SEX, DRUGS AND 'EVIL' SOULS: THE GROWING RELIANCE ON PREVENTIVE DETENTION REGIMES

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Since the terrorist attacks of 11 September 2001, legislatures around the world have increasingly invoked preventive detention measures to address perceived security risks to the community. Australia has been no exception to this trend. Whilst not a new phenomena, the growing use by States of such exceptional powers raises important policy questions. This article traces the rise of current preventive detention regimes in Australia as they have been applied to various categories of 'dangerous persons', in particular as they relate to sex offenders, the involuntary detention of those with infectious diseases or mental illness, those with alcohol and drug problems, 'unlawful non-citizens' and in relation to terrorism. Policy issues that arise from these regimes are considered, including the conflict between preventive detention regimes and the international human right to freedom from arbitrary detention.

I INTRODUCTION

The rather provocative title of this article outlines three areas of the law where legislation enables preventive detention either in prison, medical institutions or immigration detention centres. The terrorist attacks that occurred in the United States on 11 September 2001 have profoundly altered and reshaped the way in which legislatures around the world respond to security concerns. Preventive detention regimes are certainly not new, but in recent years there has been a growing reliance upon detaining those perceived as some form of threat to members of the community. This article traces the rise of preventive detention regimes in Australia and examines in what circumstances preventive detention may be justifiable given the right to freedom from arbitrary detention enshrined in the *International Covenant on Civil and Political Rights.*[1]

The word 'sex' in the title I am taking to refer to sex offenders. I will outline how recent legislation in Queensland enables the detention of certain individuals on the grounds of dangerousness *after* the offender's sentence has expired. Up until recently, this legislation was unique.[2] Since a majority of the High Court has upheld the validity of the Queensland legislation,[3] the door has been opened to other forms of preventive detention of classes of individuals.

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1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9(1) (entered into force 23 March 1976). This was ratified by Australia on the 30 November 1980.

2 The *Crimes (Serious Sex Offenders) Act 2006* (NSW) is similar to the Queensland model.

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

The word 'drugs' I have taken to refer to two different types of preventive detention. First, it refers to the involuntary detention of those with mental illnesses or infectious diseases in order to treat them with drugs and to prevent harm to the community. Secondly, it refers to the involuntary detention of those with alcohol or drug problems in order to treat them or keep them from harming others. A recent report by the Senate Select Committee on Mental Health has suggested that the dominant medical model is 'hampering improvement in mental health care' and that 'the forced treatment of individuals is a difficult and controversial practice'.[4] However, I will argue that the fear of risk to the community often wins out in balancing between notions of individual liberty and involuntary treatment regimes.

Finally, the term 'evil souls' can be used to refer to any number of individuals. I am using this term in an ironic sense to refer to those perceived to be some sort of threat to the community. I will concentrate on preventive detention in relation to those categorised as 'unlawful non-citizens' and terrorists. While the policy of mandatory detention of unlawful non-citizens was introduced in 1992, I will argue that the government's emphasis on 'border protection' since 2001 has led to the notion that immigration detention has become a form of preventive detention of a particular 'type' of person: one who is perceived as uncivilised at best and a terrorist at worst. In September 2004, the government emphasised its commitment to 'retaining the policies of excision, offshore processing and mandatory detention that act as a powerful deterrent to unauthorised arrivals'.[5] While there were some signs of a softening of government policy towards long term immigration detainees during 2005,[6] in April 2006, the Minister for Immigration and Multicultural Affairs announced that all unauthorised boat arrivals seeking asylum in Australia will be transferred to offshore centres for assessment of their claims.[7] Recent anti-terrorism laws also rely on the notion of preventive detention for investigating and preventing terrorist acts. Under recent amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Criminal Code Act 1995* (Cth), persons can be detained without charge for the 'collection of intelligence' relating to a terrorism offence or to prevent an imminent terrorist act occurring.[8]

I will outline how various legislative regimes are being developed and used primarily on the basis of prevention of harm to others. I am purposefully taking a broad brush approach in relation to preventive detention regimes, concentrating

4 Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health – From Crisis to Community, First Report* (2006) 19, 37.

5 Attorney-General Phillip Ruddock and Minister for Justice and Customs, Senator Christopher Ellison, 'Strengthening our Borders' (Joint Press Release, 27 September 2004).

6 The Senate Legal and Constitutional Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958, Report* (2006) chp 5.

7 Senator Amanda Vanstone, 'Strengthened Border Control Measures for Unauthorised Boat Arrivals' (Press Release, 13 April 2006); The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth) was introduced into the House of Representatives and referred to the Referred to Senate Legal and Constitutional Legislation Committee on 11 May 2006 for a Report by 13 June 2006.

8 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth); *Anti-Terrorism Act (No 2) 2005* (Cth).

on recent developments in this area to demonstrate a growing reliance on detaining those considered 'dangerous'. I will then analyse some policy issues to which such reliance gives rise. First, however, it is necessary to emphasise that there are general principles in law against the arbitrary detention of individuals. The principle of the right to freedom from arbitrary detention can be found in international law that is binding on Australia. Article 9(1) of the *International Covenant on Civil and Political Rights* states:

> Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.

Arbitrary detention is not the equivalent of 'against the law'. The Human Rights Committee has stated that it is necessary to consider elements such as 'inappropriateness, injustice and lack of predictability' in interpreting whether or not detention is arbitrary.[9]

The High Court of Australia has also laid down the principle that involuntary detention should only be a consequence of a finding of guilt.[10] Similar principles operate in most common law countries, including Canada, New Zealand, South Africa, the United Kingdom and the United States.[11] There have been a number of exceptions to this rule on the basis that the detention has a non-punitive purpose. For example, the involuntary detention of those with mental illnesses has been justified on the basis that it is for the treatment of the individual rather than for punishment. I will return to this point in the section dealing with policy issues. I now turn to providing an overview of preventive detention regimes.

II THE DEVELOPMENT OF PREVENTIVE DETENTION REGIMES

A *Sex Offenders*

In sentencing an offender, a judge must ensure that the type and extent of punishment is proportionate to the gravity of the harm and the degree of the offender's responsibility.[12] The majority of the High Court in *Veen v The Queen (No 2)*[13] confirmed that proportionality was paramount, but that this did not mean

9 *Hugo van Alphen v The Netherlands*, Communication No 305/1988, [5.8], UN Doc CCPR/C/39/D/305/1988 (1990). The point was also stressed in *A v Australia*, Communication No 560/1993, [9.2], UN Doc CCPR/C/59/D/560/1993 (1997). See also the discussion in Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000) 211-19.

10 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

11 Patrick Keyzer, Stephen Southwood and Cathy Pereira, 'Pre-Emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues' (2004) 11 (2) *Psychiatry, Psychology and Law* 244, 247.

12 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (12th ed, 2005) 324.

13 (1988) 164 CLR 465.

that the protection of the community was irrelevant. The majority drew a distinction between merely inflating a sentence for the purposes of preventive detention, which is not permissible, and exercising the sentencing discretion having regard to the protection of the community among other factors, which is permissible. This means that when community protection is taken into account, a form of de facto preventive detention is built into the sentence.

In *Veen v The Queen (No 2)*[14] the majority of the High Court also noted that it is possible for Parliament to set up an independent scheme enabling indefinite sentences. This allows a judge to hand down an indefinite prison term at the time of sentence and such legislation has existed for over a century.[15]

In the early 1990s, the Victorian and New South Wales governments attempted to go one step further in establishing a legislative regime whereby two individuals considered a risk to the public could be detained in prison after their time for release back into the community. This was the forerunner to the form of preventive detention legislation discussed below that enables sex offenders to be detained *after the expiration of the offender's sentence* for the prevention of harm to members of the community. This type of preventive detention is therefore very different to considering community protection at the time of sentence.

In Victoria, the government enacted the *Community Protection Act 1990* (Vic) which was specifically aimed at the preventive detention of Garry David who had seriously mutilated his body over 70 times and had threatened to kill the then Victorian Premier John Cain, to poison the city water supply and commit mass murder.[16] The Act empowered the Supreme Court to make an order to detain David for six months for the safety of members of the public. However, David could not be released from a preventive detention order except by further order of the court. A 1991 amendment to the Act enabled the preventive detention order to last for 12 months. Garry David died in Pentridge prison in June 1993 and the Act was repealed when indefinite sentencing provisions were enacted.[17]

The *Community Protection Act 1994* (NSW) was largely based on the Victorian *Community Protection Act 1990* (Vic). The former Act commenced in December 1994 and was aimed at the preventive detention of Gregory Kable who had been sentenced to a minimum of four years imprisonment after he pleaded guilty to the manslaughter of his wife. He was due for release in early January 1995. During his prison term he wrote a number of threatening letters to the victim's family and the carers of his two children.

Section 5 of the *Community Protection Act 1994* (NSW) enabled the Supreme Court to make an order detaining Kable in prison if it was satisfied that he was

14 Ibid 486.

15 For example, the *Indeterminate Sentences Act 1907* (Vic) provided for a court to declare a person an 'habitual criminal' and to detain him or her at the Governor's Pleasure.

16 For a comprehensive account of Garry David's life, see Deidre Greig, *Neither Mad nor Bad: The Competing Discourses of Psychiatry, Law and Politics* (2002).

17 Section 18A of the *Sentencing Act 1991* (Vic), inserted by *Sentencing (Amendment) Act 1993* (Vic).

'more likely than not to commit a serious act of violence' and that it was considered appropriate for the 'protection of a particular person or persons or the community generally' that he be held in custody. Section 3(1) stated that the object of the legislation was 'to protect the community by providing for the preventative detention ... of Gregory Wayne Kable'.

In *Kable v DPP (NSW)*,[18] the majority of the High Court (Toohey, Gaudron, McHugh and Gummow JJ) held that the *Community Protection Act 1994* (NSW) compromised the integrity of the judicial system created under Chapter III of the *Commonwealth Constitution* because it obliged the Supreme Court of New South Wales to exercise a non-judicial function. The justices in the majority mentioned different formulations of the relevant principles, but all of them referred to constitutional integrity or public confidence and its diminishment by the legislation.

The majority decision in *Kable's* case makes it clear that preventive detention of an *individual* offender will be unconstitutional. But what if the preventive detention relates to a *class* of offenders? The High Court has recently opened the door for governments to pass valid legislation in this regard.

The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was passed in response to the release of the sex offender, Dennis Raymond Ferguson. In 1989, Dennis Raymond Ferguson was sentenced to 14 years imprisonment for kidnapping three children from their New South Wales home and committing sexual offences against them in a Brisbane motel over a three-day period. The sentencing judge described Ferguson's chances of rehabilitation as 'absolutely nil' and Ferguson failed to participate in any treatment or rehabilitation programs in prison.

Ferguson's impending release from prison on 9 January 2003 gave rise to extensive police and community concerns about the risk that he would re-offend. On the day before he was due to be released, Mackenzie J of the Supreme Court of Queensland granted an order requiring Ferguson to report to his nearest police station within 48 hours of his release and to advise the police of every plan to change his name and address over the next fifteen years.[19] Justice Mackenzie stated that he was satisfied that 'a substantial risk exists that the offender will commit further offences of a sexual nature upon or in relation to a child under the age of 16'.[20] He based this finding on evidence given by two prisoners of conversations they had had with Ferguson. However, Mackenzie J was critical of the way in which the proceedings had been conducted given that Ferguson had been refused Legal Aid and the prisoners' affidavits were only provided at a late stage. He stated: 'It is important that this situation never happens again'.[21]

18 (1996) 189 CLR 51.
19 *Director of Public Prosecutions v Ferguson* [2003] QSC 1 (Unreported, Mackenzie J, 8 January 2003).
20 Ibid 5.
21 Ibid 6.

Ferguson subsequently moved to New South Wales where he was required under s 9(1) of the *Child Protection (Offenders Registration) Act 2000* (NSW) to give his personal details to the police including the nature of his employment. Ferguson provided the police with these details when first arriving in New South Wales. However, he failed to subsequently notify them of a change of employment. His new job was with a cleaning company that involved him distributing its products to various places including schools for fundraising activities. Ferguson was charged under s 17 of the *Child Protection (Offenders Registration) Act 2000* (NSW) with failing to comply with reporting obligations. The penalty under that section is a $10,000 fine and / or up to two years' imprisonment. In November 2003, Ferguson was sentenced in the Parramatta Local Court to 15 months' imprisonment without parole.[22] He has since been released and driven out of various towns.[23]

In June 2003, the Queensland Parliament enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). It enables the Attorney-General of Queensland to apply to the Supreme Court for the indefinite detention of a prisoner serving a period of imprisonment for a serious sexual offence, whether or not the person was sentenced to imprisonment before or after the commencement of the Act. A serious sexual offence is defined in the Schedule to the Act as an offence of a sexual nature involving violence or against children.

The application period is restricted to the last six months of the prisoner's term of imprisonment 'to ensure that the prisoner is able to take full advantage of any opportunities for rehabilitation offered during the term of imprisonment'.[24]

Under s 13, the court must be satisfied to a high degree of probability (not reasonable doubt) that the prisoner is a 'serious danger to the community'. The latter is defined in s 13(2) as meaning that there is an 'unacceptable risk that the prisoner will commit a serious sexual offence' if released from custody. The court has some discretion in the orders that can be made. Under s 13(5) it can make a 'continuing detention order' which is an order for indefinite detention or a 'supervision order' where the prisoner is released from custody, but is subject to certain conditions such as reporting to and receiving visits from a corrective services officer.

Section 13(4) requires that in making a continuing detention order or a supervision order, the court have regard to at least two psychiatric reports and any other assessments as well as the prisoner's antecedents and criminal history, the need to protect members of the community and other relevant matters.

22 Janine O'Neill, 'Imprisoned Paedophile Screams at Magistrate', *Courier-Mail* (Brisbane), 25 November 2003, 3.

23 See for example, Ian Townsend, 'Well-known Paedophile Dennis Ferguson Hounded from Ipswich', *PM (ABC Radio)* (Nationwide), 2 February 2004 <http://www.abc.net.au/pm/content/2005/s1294614.htm> at 12 May 2006. In November 2005, Ferguson was reported as having been charged with two counts of indecent treatment of a child: Mark Todd, 'Notorious Pedophile on New Charges' *The Age* (Melbourne), 11 November 2005, 9.

24 Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld) 5.

The first application under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) concerned Robert John Fardon.[25] On 17 March 1967, Fardon pleaded guilty to the attempted carnal knowledge of a girl under the age of 10 and was sentenced on 17 April 1967 to a good behaviour bond operational for three years. Over the next decade or so, he was convicted of various offences such as theft, drink driving and one count of assault occasioning bodily harm.

On 8 October 1980, Fardon pleaded guilty to rape and indecent dealing with a 12-year-old girl and the wounding of her 15-year-old sister. He served eight years of a 13-year sentence for those offences. Within 20 days of being released on parole, he raped, sodomised and assaulted a woman with whom he had gone to a flat to obtain heroin. On 30 June 1989, he was sentenced to 14 years imprisonment for those offences. There was evidence that Fardon told a sentence management support officer on 12 March 1998 that he wanted to stay in prison until he dies and he would kill an officer or another prisoner to stay there.[26]

Fardon's term of imprisonment was due to expire on 29 June 2003. Justice Muir made an interim detention order and an order that Fardon undergo psychiatric examination on 27 June 2003.[27] An appeal against the preliminary orders was dismissed by a majority of two judges to one in the Queensland Court of Appeal.[28] On 6 November 2003, White J ordered Fardon's continuing detention.[29]

Fardon then appealed to the High Court.[30] The appeal was limited to the issue as to whether s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) conferred jurisdiction upon the Supreme Court of Queensland which was repugnant to, or incompatible with, its integrity as a court. Six of the judges (with Kirby J dissenting) held that s 13 of the Act was valid. Chief Justice Gleeson was careful to point out that the High Court had no jurisdiction to consider policy issues concerning the legislation:

> There are important issues that could be raised about the legislative policy of continuing detention of offenders who have served their terms of imprisonment, and who are regarded as a danger to the community when released. Substantial questions of civil liberty arise. This case, however, is not concerned with those wider issues. The outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court.[31]

25 Two subsequent applications under the Act were refused because insufficient time was given between the making of the application and the offender's pending release: *Attorney-General (Qld) v David Gregory Watego* [2003] QSC 367 (Unreported, Muir J, 31 October 2003) and *Attorney-General (Qld) v Wayne Michael Nash* (2003) 143 A Crim R 312.

26 *Attorney-General (Qld) v Fardon* [2003] QSC 331 (Unreported, Atkinson J, 2 October 2003) 7.

27 *Attorney-General (Qld) v Fardon* [2003] QSC 200 (Unreported, Muir J, 9 July 2003).

28 *Attorney-General (Qld) v Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003).

29 *Attorney-General (Qld) v Fardon* [2003] QSC 379 (Unreported, White J, 6 November 2003).

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

31 Ibid 52-3.

Chief Justice Gleeson went on to state that many laws enacted by Parliament may be politically controversial, but it does not necessarily follow that such laws compromise the integrity of the courts.[32] In their joint judgment, Callinan and Heydon JJ also stated that while categories of non-punitive, involuntary detention exist, this does not mean that 'this court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes'.[33]

The majority judgments emphasised that the primary purpose of the Act is not punishment, but community protection. The majority viewed this as compatible with the exercise of judicial power. The legislation was distinguished from that in *Kable's* case on a number of grounds.

For example, Gleeson CJ stated that the majority in *Kable's* case accepted that 'the appearance of institutional impartiality of the Supreme Court was seriously damaged by a statute which drew [the Court] into what was, in substance, a political exercise.'[34] In comparison, the Queensland legislation enables a substantial judicial discretion as to whether or not to make an order, the rules of evidence and the onus of proof apply, there is a process for appeal, the hearings are to be conducted in public and 'in accordance with the ordinary judicial process'.[35] He concluded that there was nothing in the Act to suggest that the Supreme Court was to act as a 'mere instrument of government policy'.[36]

Only Kirby J in his dissenting judgment was prepared to hold that s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) conferred jurisdiction upon the Supreme Court of Queensland which was repugnant to its integrity as a court. He stated that '[i]n this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed'.[37]

The Attorneys-General for the Commonwealth government and the governments of New South Wales, South Australia, Western Australia and Victoria were given status as 'interveners' during the High Court hearing because of their interest in the outcome. The High Court decision thus signals the opening of the door for preventive regimes across Australia and it may also lead to the enactment of legislation allowing for the preventive detention of other categories of prisoners.

In 2005, the South Australian government amended its *Criminal Law (Sentencing) Act 1988* (SA) to enable the Attorney-General to apply to the Supreme Court of South Australia for an order that an offender considered 'incapable of controlling, or unwilling to control, sexual instincts' and who is

32 Ibid 57.
33 Ibid 109.
34 Ibid 56.
35 Ibid 57.
36 Ibid.
37 Ibid 83.

already serving a prison sentence be detained indefinitely.[38] The *Crimes (Serious Sex Offenders) Act 2006* (NSW) follows the Queensland model in allowing for the continued detention of those in prison for sex offences, but broadens the scope of offences to 'a serious sex offence' as well as 'an offence of a sexual nature'.[39] The recently enacted *Dangerous Sexual Offenders Act 2006* (WA) also reflects the Queensland legislation, but which is broader in encompassing sex offenders who may be out on parole.[40] In 2005, the Victorian government also passed legislation which, while not as sweeping as the Queensland Act, enables continued monitoring of sex offenders after they have served their sentence.[41]

B *Drugs*

The right to liberty and security of the person is not only enshrined in the *International Covenant of Civil and Political Rights* as outlined above. It also finds voice in article 5(1) of the *European Convention on Human Rights*.[42] Article 5(1) confirms the fundamental human right to liberty and security of person and proscribes the deprivation of human liberty except in certain listed cases and when in accordance with lawful procedures. It is interesting to note one of the cases excepted by article 5(1). Under paragraph (e) lawful detention is allowed of 'persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants'.

The rationale for detaining those with infectious diseases is clear, but no justification is proffered as to why persons of unsound mind, alcoholics, drug addicts, or vagrants are singled out for potential detention. Mark Finnane has pointed out that policing in the 19th century was an exercise in the governance of drunks, prostitutes, vagrants and the like for the benefit of the respectable classes.[43] It may be that the categories of those mentioned in article 5(1)(e) who may be lawfully detained are a reflection of the historical underpinnings of modern policing. I will return to the concept of status offences in the section on policy issues. Here, I wish to review the legislation enabling preventive detention in hospital settings.

There are various legislative regimes in Australia that allow for the involuntary detention of those with mental illnesses and infectious diseases on the basis of treatment as well as the protection of the community. The process for admitting a person involuntarily to a mental health facility varies within each state and

38 *Criminal Law (Sentencing) Act 1988* (SA) s 23(2a), as amended by *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA).
39 *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 14.
40 *Dangerous Sexual Offenders Act* 2006 (WA), s 8(2) states that an application may be brought 'whether or not the person under sentence of imprisonment is in custody'.
41 *Serious Sex Offenders Monitoring Act 2005* (Vic).
42 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature on 4 November 1950, 213 UNTS 227 (entered into force 3 September 1953), as amended by Protocols Nos 3, 5, 8, 11 and 14 (entered into force 21 September 1970, 20 December 1971, 1 January 1990, 1 November 1998 and 13 May 2004 respectively) ('*European Convention on Human Rights*').
43 Mark Finnane, *Police and Government: Histories of Policing in Australia* (1994) chp 1.

territory.[44] In general, a person may be involuntarily detained if he or she is suffering from a mental illness or mental disorder, is in need of treatment, is refusing or is unable to consent to treatment and poses a threat to him or herself or others. The fundamental question which is raised by such legislation is whether it is justifiable to detain individuals with mental illnesses without their consent on the basis that there may be a risk of harming others. This question also arises in relation to the compulsory care of those with intellectual disabilities or cognitive impairments whose behaviour is believed to place others at risk of harm. Guardianship laws often provide for guardians to be appointed to consent to the care and treatment of such individuals.[45]

In all Australian jurisdictions, the protection from self-harm or the protection of others is a criterion that must be taken into account in the relevant legislation. Table 1 sets out the appropriate legislation and requirements in this regard.

Table 1: Civil Commitment Legislation for those with Mental Illnesses

Name of Legislation	Relevant Sections
Mental Health (Treatment and Care) Act 1994 (ACT)	**s 26(p)(i)** and **(ii)**: Person likely to do serious harm to himself or herself of others.
Mental Health Act 1900 (NSW)	**s 9(1)(a)** and **(b):** Treatment or control of person is necessary for the person's own protection from serious harm; or for the protection of others from serious harm.
Mental Health and Related Services Act 1998 (NT)	**ss 14(b)(ii)A, 14B, s 15(c)**: Person is likely to cause imminent harm to himself or herself, a particular person or any other person.

44 An analysis of the degree to which detention of the mentally ill is a problem is beyond the scope of this paper and difficult to determine in any case. The Senate Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community, First Report* (2006) at 37 notes that

> [i]nvoluntary admissions and treatment are common, and can be the norm in acute inpatient settings. For example, 83 per cent of patients admitted to St Vincents Acute Inpatient Unit in Sydney are involuntary admissions. The actual level of people being treated against their will is probably higher than figures alone suggest.

It should be noted that there is a view that it is deinstitutionalisation or 'decarceration' rather than detention of those with serious mental illnesses that is the real problem: Andrew Scull: *Decarceration: Community Treatment and the Deviant: A Radical View* (2nd ed, 1984).

45 See for example on this issue, Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, *Final Report*, Report No 48 (2003).

Name of Legislation	Relevant Sections
Mental Health Act 2000 (Qld)	**s 13**: There is a risk that the patient may cause harm to himself or herself or someone else.
Mental Health Act 1993 (SA)	**s 12(c)**: Person should be admitted as a patient and detained in an approved treatment centre in the interests of his or her own health and safety or for the protection of other persons.
Mental Health Act 1996 (Tas)	**s 24(b) and (c)**: Person may be detained if there is a significant risk of harm to the person or others and the detention is necessary to protect that person or others.
Mental Health Act 1986 (Vic)	**s 8(1)(c)**: Person should be detained for involuntary treatment because it is necessary for his or her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public.
Mental Health Act 1996 (WA)	**s 26(1)(b)(i)**: Treatment required to be provided in order to protect the health or safety of that person or any other person.

In 2000, a Report to the National Mental Health Working Group found that there had been improvement in state and territory mental health legislation both in terms of human rights protection and consistency across jurisdictions.[46] However, there were a number of problematic areas identified such as the lack of provisions dealing with the rights of voluntary patients, what the criteria should be for 'short' periods of involuntary detention, the lack of provisions regarding an obligation to inform patients of their rights and discrepancies with definitions of mental illness.[47]

46 Helen Watchirs, National Rights Analysis Instrument Assessment Panel, Report to the Australian Health Ministers' Advisory Council National Mental Health Working Group, *Application of Rights Analysis Instrument to Australian Mental Health Legislation* (2000) <http://www.health.gov.au/internet/wcms/Publishing.nsf/Content/mental-pubs/$FILE/amhl.pdf> at 12 May 2006.

47 Ibid 3-5.

Civil commitment legislation is very much based on a medical model such that treatment is often viewed as synonymous with drug treatment. Graeme Smith writes:

> The psychiatry profession has polarised the debate about the nature of psychiatric illness by pursuing a medical model with vigour, creating a classification of psychiatric illness or disorder more precise than those of many physical disorders, yet lacking the most valid of all justifications, known causality.[48]

Australia's first National Mental Health Plan which was agreed to by the Australian Health Ministers in 1992 concentrated on reforming specialist mental health services, emphasising community based care, decreased reliance on institutional care and mainstreamed acute beds into general hospitals.[49] Its major focus was on the low prevalence mental illnesses such as psychosis and bipolar disorder. While subsequent plans have moved outward to focusing on those with higher prevalence illnesses such as anxiety and depression, the initial emphasis on involuntary treatment of those with low prevalence but serious mental illnesses has led to criticisms that those who want treatment are unable to find it.[50] After conducting a national review of the experiences of those who use and provide mental health services, the Mental Health Council of Australia concluded in 2003 that 'current community-based systems fail to provide adequate services'.[51] It pointed out that Australia spends approximately 7 per cent of its health budget on mental health, whereas other first world countries spend 10 to 14 per cent.[52] The lack of adequate funding means that the emphasis remains on the use of drugs to treat those with serious mental illnesses, rather than on psychosocial treatment methods or funding wide-ranging community support services.

The Mental Health Council reported that the main concern with the current mental health system was that of neglect rather than outright abuse.[53] That is, some participants in the review felt there was no real follow-up once discharged from hospital into the community and they were not treated as individuals with individual problems and needs, but lumped into a category of 'people with mental illnesses'.[54] The involuntary civil commitment of those with mental illness thus needs to be understood in this broader context regarding deficiencies in existing mental health care in Australia.

48 Graeme Smith, 'The Italian Experience' (2004) 63(4) *Meanjin* 81, 83.

49 The current *National Mental Health Policy* is online: <http://www.health.gov.au/internet/wcms/Publishing.nsf/Content/mental-pubs/$FILE/nmhp.pdf> at 12 May 2006. The first National Mental Health Plan is no longer available online.

50 National Mental Health Strategy Evaluation Steering Committee for the Australian Health Ministers Advisory Council, *Evaluation of the National Mental Health Strategy, Final Report*, (1997) 1.

51 Mental Health Council of Australia, *Out of Hospital, Out of Mind, Final Report* (2003) 1.

52 Ibid 3.

53 Ibid 21.

54 Ibid.

The civil commitment of those with mental illnesses raises the question as to why there is a need for specific legislation at all. Recently, Murray Allen, the President of the Mental Health Review Board of Western Australia referred to such legislation as discriminatory and stated that its abolition may go a long way towards ridding mental illness of the stigma attached to it.[55] This echoes the argument of psychiatrist, Stephen Rosenman that specific mental health law should give way to guardianship law which is non-discriminatory and intervenes according to need rather than diagnostic classification.[56]

At least all Australian jurisdictions have a process to review decisions to involuntarily commit an individual with a mental illness. All jurisdictions have a tribunal specifically established for this purpose.[57] In general, mental health tribunals consist of members representing the legal and medical professions as well as the community and conduct initial and periodic reviews concerning whether the criteria for involuntary commitment have been met. Most jurisdictions also have an avenue of appeal to a higher court based on the merits of the tribunal decision.[58]

While it is unrealistic to believe that civil commitment legislation will be abolished in Australia, there is certainly a question as to how long individuals should be detained for treatment and the protection of others. Principle 16(2) of the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*[59] refers to detention as being 'for a short period ... for observation and preliminary treatment'. What a short period means differs across Australian jurisdictions.[60]

Another area of preventive detention that has the potential to expand is that of the detention of those with infectious diseases. Individuals may be detained under civil law on the basis that they have an infectious disease and they pose a risk to public health. The Commonwealth and each state and territory have powers to quarantine or isolate individuals in the case of an epidemic. There are also provisions that enable the detention of an individual with an infectious disease in the absence of an epidemic and, in some cases, the provisions deal specifically with individuals with HIV/AIDS. The preventive detention of those with HIV/AIDS has led to the criticism that public health laws perpetuate discrimination by imposing a different regime of surveillance and controls on sex workers and their clients.[61]

55 Murray Allen, 'Why Specific Legislation for the Mentally Ill?' (2005) 30(3) *Alternative Law Journal* 103.

56 Stephen Rosenman, 'Mental Health Law: An Idea Whose Time Has Passed' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 560.

57 The terms used differ slightly. In New South Wales, the Northern Territory, Queensland, South Australia and Western Australia, the relevant body is called the Mental Health Review Tribunal. In the Australian Capital Territory and Tasmania, the term used is the Mental Health Tribunal and in Victoria, the relevant body is called the Mental Health Review Board.

58 Watchirs, above n 46, 12.

59 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,* GA Res 46/119, UN GAOR, 46th sess, 75th plen mtg, UN Doc A/RES/46/119 (1991).

60 Watchirs, above n 46.

61 Nicki Greenberg, 'The Rhetoric of Risk' (1997) 22(1) *Alternative Law Journal* 11; Bernadette McSherry, 'Dangerousness and Public Health' (1998) 23(6) *Alternative Law Journal* 276.

A number of the existing provisions are very broad and do not specify time limits on the period of detention. For example, under regulation 7 of the *Public Health (Infectious and Notifiable Diseases) Regulations 1992* (ACT), section 13 of the *Notifiable Diseases Act 1981* (NT) and section 249(6) of the *Health Act 1911* (WA), a person may be detained by the relevant Medical Officer until release is authorised on the grounds that the person is free from disease or no longer constitutes a danger to public health.

The provisions in the New South Wales, Queensland, South Australian, Tasmanian and Victorian legislation make it clear that detention is a last resort.[62] Only after measures such as requesting that the person refrain from certain conduct and/or submit to supervision have been taken, can an order for detention be made. In Queensland, South Australia, Tasmania and New South Wales, a court must make or confirm an order for detention. The provisions in New South Wales, South Australia, Tasmania and Victoria also impose time limits on detention, with avenues for renewal of the order. The South Australian and Victorian provisions include a specific right to appeal against the order for detention.

There is a large degree of inconsistency between the different jurisdictions with regard to whether a person is detained under an administrative (ostensibly under executive) power or a judicial order. As I set out later in this paper, it is appropriate that the power to detain be exercised judicially or, at the very least, subject to judicial merits review.

The final area of law which allows for the detention of individuals in a treatment facility is that dealing with those with alcohol or drug problems. Table 2 sets out the current legislative schemes enabling the detention of such individuals. It should be noted that detention on the basis of 'protection of other persons' is mentioned as a criterion in most relevant legislative schemes.

Table 2: Powers of Detention of Intoxicated Persons

Name of Legislation	Relevant Sections
Intoxicated People (Care and Protection) Act 1994 (ACT)	**s 4**: If a police officer believes, on reasonable grounds, that a person in a public place is intoxicated and is, because of that intoxication— (a) behaving in a disorderly way; or (b) behaving in a way likely to cause injury to himself, herself or another person, or damage to any property; or

62 *Public Health Act 1991* (NSW); *Health Act 1937* (Qld); *Public and Environmental Health Act 1987* (SA), *HIV/AIDS Preventive Measures Act 1993* (Tas); *Health Act 1958* (Vic).

	(c) incapable of protecting himself or herself from physical harm; the officer may take the person into custody and detain the person.
Inebriates Act 1912 (NSW) Note: This Act was to be repealed by the *Miscellaneous Acts (Mental Health) Repeal and Amendment Act 1983* No 181, Sch 1, but that Act was repealed before Sch 1 was commenced.	**s 3(1)**: an inebriate, certain family members or member of police force above rank of sergeant acting on request of medical practitioner may apply for an order for the inebriate to: • Enter a recognizance; • Be placed for a period not exceeding 28 days under care or control of some person in the house of the inebriate or a friend, public or private hospital, institution or admission centre; • Be placed in a licensed institution for not more than 12 mths; • Be placed under care and charge of an attendant or attendants under the control of the Court, Judge or Magistrate making the order or a guardian willing to act in that capacity Provided such order only made on the production of a certificate from medical practitioner that the person is an inebriate, together with corroborative evidence AND on personal inspection of the inebriate by the Court, Judge or Magistrate or a person appointed in that behalf. **Inebriate** is a person who habitually uses intoxicating liquor or intoxicating or narcotic drugs to excess (**s 2**)

Name of Legislation	**Relevant Sections**
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). Part 16: Powers Relating to Intoxicated Persons (ss 205 – 210) Date of commencement 12 December 2005	**s 206**: A police officer may detain an intoxicated person found in a public place who is: (a) behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property, or (b) in need of physical protection because the person is so intoxicated. **s 207**: Restrictions regarding nature of detention **Intoxicated person** means a person who appears to be seriously affected by alcohol or another drug or a combination of drugs (**s 205**)
Volatile Substance Abuse Prevention Act 2005 (NT)	**s 19**: **when a person may be taken into detention ('apprehended')**: (a) person is inhaling or has recently inhaled a volatile substance and (b) should be apprehended to protect the persons or other people's health and safety. person is to be taken to a place of safety or a responsible adult **(s 21)** but if police officer or authorised person unable to do so and if the person is deemed to continue to pose a risk then that person can be detained in a police station **(s 22)**.
Liquor Act 1978 (NT)	**s 122**: **prohibition orders:** Courts can order a prohibition order on the sale of supply of liquor to certain persons. As part of the order, the court can order an assessment report and a specified program of treatment and rehabilitation.

Name of Legislation	Relevant Sections
Public Intoxication Act 1984 (SA)	**s 7**: **power of police or authorized person to apprehend** a person who in a public place is under the influence of a drug or alcohol and is unable to take proper care of him or herself. The person may be detained in a police station or sobering up centre.
Alcohol and Drug Dependency Act 1968 (Tas)	**s 24(2)**: An **admission application** may be made in respect of a patient on the grounds – **(a)** that he [or she] is suffering from alcohol dependency or drug dependency to a degree that warrants his detention in a treatment centre for medical treatment; and **(b)** that it is necessary in the interests of his [or her] health or safety or for the protection of other persons that he [or she] be so detained. **s 2**: **'patient'** means a person suffering, or appearing to be suffering, from alcohol dependency or drug dependency, and includes any person liable to be detained under this Act; **s 27**: **Duration of detention** - a patient admitted to a treatment centre in pursuance of an admission application may be detained in that centre for a period of 6 months beginning with the day on which he [or she] was so admitted and for such further periods for which authority for his [or her] detention may be renewed under this section.

Name of Legislation	**Relevant Sections**
Police Offences Act 1935 (Tas) Division I- Drunkenness, Vagrancy, Indecency and Other Public Annoyances	**s 4A(2)**: A police officer may take a person into custody where they believe on reasonable grounds that a person in a public place is intoxicated and behaving in a manner likely to cause injury to self or other person or is incapable or protecting him or herself from physical harm. **s 4A(3)**: the Police officer may release the person to the care of a responsible person or if that is not possible to hold that person in custody.
Alcoholics and Drug-Dependent Persons Act 1968 (Vic)	**s 11**: **Order of Assessment** where complaint brought by a person of a prescribed class that a person is an alcoholic or drug-dependent. **s 12**: **Committal to a Treatment Centre** where a person is found to be an alcoholic or drug-dependent person following a medical assessment under s 11.
Drugs, Poisons and Controlled Substances Act 1981 (Vic)	**s 60L**: **Power of Police to detain** persons they believe (with reasonable grounds) to be under 18 years of age, inhaling or recently inhaled a volatile substance and likely to cause serious bodily harm to self or other person if not detained. **s 60M**: **Length of Detention:** if over 18 must be immediately released, if under 18, only for so long as risk of causing serious bodily injury remains, as soon as practicable into custody of a person capable of taking responsibility,

Name of Legislation	Relevant Sections
Protective Custody Act 2000 (WA)	**s 6**: An intoxicated person who is on public property or trespassing on private property may be apprehended by an authorized officer where that officer reasonably suspects that the person is intoxicated and needs to be apprehended to protect the health and safety of the person or other persons, or to prevent the person causing serious damage to property. **s 7**: detention may only be for so long as the person remains intoxicated and it remains necessary for the protection of health, safety, property except in some instances the person may be detained between the hours of midnight and 7.30am where the police officer believes that to be in the best interest of the person. **Intoxicated** means affected by, or apparently by, an intoxicant to such an extent that there is a significant impairment of judgment or behaviour (**s 3**)

There is very little commonality in these provisions. Some rely on police powers of detention, others enable doctors or family members to seek an order for detention in a hospital. These detention powers overlap with public order offences aimed at managing public drunkenness.[63] From around the late 1970s, there was a shift away from the arrest and prosecution of individuals for public drunkenness toward a social welfare or medical model.[64] Nonetheless, powers to detain those with alcohol and drug problems, even where such powers are classified as civil rather than criminal, have coercive and punitive elements. Where police are given the power to detain an individual, police discretion becomes the key to decision making and administrative and judicial review processes are bypassed.[65] This can lead to discriminatory practices, with certain minorities being targeted.

63 On these offences see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 749-50.
64 Ibid 749.
65 DJ Galligan, 'Regulating Pre-Trial Decisions' in Nicola Lacey (ed), *A Reader on Criminal Justice* (1994).

The recent 'law and order' election platforms of both the Australian Labor Party and the Country Liberal Party in the Northern Territory provides but one example of the political desire to be seen as 'getting tough' on those with alcohol and / or drug problems. The ALP Platform on Community Safety and Justice proposed 'sobering up facilities or shelters' to detain intoxicated people.[66] The Chief Minister also referred to additional funding for the police force to target anti-social behaviour and street offences.[67] The proposal for sobering up facilities was listed under the heading 'prison and custodial arrangements', indicating that this was a criminal justice matter, but the subsequent detention and 'moving on' of those in public places was generally done in the absence of any charges being laid. Over a two week period, 'Operation Soarer' resulted in the detention of more than 1000 people, many of whom were aborigines known as 'long grassers' who live on the streets, parks and reserves of Darwin.[68] Operation Soarer can be seen as an example of the overlap between criminal and civil powers of detention in the sense that it allowed persons to be detained without charge for purported health (sobering up) reasons. When the well-known actor David Gulpilil was asked to move on from where he was camped, there was media publicity about the policy being racist.[69] Nevertheless, Operation Soarer and the law and order platform won popular support, with the Australian Labor Party being returned in a landslide victory, winning 19 out of the 25 seats in the Northern Territory Legislative Assembly.

Powers to detain individuals in order to treat them for drug or alcohol problems can be viewed as an even more intrusive method of preventive detention than keeping a person in a 'sobering up' facility yet little is known about how often these provisions are used and the outcomes of such treatment. The Victorian Department of Human Services is currently undertaking a review of the *Alcoholics and Drug-dependent Persons Act 1968* (Vic). In its Discussion Paper, it notes that the civil commitment provisions of the Act have never been evaluated, nor have the equivalent provisions in the Tasmanian and New South Wales legislation.[70] The Department estimates that between 1992 and 2004, eleven individuals per year on average were civilly committed under the Act.[71] In looking at a sample of 31 case studies, the Department found that the majority of those committed were using alcohol, with about half using alcohol exclusively.[72] The Department noted that there were significant limitations in the benefit of

66 Northern Territory Australian Labour Party, *Northern Territory ALP Platform on Community Safety and Justice* (2004) NT ALP <http://www.nt.alp.org.au/dl/platform2004/community_safety_justice.pdf> at 12 May 2006.

67 NT Chief Minister Clare Martin, 'Additional Police Help Target Anti-Social Behaviour and Street Offences' (Press Release, 24 April 2005).

68 Northern Territory Police, 'Police Target Social Disorder' (Press Release, 24 April 2005) at 12 May 2006.

69 See, eg, Lindsay Murdoch, 'Gulpilil Angry at Plan to Jail Drunks', *The Age* (Melbourne), 18 June 2005 cited <http://www.kooriweb.org/foley/news/age18jun05.html> at 12 May 2006.

70 Victorian Government Department of Human Services, Drugs Policy and Services Branch, *Review of the Alcoholics and Drug-dependent Persons Act 1968* (August 2005) 10 <http://www.health.vic.gov.au/drugs/downloads/15757_dhs_addpapaper_final.pdf> at 12 May 2006.

71 Ibid 8.

72 Ibid.

involuntary treatment of those not motivated to change their behaviour and that short-term detention 'does little to identify long term environmental issues that predict a person's recovery in the real world'.[73]

This brief overview of legislative regimes enabling preventive detention in hospital settings raises issues concerning why it is that certain individuals can be detained and not others. I will return to this question in the section dealing with policy issues.

C *Evil Souls*

Many individuals may be seen as falling within the general category of 'evil souls'. I want to consider two categories that have been the object of legislative regimes in recent years: those categorised as 'unlawful non-citizens' and terrorists.

1 *Unlawful Non-citizens*

Mandatory immigration detention was introduced into Australia by the Labor federal government in 1992 and still has bipartisan support. Under section 189(1) of the *Migration Act 1958* (Cth) if an 'officer' – including an immigration official or a state police officer – 'knows or reasonably suspects' that a person is an unlawful non-citizen, the officer 'must detain the person'. Section 196(1) provides that an unlawful non-citizen detained under section 189(1) must be kept in immigration detention until removed from Australia, deported or granted a visa. This provision has led to individuals being detained for excessively long periods. Decisions by a majority of the High Court of Australia in 2004 meant that asylum seekers who cannot be returned to their country of origin can be kept in detention indefinitely.[74]

In this section, I want to explore the notion that immigration detention has become a form of preventive detention of a particular 'type' of person: one who is perceived as uncivilised at best and a terrorist at worst, and of the wrong 'type' to be part of the Australian community.

In 2001, the Australian government's refusal to allow the Norwegian vessel, the MV Tampa, to enter Australian waters after it had rescued 433 asylum-seekers from a sinking boat in international waters, reinforced an undercurrent of fear concerning 'queue jumpers'. Prime Minister John Howard's 2001 election campaign statement that 'we will decide who comes to this country and the circumstances in which they come'[75] tapped into security concerns brought to the fore by the terrorist attacks on the United States on 11 September 2001.

73 Ibid 10.

74 *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural Affairs v Al Khafaji* (2004) 219 CLR 664.

75 The transcript of the Prime Minister's 2001 election campaign speech is available at <http://afr.com/election2001/transcripts/2001/12/06/FFXBOGX3DTC.html> at 12 May 2006.

The rationale behind immigration detention is meant to be that it enables enquiries and a determination of the status of immigrants to be made. However, the events of 2001 added an overlay of concern about the characteristics of those seeking asylum. On 9 October 2001, Prime Minister John Howard said in relation to asylum seekers who had allegedly thrown their children overboard from the boat SIEV 4,[76] that 'I certainly don't want people of that type in Australia. I really don't.'[77] It was subsequently revealed that no-one on the SIEV 4 had in fact thrown children into the water,[78] but the phrase 'people of that type' was a powerful one. It encapsulated the belief that asylum seekers are not like 'us', but are uncivilised (why else would they put their children in danger?) and therefore undeserving of becoming part of the Australian community.

Savitri Taylor has pointed out that a link between those arriving in Australia without authorisation and terrorists was emphasised by some government members in the aftermath of the 11 September 2001 attacks.[79] For example, the then Defence Minister, Peter Reith in a television interview dated 13 September 2001 said that he had no doubt that the dangers of terrorism underscored the need to screen 'boat people'.[80] He stated that

> a government does have and should have at law the right as a sovereign territory to protect its borders and to use its military to do so. Quite frankly, why else would you have a defence force if you are not entitled to use them to deal with illegal entries into your own country?[81]

The perceived need to boost border security resulted in substantial changes to domestic asylum seeker law and policy, including the power to take those labelled 'offshore entry persons' to declared countries such as Nauru and Papua New Guinea.[82] Taylor points out that the 'soft' security concern of controlling population movement into Australia and the 'hard' security concern of defending Australia's right to continued existence became blurred in the wake of 11 September 2001.[83]

The preventive aspect of immigration detention can be explained in two ways. The policy seems to be that immigration detention serves as a deterrent; a way of

76 SIEV is an acronym for 'suspect illegal entry vessel'.

77 Quoted in Fran Kelly, 'Government Wrong on Asylum Seeker Allegations', *7.30 Report, ABC Television*, 13 February 2002 <http://www.abc.net.au/7.30/content/2002/s481361.htm> at 12 May 2006.

78 Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, 'A Certain Maritime Incident' (2002) xxiii.

79 Savitri Taylor, 'Reconciling Australia's International Protection Obligations with the "War on Terrorism"' (2002) 14(2) *Pacifica Review* 121-40, 121.

80 Peter Reith, 'Interview', *Sunrise, Network Seven Television*, 13 September 2001 <http://www.minister.defence.gov.au/2001/1309011.doc> at 12 May 2006. On this point, see also David Marr and Marian Wilkinson, *Dark Victory* (2004) 201-2.

81 Ibid.

82 Taylor, above n 79, 127. See also Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Law and Policy Journal* 49; Marr and Wilkinson, above n 80.

83 Taylor, above n 79, 127.

preventing others from 'illegally' entering Australia.[84] Such detention also operates not only to prevent the detainee entering Australian society, but also from escaping deportation. The then Immigration Minister, Peter Ruddock, told ABC Radio in 2002 that 'our concern is that people would abscond. Experience here and abroad is that people who have received decisions that are adverse, who are being held for removal, if they were freed and in the Australian community they would not be able to be readily found.'[85]

Matthew Groves has pointed out the parallels between immigration detention and imprisonment.[86] While the High Court has accepted that the rationale for immigration detention is not punishment,[87] Hayne J has pointed out that immigration detention parallels punishment because detention centres possess 'many, if not all, of the physical features and administrative arrangements commonly found in prisons'.[88]

The length of time that some immigrants have spent in detention underscores a preventive detention rationale. For example, the then 24-year old Peter Qasim arrived in Australia seeking asylum in 1998 and was kept at various immigration detention centres for a total of six years and ten months. He asserts that he is a Kashmiri who fled the region after becoming involved with the separatist Kashmir Liberation Front. He exhausted all legal appeals for asylum and on 17 May 2005 he was assessed by a psychiatrist who diagnosed him as being profoundly depressed and recommended immediate hospitalisation to stop him from harming himself. He was transferred from the Baxter Immigration Detention Centre to Glenside psychiatric hospital in Adelaide. Finally, on 17 July 2005 he was given a special bridging visa to enable him to live in the community.

There is growing evidence that the lengthy detention of 'unlawful non-citizens' contributes to feelings of anxiety, hopelessness and depression[89] and that children are particularly vulnerable to the effects of prolonged detention.[90] It has been suggested that the detention environment is a direct contributor to psychological

84 See Aruna Sathanapally, Australian Human Rights Centre, *Asylum Seekers, Ordinary Australians and Human Rights*, Working Paper No 3 (2004) <http://www.ahrcentre.org/working_papers/2004_3_Asylum_Seekers.htm#_Toc56349499> at 12 May 2006.

85 Quoted in AAP, 'Asylum seekers would abscond if freed: Ruddock', *The Age* (Melbourne), 1 August 2002.

86 Mathew Groves, 'Immigration Detention vs Imprisonment: Differences Explored' (2004) 29(5) *Alternative Law Journal* 228.

87 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

88 *Al-Kateb v Godwin* (2004) 219 CLR 562, 650.

89 Derrick Silove and Zachary Steel (eds), *The Mental Health and Well-Being of On-Shore Asylum Seekers in Australia* (1998); Aamer Sultan and Kevin O'Sullivan, 'Psychological Disturbances in Asylum-Seekers Held in Long Term Detention: A Participant Observer Account' (2001) 175 *Medical Journal of Australia* 593; Zachary Steel et al, 'Psychiatric Status of Asylum-Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia' (2004) 28(6) *Australian and New Zealand Journal of Public Health* 527.

90 Sarah Mares et al, 'Seeking Refuge, Losing Hope: Parents and Children in Immigration Detention' (2002) 10 *Australasian Psychiatry* 91.

stress, either on its own or as a 'retraumatising influence'.[91] This is borne out by suicide rates in detention centres which are estimated to be between three to 17 times that in the Australian community.[92]

It has been strongly argued that Australia's mandatory immigration detention system violates article 9(1) of the *International Covenant on Civil and Political Rights* and the *Convention Relating to the Status of Refugees*.[93] Recent cases have also highlighted the lack of proper psychiatric care at Baxter Detention Centre. For example, Finn J found that the Commonwealth had breached its duty to ensure that reasonable care was taken of two Iranian men in detention in relation to the treatment of their respective mental health problems.[94] This was attributable to systemic defects in the manner in which mental health services were provided at Baxter.

Perhaps above all, it was the case of Cornelia Rau that galvanised concerns about the detention of and lack of treatment of those with mental illnesses in immigration detention. Cornelia Rau is a 39 year old permanent Australian resident of German background who has lived in Australia since she was 18 months old. She has a history of mental illness. She was detained in the Brisbane Women's Correctional Centre for six months on suspicion that she was an unlawful non-citizen after she told police she was a German tourist. She was kept with the general prison population because the Women's Correctional Centre does not have a separate area in which to house immigration detainees. She was treated as though she was a prisoner and placed in a confinement cell when she was found to have breached disciplinary provisions under the *Corrective Services Act* 2000 (Qld). In August, Cornelia spent a week in Brisbane's Princess Alexandra Hospital for a mental health assessment, but was returned to the correctional centre. That month, her family reported her missing.

In October 2004, Cornelia Rau was transferred to the Baxter Detention Centre in South Australia. In November, Cornelia spent two periods in isolation in the Management Compound which enables 24 hour supervision of detainees, the first time for four days and the second time for eight days.

Finally in February 2005, Cornelia's family recognised her from a report on her in the *Sydney Morning Herald*. She was released from immigration detention and moved to Glenside Psychiatric Hospital near Adelaide.

91 Derrick Silove and Zachary Steel, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *Medical Journal of Australia* 596.

92 Catholic Commission for Justice, Development and Peace, *Damaging Kids: Children in Department of Immigration and Multicultural and Indigenous Affairs' Immigration Detention Centres,* Occasional Paper No 12 (2002).

93 Amnesty International Report, *Australia: A Continuing Shame: The Mandatory Detention of Asylum Seekers* (June 1998); Amnesty International Australia, *The Impact of Indefinite Detention: The Case to Change Australia's Mandatory Detention Regime,* Preliminary Report (23 March 2005); Parinaz Kermani, 'Not at Home: The Dilemma of Detained Asylum Seekers' (2005) 79(7) *Law Institute Journal* 54.

94 *S v Secretary, Department of Immigration Multicultural and Indigenous Affairs* (2005) 143 FCR 217.

The Report of the Palmer Inquiry into Cornelia's detention pointed out that there 'is no automatic process of review sufficient to provide confidence to the Government, to the Secretary of [the Department of Immigration and Multicultural and Indigenous Affairs] or to the public that the power to detain a person ... is being exercised lawfully, justifiably and with integrity.'[95] The Report also referred to the 'excessively long time' Cornelia was detained 'simply for administrative convenience',[96] and noted that those in detention require 'a much higher level of mental health care than the Australian community'.[97]

The former Victorian Police Commissioner, Neil Comrie headed a further inquiry into the wrongful deportation of Vivian Alvarez and on 6 October 2005, the Commonwealth Ombudsman, Professor John MacMillan published a report based on that inquiry.[98] Vivian Alvarez came to the attention of Immigration officials on 2 April 2001 when a social worker informed them that a physically injured and apparently destitute woman from the Philippines was wandering around the streets. She was admitted to the Richmond Clinic, the psychiatric ward of Lismore Base Hospital. It has been speculated that her injuries were the result of a car accident that affected her ability to explain who she was. She claimed to have come to Australia on a spousal visa, but immigration officials seem to have formed the view that she must have been brought to Australia as a sex slave. She had been reported missing to the Queensland Police under the name Vivian Solon or Young with a note of the same date of birth she had given immigration officials.

Vivian remained in hospital until a week before she was deported to the Philippines on 20 July 2001. Vivian was discharged suffering from severe back problems that necessitated her walking with a 4 wheel walker. It was discovered in 2003 that Vivian could have been wrongfully deported when an immigration officer recognised her from a missing persons report. Her family was not informed of the discovery and it was only in April 2005 that the Australian Federal Police began a search for Vivian in the Philippines. An Australian Catholic priest Father Mike Duffin watched reports about the search and identified Vivian as a woman brought to a mission for the destitute and dying in the city of Olongapao four years previously.

The Ombudsman's Report found that the initial decision to detain Vivian as an unlawful non-citizen was not based on a reasonable suspicion, as the relevant inquiries were not timely or thorough and her serious physical and mental health problems received insufficient attention.[99] The Report states that Vivian's unlawful removal to the Philippines was a result of systemic failures in the

95 Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, Report* (2005) viii.
96 Ibid x.
97 Ibid xii.
98 Commonwealth Ombudsman, *Inquiry Into the Circumstances of the Vivian Alvarez Matter* (2005) <http://www.comb.gov.au/publications_information/Special_Reports/2005/alvarez_report03.pdf > at 12 May 2006.
99 Ibid xi.

Department of Immigration[100] and the failure of three senior officers to take action after they had discovered the mistake could constitute a breach of the Australian Public Service Code of Conduct.[101] The Department's management of the matter was described as 'catastrophic'.[102]

While the Palmer and Ombudsman's Reports focus on the wrongful detention of Australian citizens, their recommendations highlight changes that need to be made in the way in which all detainees are treated. The Reports have sparked concern about the nature and exercise of detention powers and highlight the lack of proper mental health treatment for detainees. They have also raised questions concerning the accountability of members of the Department of Immigration and Multicultural and Indigenous Affairs, leading some to call for a system of judicial oversight of detention powers.[103]

The Minister for Immigration, Senator Amanda Vanstone has stated that the government accepts the thrust of the findings and recommendations of these two reports.[104] She has promised that the government 'will provide ex gratia assistance, including health support, to both Ms Rau and Ms Solon to enable them to re-establish themselves in the community'[105] and that the role of the Commonwealth Ombudsman in relation to immigration and detention matters will be strengthened. On 25 May 2005, Senator Vanstone announced she had previously ordered a '28 day limit - in all but exceptional circumstances - on the time immigration detainees can be held in prison'.[106] What those exceptional circumstances are have not been defined. On 6 October 2005, Senator Vanstone also announced that $230 million would be provided over five years for a 'broad range of initiatives to improve training, provide better health and wellbeing to immigration detainees, much better records management, decision quality assurance, and a much stronger focus on clients'.[107] These responses are certainly to be welcomed, but there are no signs that the government will change its mandatory detention policy.

2 Terrorists

The 'War Against Terror' has brought with it a raft of legislative powers concerning the interrogation, detention and prosecution of suspected terrorists.

For example, section 236A was inserted into the United States *Immigration and*

100 Ibid xiii.
101 Ibid xiv.
102 Ibid xv.
103 See discussion in Angus Francis, 'Accountability for Detaining and Removing Unlawful Non-Citizens' (2005) 30(6) *Alternative Law Journal* 263, 266.
104 Senator Amanda Vanstone, 'Report of Palmer Inquiry into Cornelia Rau Matter', (Press Release, 14 July 2005); Senator Amanda Vanstone, 'Palmer Implementation Plan and Comrie Report' (Press Release, 6 October 2005).
105 Senator Amanda Vanstone, 'Report of Palmer Inquiry into Cornelia Rau Matter' (Press Release, 14 July 2005).
106 Senator Amanda Vanstone, 'Ministerial Statement to Senate Estimates Committee' (Press Release, 25 May 2005).
107 Senator Amanda Vanstone, 'Palmer Implementation Plan and Comrie Report' (Press Release, 6 October 2005).

Nationality Act[108] by the *Patriot Act* 2001[109] to enable the Attorney-General to detain any 'alien' reasonably believed to have engaged in activity that endangers the national security of the United States. 'Enemy combatants' (rather than enemy prisoners of war under the Geneva Conventions) have been interred at Guantanamo Bay since January 2002.[110] Some, such as Australia's Mamdouh Habib, have been released without charge.[111] Much has been written about how this form of detention breaches international humanitarian law[112] and now the spotlight has fallen on the specially constituted military commissions set to try certain detainees such as the Australian citizen, David Hicks.[113]

Changes to the law in the United Kingdom and Australia did not go as far as the detention powers in the United States, but are still predicated on a preventive rationale and a status-based approach to criminality. While not unique to terrorism, having long been a feature of Australian drug laws, this development is further evidence of the current pre-eminence of the risk management model of criminal justice.[114]

Section 23 of the *Anti-Terrorism, Crime and Security Act 2001* (UK) enabled the detention without trial of non-British nationals designated by the Home Secretary as 'suspected international terrorist[s]'. A derogation from article 5 of the *European Convention on Human Rights* was entered for this section. The House of Lords duly held that this power was incompatible with certain articles of the *European Convention on Human Rights*.[115] The issue before the House of Lords was whether the exercise of power to detain under the Act was a breach of article 5, and whether the derogation could be justified under article 15. As mentioned earlier, article 5 confirms the right of all persons to liberty and security of person. Article 15 allows States to derogate from obligations incumbent on them as a result of article 5, where there is a war or 'other emergency threatening the life of the nation' and only then 'to the extent strictly required by the exigencies of the

108 8 USC §§1101 et seq.

109 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (US Patriot Act) Act of 2001,* Pub Law No 107-56, 115 Stat 272 (2001).

110 A majority of the Supreme Court recognized the power of the government to detain enemy combatants, but ruled that detainees must have the ability to challenge their detention before an impartial judge: *Hamdi v Rumsfeld* 124 S Ct 2633 (2004); *Rasul v Bush* 124 S Ct 2686 (2004).

111 Mamdouh Habib was released in January 2005 after being transferred to Guantanamo Bay on 4 May 2002. He had been arrested in Pakistan on 5 October 2001 and deported to Egypt for five months of interrogation before being imprisoned in Afghanistan.

112 See, eg, Arfan Khan, 'International and Human Rights Aspects of the Treatment of Detainees' (2005) 69(2) *Criminal Law* 168; Diarmuid O'Scannlain, 'Dissecting the Guantanamo Trilogy' (2005) 19(1) *Notre Dame Journal of Law, Ethics and Policy* 317; Michael Head, 'Retrospective Criminal Laws and Guantanamo Bay: Digging a Deeper "Legal Black Hole"' (2004) 29(5) *Alternative Law Journal* 244; Tom Davis, 'War on Terror: The Dilemma of Guantanamo Bay' (2004) 29(5) *Alternative Law Journal* 250.

113 See, eg, David Sloss, 'Availability of US Courts to Detainees at Guantanamo Bay Naval Base – Reach of Habeas Corpus – Executive Power in War on Terror' (2004) 98(4) *American Journal of International Law* 788; Michelle Grattan, 'Before a Kangaroo Court', *The Age* (Melbourne), 3 August 2005, 17; Editorial, 'Surrendering the Right to a Fair Trial' *The Age* (Melbourne), 3 August 2005, 16.

114 In relation to changes to the law brought about by the 'War on Drugs' see Bronitt and McSherry, above n 63, chp 14.

115 *A (FC) and Others(FC) v Secretary of State for the Home Department; X (FC) and Another (FC) v Secretary of State for the Home Department* [2005] 3 All ER 169.

situation'. The House of Lords held the powers contained within section 23 were discriminatory because they only applied to foreign nationals and were not proportionate to the threat the United Kingdom faced from terrorism. The majority held that the extent of derogation was more than 'strictly required by the exigencies of the situation', recognising that there was a duty of the court to protect fundamental liberties. Lord Nicholls stated that 'Parliament must be regarded as having attached insufficient weight to the human rights of non-nationals.'[116]

The government paid heed to the House of Lords decision, but has since enacted the *Prevention of Terrorism Act 2005* (UK) which enables the making of 'control orders' so that anyone suspected of being involved in terrorism may be subject to house arrest, curfews or tagging.

In Australia, the *Australian Security Intelligence Organisation Legislation Amendment Act 2003* (Cth) inserted a new division 3 ('Special Powers Relating to Terrorism Offences') into Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth). According to this Part, the Director-General of ASIO can request a warrant, with the Minister for ASIO's consent, to detain a person for the 'collection of intelligence' relating to a terrorism offence. There is no requirement that there be any grounds to suspect the person of having committed, or about to commit a crime. If a detainee fails to provide information sought they have the onus to prove that there is a reasonable possibility that they do not have the information sought or risk being charged with an offence of failing to supply information.[117] Detainees can be interrogated in the absence of a lawyer[118] and even if the person identifies a particular lawyer who is able to advise them, the legal adviser cannot intervene in questioning unless it is to ask for clarification of an ambiguous question.[119] Disclosing any information about individuals being detained is an offence punishable by five years' imprisonment.[120] Andrew Palmer has pointed out that a person can be detained under such a warrant for seven days, yet a person detained under the *Crimes Act 1914* (Cth) on suspicion of committing a Commonwealth terrorism offence can only be held for a maximum of 24 hours without charge.[121]

At the Council of Australian Governments meeting held on 27 September 2005, the Federal and State governments agreed to enact further laws enabling 'preventative'[122] detention and control orders. Part 1 of the *Anti-Terrorism Act (No 2) 2005* (Cth) inserts a new Division 104 into the *Criminal Code Act 1995* (Cth) authorising the issue of control orders in order to protect the public from

116 Ibid [81].
117 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G.
118 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34TB.
119 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34TA, 34U.
120 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA.
121 Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27(2) *The University of New South Wales Law Journal* 373, 376-7.
122 The term 'preventative' is often used interchangeably with 'preventive'. I have used the latter term because it is the 'default' term used in the Oxford English Dictionary .

terrorist attack. Part I also inserts a new Division 105 into the *Criminal Code* (Cth) allowing for a person to be detained without charge for up to 48 hours in order to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act after it has occurred. Section 105.34 states that a detainee is not entitled to contact another person, but s 105.35 allows the detainee to contact a family member or employer to let them know he or she is 'safe but not able to be contacted for the time being'. The Senate's Legal and Constitutional Committee noted that detaining a person without charge 'raises significant concerns with respect to the presumption of innocence, freedom from unlawful and arbitrary detention and the right to a fair trial'.[123] The Committee was given three weeks in which to inquire into the then Bill and it received 294 submissions within that time frame. Despite significant opposition to the provisions of the Bill, it was rushed through Parliament and passed by the Senate on 6 December 2005.

This system of preventive detention and control orders has been referred to as one of 'prevention and disruption' foreign to the traditional system of prosecution and punishment.[124] Echoing the Queensland system of preventive detention for sex offenders post sentence, these provisions are based on a person's risk of engaging in criminal activity. However, the restrictions on liberty through preventive detention and control orders go further than preventive detention of sex offenders because they are not based on a finding of guilt, yet have all the hallmarks of punishment.[125]

Those charged with terrorism related offences in Australia have been placed in high security prison settings, usually in solitary confinement. For example, a 21 year old medical student, Ishar Ul-Haque was held for six weeks in a maximum security isolation cell in Goulburn Prison before being released by Judge Peter Hidden who remarked that his detention in isolation was 'for reasons which simply do not appear from any material before me'.[127] Twenty year old Zaky Mallah who was acquitted of terrorism-related offences on the 6 April 2005 had also been held in maximum security at Goulburn Prison. In New South Wales and at a Commonwealth level, legislation has been passed to prevent bail for

123 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 24.

124 Ibid, Submission No 210 by Simon Bronitt et al, 2.

125 Ibid 7.

126 Bilal Khazal and Faheem Khalid Lodhi are currently being held in Goulburn's 'supermax' prison prior to their trials for terrorism related offences that are scheduled for early 2006. Joseph 'Jack' Thomas who has been charged with receiving financial support from a terrorist organization was held in isolation in a maximum security unit at Barwon Prison for three months before bail was granted on 14 February 2005. On 8 November 2005, a number of men were arrested in raids across Sydney and Melbourne in relation allegedly to belonging to a terrorist organization. Ten of the charged men are being held in solitary confinement in Barwon Prison's maximum security Acacia unit: AAP, 'No Xmas Joy for Vic Terror Suspects', *The Sydney Morning Herald* (Sydney), 28 December 2005 <http://www.smh.com.au/news/National/No-Xmas-joy-for-Vic-terror-suspects/2005/12/28/1135732626998.html> at 12 May 2006.

127 Quoted in Hall Greenland, 'Operation Terror', *The Bulletin* (Australia), 9 March 2003, <http://bulletin.ninemsn.com.au/bulletin/site/articleIDs/6FE2BAA21F231C8ECA256FB80000E40F> at 12 May 2006.

terrorism related offences unless there are exceptional circumstances.[128] Clive Walker has observed:

> Rejection of the US war model [for counter-terrorism] is to be welcomed, for, like the 'war on drugs' or the 'war on crime', that approach is conducive to a lack of accountability and proportionality and threatens an everlasting departure from civil society. Yet, the alternative to the war model is still an extensive security State, with an increasing focus on surveillance and financial scrutiny and approaches indicative of risk management and prevention rather than prosecution.[129]

This overview of detention regimes raises a number of policy issues to which I now turn.

III POLICY ISSUES

A Problems with Risk Assessment

The assessment of 'risk' of harm is of such significance that it has been viewed as the core organising concept of the western world in recent years.[130] The increased emphasis on risk management may be a reflection of the increasing uncertainty of living conditions in industrial societies. The domain of crime and justice may act as a lightning rod for the expression of anxieties generated by concerns about employment security or personal fulfilment.[131]

A common theme running through the preventive detention of the classes of individuals outlined above is the fear that they could cause harm to members of the community if the right to liberty prevailed. In his recent book, *Laws of Fear*, Cass Sunstein makes the point that in responding to the risk of future harm, governments often impose selective rather than broad restrictions on liberty. He writes:

128 Schedule I of the *Anti-Terrorism Act 2004* (Cth) inserted s 15AA into the *Crimes Act 1914* (Cth); the *Bail Amendment (Terrorism) Act 2004* (NSW) inserted s 8A(c) into the *Bail Act 1978* (NSW). Pre-trial detention can be viewed as a form of preventive detention. Remanding a person in custody and a refusal to grant bail can be viewed as preventing further offences and / or the person absconding. In general, Australian legislative schemes set out a presumption in favour of bail and view custodial remand as the last resort in the pre-trial context. However, there appears to be a growing trend towards legislation creating a presumption against bail: Bernadette McSherry, *Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour*, Report prepared for the Criminology Research Council (2002) 34-7 <http://www.aic.gov.au/crc/reports/200001-18.pdf> at 12 May 2006.

129 Clive Walker, 'Terrorism and Criminal Justice – Past, Present and Future' (2004) *Criminal Law Review* 311, 327. A similar point has been made by Jenny Hocking: 'The ultimate impact of terrorism has been to provide a ready legitimisation for this increased security control, a pervasive surveillance infrastructure and a diminution of established legal and political protections before the law': Jenny Hocking, *Terror Laws: ASIO, Counter-terrorism and the Threat to Democracy* (2004) 247.

130 Nikolas Rose, 'Governing Risky Individuals: The role of Psychiatry in New Regimes of Control' (1998) 5(2) *Psychiatry, Psychology and Law* 177; Frank Morgan, N Morgan and I Morgan, *Risk Assessment in Sentencing and Corrections* (1998); Nicola Gray, Judith Laing and Lesley Noakes, *Criminal Justice, Mental Health and the Politics of Risk* (2002).

131 Morgan, Morgan and Morgan, ibid, 3-4.

> Selectivity creates serious risks. If the restrictions are selective, most of the public will not face them, and hence the ordinary political checks on unjustified restrictions are not activated. In these circumstances, public fear of national security risks might well lead to precautions that amount to excessive restrictions on civil liberties.[132]

Drawing from social psychology, Sunstein argues that in assessing risks, people draw on heuristics or rules of thumb.[133] He refers to the 'availability heuristic' as meaning that individuals tend to refer to examples that are readily available. Thus, when thinking about the risk of terrorism, images of the planes crashing into the World Trade Centre or the fires caused by the Bali bombings or the mangled remains of a bus in the London bombings come immediately to mind. Sunstein also refers to probability neglect.[134] That is, people tend to focus on worst-case scenarios rather than the probability of such scenarios occurring.

All this goes to explain why preventive detention regimes appeal to populist governments. In a poll conducted by *The Age* newspaper, 78% of respondents supported the deportation of terrorist suspects and 56% supported the detention of terrorist suspects without charge for up to three months.[135] In a commentary in that newspaper the following day, Andrew Lynch stated that these particular findings 'will concern sections of the community for whom those methods are a reduction of what defines our society. In losing that part of ourselves, we give the terrorists a victory'.[136]

The detention of sex offenders, individuals with mental illnesses and those addicted to drugs and alcohol usually brings into play expert opinions by mental health professionals. Nikolas Rose has made the point that the emphasis on risk management in the mental health professions means that psychiatric practice is now more administrative than therapeutic.[137] The legislative regimes dealing with the detention of sex offenders and those with mental illnesses outlined above at least have a system of administrative or judicial review in place. The legislation dealing with the detention of those addicted to drugs and alcohol is much more ad hoc and liable to police discretion. Andrew Carroll, Mark Lyall and Andrew Forrester point out that in situations where release decisions are made by tribunals or courts, those decisions are influenced by 'clinical evidence, the most critical aspect of such evidence being opinion regarding likelihood of future violence'.[138]

132 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (2005) 204-5.
133 Ibid 36.
134 Ibid 39.
135 Michelle Grattan, 'War in Iraq Raised Terror Risk, Say 66%', *The Age* (Melbourne), 3 August 2005, 1, 2.
136 Andrew Lynch, 'We Have Not Been Bombed Back to the Dark Ages by Terrorism', *The Age* (Melbourne), 4 August 2005, 15.
137 Rose, above n 130.
138 Andrew Carroll, Mark Lyall and Andrew Forrester, 'Clinical Hopes and Public Fears in Forensic Mental Health' (2004) 15(3) *The Journal of Forensic Psychiatry and Psychology* 407, 411.

There is still a question mark as to how accurate risk assessment really is. Assessing the risk of future violence is a notoriously difficult task.[139] During the early 1980s, research suggested that mental health professionals tended to over-predict violence.[140] One study concluded that it was rare for psychiatrists to predict future violence with a better than 33% accuracy.[141] During this time, the emphasis was on making clinical assessments of 'dangerousness' which did not provide a medical diagnosis, but involved 'issues of legal judgment and definition, as well as issues of social policy'.[142]

Between the mid-1980s until the mid to late 1990s, the focus shifted from assessing dangerousness to a focus on statistical or actuarial risk prediction. This shift to risk assessment and risk management has seen the rise of 'scientific' literature examining a range of risk factors that have a statistical association to a future event. Numerous questionnaire style instruments have been developed to aid in the assessment of risk.[143] The main limitation of actuarial judgments is that they may ignore individual needs and individual differences, whilst focusing too much on historical variables. There are also problems with the relevance of actuarial studies to the preventive detention of sex offenders. Fred Berlin, Nathan Galbreath, Brendan Geary and Gerard McGlone argue that while actuarial data can be used to identify a group of persons to be considered for possible civil commitment, at present it cannot be used to accurately predict the likelihood of future acts of sexual violence with respect to any specific individual within such a group.[144]

Currently, risk assessment involves the consideration of risk factors, harm and likelihood. It combines both clinical and actuarial approaches to form what has been termed 'structural clinical judgment'.[145] Key risk factors include past violence, pre-existing vulnerabilities, social and interpersonal factors, symptoms of mental illness, substance abuse, state of mind, situational triggers and, more controversially, personality constructs.[146]

Andrew Carroll, Mark Lyall and Andrew Forrester have stated that the more restrictions that are placed on individual freedom because of perceived risks to

139 Paul Mullen, 'Dangerousness, risk and the prediction of probability' in Michael Gelder, Juan Lopez-Ibor and Nancy Andreason (eds), *New Oxford Textbook of Psychiatry* (2000) 2066-78.

140 Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (1993) 7.

141 John Monahan, *The Clinical Prediction of Violent Behaviour* (1981).

142 Henry Steadman, 'From Dangerousness to Risk Assessment of Community Violence: Taking Stock at the Turn of the Century' (2000) 28(3) *Journal of the American Academy of Psychiatry & the Law* 265, 266.

143 See further, McSherry, above n 128.

144 Fred Berlin et al, 'The Use of Actuarials at Civil Commitment Hearings to Predict the Likelihood of Future Sexual Violence' (2003) 15(4) *Sexual Abuse: A Journal of Research and Treatment* 377. See also Bernard Harcourt, 'Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age', *Public Law and Legal Theory*, Working Paper No 94 (2005) <http://www.law.uchicago.edu/academics/publiclaw/94-beh-against-prediction.pdf> at 12 May 2006.

145 Kirk Heilbrun, James Ogloff and Kim Picarello, 'Dangerous Offender Statutes in the United States and Canada: Implications for Risk Assessment' (1999) 22 *International Journal of Law and Psychiatry* 393.

146 Bernadette McSherry, 'Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour' (2004) No 281 *Trends and Issues in Crime and Criminal Justice.*

the community, the more difficult it becomes to bridge the gap between institutional and community care.[147] They note that a strong focus on preventive detention paradoxically 'reduces the data on which risk assessments can be based, and so reduces the accuracy of such assessments'.[148]

The process of assessing risk is certainly more sophisticated than in the early 1980s, but Herschel Prins points out that there is still no ideal, or even sophisticated, approach available to the assessment of risk.[149] It would seem that risk assessment should vary according to the characteristics of the individual, situation and potential victim involved along with the number of cumulative risk factors experienced by the patient. It may well be that sex offenders and those whom Carroll, Lyall and Forrester refer to as forensic patients (for example, those found not guilty of a crime on the basis of mental impairment) need to be treated differently than those detained under civil commitment legislation because the former have committed an offence.

At least in relation to those with mental illnesses or alcohol or drug problems, the risk of harm to the community is but one criterion that needs to be taken into account. In comparison, the Queensland legislation enabling preventive detention of sex offenders is focused solely on the risk of harm to the community. Because of the uncertainty attached to risk assessment, it is more difficult to justify such a regime which deprives individuals of their liberty without any step by step process of rehabilitation in place, than it is to detain individuals for treatment purposes.

B *Punishment on the Basis of the Status of the Person Rather than for their Criminal Acts*

The principle of legality, or – as it is more traditionally known – the rule of law, requires that there should be no punishment without law (*nulla poena sine lege*). An important premise behind the rule of the law is that governments should punish criminal conduct, not criminal types. Thus, the physical element of most offences consists of the commission of an act or series of acts by the accused.

Francis Allen states in this regard:

> Although the point seems not often made, the *nulla poena* principle has important implications not only for the procedures of justice but also for the substantive criminal law. It speaks to the questions, What is a crime? And Who is the criminal? The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who or what they are.[150]

147 Carroll, Lyall and Forrester, above n 140, 420.
148 Ibid.
149 Herschel Prins, 'Risk Assessment and Management in Criminal Justice and Psychiatry' (1996) 7 *Journal of Forensic Psychiatry* 42.
150 Francis Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* (1996) 15.

Despite this principle, democratic governments have long justified the detention and punishment of individuals possessing certain characteristics. During the nineteenth century, 'status' offences existed to deal with vagrants, prostitutes, drunks and habitual criminals.[151] During the twentieth century, there was a move towards a social welfare or medical model, and away from the criminal model, to deal with 'drunk and disorderly' individuals, and a range of civil powers of detention were available.[152] Different 'undesirable' groups have been targeted at different times. For example, Simon Bronitt contends that the current legislative responses to detaining suspected terrorists are neither novel nor extraordinary.[153] He points out that the *Bushranging Act 1830* (NSW)[154] empowered the arrest of suspected bushrangers on the basis that they could not establish their identity, and required suspects to prove that they were not engaged in illegal activities. Similarly, Alex Steel refers to the existence of 'razor gangs' in New South Wales in the 1920s as leading to the introduction of a general crime of consorting with criminals or prostitutes.

It seems that the pendulum has swung once more in favour of detaining people for who they are, or who they associate with, rather than what they have done. For example, s 102.8 of the *Criminal Code Act 1995* (Cth) makes it an offence punishable by three years imprisonment to meet or communicate with those involved in a terrorist organisation on two or more occasions. The physical element of meeting or communicating is innocuous enough; it is the *status* of the person with whom the accused associates that criminalises this conduct.[155]

The whole premise of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) rests on the status of the person. Justice Gummow recognised this in *Fardon's* case: 'The Act operated by reference to *the appellant's status deriving from [his] conviction*, but then set up its own normative structure.'[156] Now that legislation enabling the preventive detention in relation to sexual offenders has been declared valid, it is only a matter of time before governments think of other categories. As Peter Pfaffenroth points out, 'the public's impression that certain offender groups pose a particularly serious menace to society could persuade policymakers to [broaden the scope] of commitment eligibility'.[157]

Just because democratic societies have made exceptions to the *nulla poena* principle does not of course make such exceptions justifiable. Deidre Greig has stated that categorising individuals as 'unacceptable risks' or 'socially dangerous' plays on stereotypes that ultimately lead to a focus on the personality of the

151 Mark Finnane, *Police and Government: Histories of Policing in Australia* (1994) chp 1.
152 Bronitt and McSherry, above n 63, 749.
153 Simon Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel nor Extraordinary?' (Paper presented at the Castan Centre for Human Rights Law, Human Rights 2003: The Year in Review Conference, Melbourne, 4 December 2003).
154 *Bushranging Act 1830* (NSW) 11 Geo 4 No 10.
155 Bernadette McSherry, 'Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws' (2004) 27(2) *University of New South Wales Law Journal* 354, 364ff.
156 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, 72 (emphasis added).
157 Peter Pfaffenroth, 'The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of *Kansas v Crane*' (2003) 55 *Stanford Law Review* 2229, 2256.

individual rather than the offence (if any).[158] Justice Kirby in *Fardon's* case may have been thinking of this point when he sounded a warning about German laws in the 1930s that allowed punishment to be 'addressed to the estimated character of the criminal instead of the proved facts of a crime'.[159]

It is perhaps timely to recall Lawton LJ's words in *R v King & Simpkins*[160] in which he was reviewing an increased sentence in relation to offences involving firearms and burglary:

> The learned judge increased the sentences ... because of his view, ... that these young men were enemies of society. But the Court has to bear in mind that in our system of jurisprudence there is no offence known as being an enemy of society ... the fact remains that the correct principle for sentencing is to sentence for the offences charged and on the facts proved or admitted.

Perhaps more than ever, it is time to reinvigorate the *nulla poena* principle in order to prevent the detention of people purely on the basis of who they are.

C Preventive Detention as Punitive

In *Chu Kheng Lim v Minister for Immigration*,[161] Brennan, Deane and Dawson JJ stated:

> The involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[162]

Professor Williams points out that the 'essence of incarceration from a punitive point of view is the deprivation of liberty, and this is in no way lessened by claiming the incarceration is civil'.[163] Nevertheless, judges are prepared to uphold preventive detention regimes on the basis that they are non-punitive in nature. Whilst this categorisation of the nature of the detention may in some instances accurately reflect the legislative purpose and intent behind its imposition, it says nothing of the experience of the individual on whom it is imposed, nothing of a crucial effect of its imposition.

As noted above, in *Al-Kateb v Godwin,* Hayne J, with whom Callinan J agreed, conceded that immigration detention shared 'many, if not all, of the physical features and administrative arrangements commonly found in prisons'.[164] However, he and the other High Court justices in the majority in *Al-Kateb's*

158 Deirdre Greig, 'The Politics of Dangerousness' in Sally-Anne Gerull and William Lucas (eds), *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform: Proceedings of a Conference held 29-31 October 1991* (1993).
159 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, 101.
160 (1973) 57 Cr App R 696, 702.
161 (1992) 176 CLR 1.
162 Ibid 27.
163 C R Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 *Monash University Law Review* 161, 179.
164 *Al-Kateb v Godwin* (2004) 219 CLR 562, 650.

case[165] reasoned that preventing a person from entering Australia was not truly punitive.[166]

Justice Gummow in *Al-Kateb v Godwin* pointed out that detention may contain a mixture of punitive and non-punitive traits and that it was of little assistance to label detention as one or the other.[167] In *Fardon*, Gummow J again referred to the punitive/non-punitive dichotomy as a concept fraught with difficulty given the multiplicity of accepted sentencing objectives.[168] However, this ignores the *effect* of the preventive detention. For example, while the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) omits any mention of punishment, the effect of the detention is precisely that. Justice Kirby pointed out that the continued detention takes place in prison (not a hospital or a detention centre) and the detainee remains a 'prisoner'.[169]

Telling a person that he or she is to remain in immigration detention or in a hospital or in a prison cell for an indefinite time in order to protect the public is hardly going to change his or her perception that he or she is being punished. The deprivation of liberty through imprisonment does not magically change from punishment to some other description because the language of a statute says so.

IV CONCLUSION

The concerns about policy issues discussed above raise the question as to whether preventive detention can ever be justifiable. Given the 'law and order' agendas of populist governments, it is unrealistic to think that preventive detention regimes will disappear. For example, in many jurisdictions, the political impetus to respond to terrorist atrocities with new laws has been impossible to resist. In the prevailing political and moral climate, there seems little time or perceived need to determine the adequacy of existing laws. The commission of the terrorist acts themselves is seen as proof that the existing laws are ineffective.

Perhaps it is more realistic to concentrate on ways in which to curtail preventive detention regimes rather than calling for their abolition in times when law and order agendas drive government policy. It is inevitable that a balance be struck between the risk of harm and the right to liberty. For example, it may be considered reasonable to detain certain individuals for treatment or to make enquiries about who they are, but unreasonable to detain individuals without charge on the basis of a risk that they might offend at some future time or because they know someone who might commit a crime. A rationale of community

165 McHugh, Hayne, Callinan and Heydon JJ were in the majority. Gleeson CJ, Gummow and Kirby JJ dissented.

166 On the similarities between immigration detention and imprisonment, see Matthew Groves, 'Immigration Detention vs Imprisonment: Differences Explored' (2004) 29 (5) *Alternative Law Journal* 228.

167 *Al-Kateb v Godwin* (2004) 219 CLR 562, 612.

168 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, 74-75.

169 Ibid 92-3.

protection alone based on the vagaries of risk assessment should not be sufficient to justify taking away the right to liberty and security of the person.

At present there appears to be little sign that governments will curb the growing reliance on preventive detention regimes. How then can their ambit be curtailed so that the balance swings a little more toward the preservation of the right to liberty? A framework for preventive detention must include time limits for detention. Detaining someone who has not committed a crime for over six years as in the case of Peter Qasim is clearly unjustifiable. Time limits should be expressed in days or weeks rather than months or years.

It is also essential that there be avenues for the judicial review of preventive detention decisions. As pointed out above, the Palmer Report highlighted the need for this in relation to immigration detention. Mary Crock has pointed out that in relation to immigration detention, a stuggle has taken place between the government and the judiciary:

> On the one side is a government intent on stifling the judicial review of refugee decisions on the ground that the determination of protection matters should lie with the executive and with elected politicians, rather than with the unelected judiciary. On the other side are judges imbued with the notion that the courts stand between the individual and administrative tyranny ...[170]

The interplay between administrative and judicial powers is a complex one, but courts and tribunals should certainly have a role in deciding when it is justifiable to restrict the liberty of a readily identifiable class of individuals. Ideally they should have the power to make the initial decision to detain a person, but if this is not allowed under legislation, at the very least, they should have the power to review the decision. One way of ensuring a workable balance between administrative and judicial powers is to legislatively set out the criteria for detention in a manner which will enable a court or tribunal to determine if necessary whether the administrative power has been lawfully exercised. Various mental health tribunals have been established to review civil commitment decisions within a fixed period of time and mental health legislation specifies the criteria to be made out in relation to involuntary commitment. This legislative process could serve as a model for curtailing preventive detention decisions.

Detention should not be arbitrary in the sense of it being 'inappropriate, unjust or unpredictable'. Apart from the enormous costs associated with keeping certain classes of prisoners in prison after the expiry of their sentence or enemy combatants or suspected terrorists in detention, it is important to query how just and how predictable it is to detain certain individuals in such a manner. The ability to take into account the protection of the community in sentencing an offender and the existence of indefinite detention regimes at the time of sentencing can also be viewed as undermining the case for preventive detention

[170] Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51, 72.

after the expiry of the sentence. Once it was bushrangers, now sexual offenders and suspected terrorists. Who can predict the next category of individuals for preventive detention?

Cass Sunstein has referred to the stereotyping of groups of individuals that may occur when people are in a state of fear.[171] When people are afraid, they are more willing to tolerate infringements on the liberty of members of some 'out-group'. It is therefore important to guard against the spread of unjustified fears. For example, Sunstein refers to the anthrax scare in the United States as an example of a state of fear that was disproportionate to its cause.[172] Four people died of infection, a dozen others fell ill, yet fear proliferated. This led to Rear-Admiral Brian W Flynn's statement that '[a]nthrax is not contagious, fear is.'[173]

It is essential to pay heed to the Sunstein's suggestion that a culture of fear leads to more restrictions on liberty than are necessary or appropriate. In the recent words of the American songwriter Bruce Springsteen:

'Fear's a dangerous thing'.[174]

171 Sunstein, above n 132, 209.
172 Ibid 85.
173 Quoted in Chris Stout (ed), *Psychology of Terrorism: Coping with the Continuing Threat* (2004) 6.
174 Bruce Springsteen, *Devils and Dust* from the CD *Devils and Dust* Sony BMG Music Entertainment, 2005.