offended in given periods. The limitations on the individual predictive value of static-99 were commented upon by Bell J in *Tillman* (2007) NSW SC 605 at pars. 72-76.

40. An extended supervision order is to be made “if and only if the Supreme Court is satisfied by a high degree of probability... likely to commit a further serious sex offence if he or she is not kept under supervision.”

41. The final hearing is a civil hearing in the Supreme Court. The State has the onus of proof and proceedings are governed by the uniform civil procedure rules.

42. The power to grant an application for continuing detention is found in s.17 of the Act. Even if it is the only order sought, the Court nonetheless has the power to decline to make it and in lieu make an extended supervision order. This position may be contrasted with that at the interim stage where if the Attorney General is seeking only detention there is no power, pending the final determination, to grant an interim supervision order. What must the Attorney General prove and to what degree?

43. Section 17 (3) sets out the test:

“A continuing detention order may be made if and only if the Supreme Court is satisfied to a high degree of probability that the offender is likely to commit a serious sex offence if he or she is not kept under supervision and that adequate supervision will not be provided by an extended supervision order.”

44. It can thus be seen that the following matters must be proven:

1. That the offender is likely to commit a further sex offence if not kept under supervision; and
2. Adequate supervision will not be provided by an extended supervision order.

45. The standard to which these matters must be proven is an unusual one in our system of law. It is neither an onus on the balance of probabilities nor beyond any reasonable doubt. Unsurprisingly it has been the subject of debate in the cases.

46. The **Victorian Serious Sex Offending Monitoring Act 2005** contains a statutory test which is similar in its terms. Section 11 of that Act is in the following terms:

"[1] A Court may only make an extended supervision order in respect of an offender if it is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence..."

47. The Victorian Court of Appeal in **TSL v Secretary to the Department of Justice** (2006) VSCA 1999 held that the meaning of the word "likely" in the section gained content from its context.

48. At paragraph 9 the Court stated:

*"The other reading of the italicised words in (6) takes at its starting point the fact that the meaning of "likely" varies according to the context in which it is used. Because it is concerned with the future, Parliament could not require the Court to be satisfied that the offender will commit a relevant offence. All that the Court could be satisfied of is that the offender is likely to do so or that there is a risk that the offender will do so. The ordinary meaning of likely, as explained by Mason, Wilson and Deane, JJ in *Bouhey v R*, is "a substantial – a "real and not remote" – chance." Not surprisingly, Parliament considered that threshold to be too low. The expression "to a high degree of probability" was included to show, that in this context, "likely" denotes a high degree of probability. On this second reading of the italicised words, the Court must be satisfied that there is a high degree of probability that the offender will commit a relevant offence."*

49. That construction of the words was the one preferred by the Victorian Court of Appeal.

50. The New South Wales Court of Appeal had occasion in **AG v Tillman** ([2007] NSW CA 327, to consider the test as formulated in **TSL**. Mason P dissented in his rejection of the formulation in **TSL**. The majority, Giles and Ipp JJ adopted **TSL's** formulation as applicable to New South Wales Act. Their Honours stated:

*"Nevertheless, the view expressed in **TSL** is reasonably open and we are not persuaded that it is clearly wrong. In the light of what has emanated from the High Court in regard to the respect that an intermediate appellate Court of one Australian jurisdiction should give to a decision of an intermediate appellate Court of another Australian jurisdiction on issues that are substantially the same, we would follow and adopt the approach of Calloway AP in **TSL**."*

51. The Attorney General must demonstrate that adequate supervision will not be provided by an extended supervision order. This gives rise to two questions. Firstly, what is the content to be given to the word "adequate". And, secondly, what is the means of comparison between a detention order and a notional extended supervision order by which the latter would be found to be inadequate?

52. Plainly enough practitioners should be prepared to challenge the assertions made by the experts called on behalf of the prosecution. This may involve detail analysis of the documents relating to the prison history of your client. One of the issues raised is quite often an alleged reluctance by a defendant to engage in therapeutic programmes run by prison authorities. It may be that there were either sound reasons for such reluctance, for example personality clashes between the defendant and other inmates or professionals or it may be the case that the defendant was never offered a place in one of the programmes.

53. Clearly, Practitioners must be in a position to challenge the conclusions, which flow from the static-99 calculus. Some aspects of static-99 may fairly be described as "arbitrary" - this was a point commented upon by Bell J in **Tillman** (2007) NSW SC 605.

54. As discussed the Court is not to order continuing detention of a defendant unless satisfied that the defendant is likely to commit a further sex offence if allowed into the community unsupervised. This plainly requires an exercise in prediction and judgement.

55. The onus is on the plaintiff, in seeking a detention order, to prove that extended supervision would not "work such as to satisfy the Court to a high degree of probability, that (even with the extended supervision order in place) it is still likely that the offender will commit a further serious sexual offence". See **Cornwall v The Attorney General for New South Wales** (2007) NSW CA 374. It is not necessary or appropriate to look to the defendant for

a demonstration that an extended supervision order would be effective. Such an approach would effectively reverse the onus of proof.

56. If the plaintiff does not prove that then pursuant to s.17 (2) the Court is to make an extended supervision order. The exercise at this level has been described as an assessment of "risk management": see **Attorney General for New South Wales v Cornwall** (2007) NSW SC 1081 per Hall J at 140 – 141. What does adequate supervision mean? In the same decision Hall J stated:

"I have earlier indicated that adequate supervision, in my opinion, must be such that in the case of high risk serious sex offender, an extended supervision order is required to be such that it would be no longer "likely" that the defendant would commit a further serious sex offence." Par 147

57. In other words, the Attorney General must demonstrate the inefficacy of any proposed alternative supervision regime, in the sense that it would not be sufficient to reduce the risk below the level of "likely". This requires an assessment of a notional regime of supervision.

58. The Department of Corrective Services will obviously have a role to play in the proposing of a model. I would suggest that the proper approach in future is for a Court to notionally devise a supervision regime, with the assistance of expert evidence and submissions of the parties, and then to proceed on the assumption that the Department of Corrective Services will provide sufficient resources to manage it: see the approach of the Court of Appeal in Queensland in **Francis v The Attorney General for the State of Queensland** 30 August 2006:

"There was no evidence, however, that the resources required of the Department to provide effective monitoring of the appellant's compliance with the conditions of supervised release would be so extensive that it would be unreasonable to expect them to be provided, or that the effective provision of such resources would be impracticable. It must be borne in mind that any supervision order made by the Court under the Act must contain, by virtue of s.16 (2) (f) a condition for supervision of the prisoner while on supervised release. The Act thus assumes that supervision will be available. The Court should not conclude either that it will not be available or will not be made sufficiently available in the absence of clear evidence to that effect and an explanation as to why its provision is regarded as unreasonable and impracticable." Par. 37.

59. It is suggested that this is the proper approach in making an assessment as to whether supervision would or would not be adequate in the meaning of s.17 (3). As to what "adequate" means it does not according to the Queensland Court of Appeal mean "watertight"; par. 39. As the Court observed if that were the requirement orders for release would never be made.

60. Finally, in the case of the **DPP for Western Australia v Mangolamara** (2007) WA SC 71 Hasluck J, was strongly critical of an application by the DPP for continuing detention in the absence of some form of supervision regime formulated as an alternative by the DPP. His Honour stated:

"If the DPP as applicant characterises the cases as a dire case in which the only means of protecting the community is by the making of a continuing detention order so that the offender is cut off from the community, then it must present cogent evidence to that effect to a high degree of probability. This means that the DPP must negative or rule out the possibility that a supervision order with terms and conditions of the kind envisaged by the Act would not be sufficient to protect the community."

61. That application was made under **Dangerous Sexual Offenders Act** (WA), which is sufficiently similar to the New South Wales Act for the decision in **Mangolamara** to be of assistance.

62. An interesting point was raised in **MG v R** (2008) NSW CCA 4 as to the potential impact of this Act on the sentencing process for a sex offender. It was argued that the prospect of an application under the Act being made should be taken into account in determining both the non-parole period and the head sentence for a sex offender. The argument that such a prospect should moderate a sentence was considered but neither conclusively accepted or rejected in the particular circumstances of that case.

Anthony Cook, SC
Public Defender