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Continued detention for the protection of the community

The legality of different forms of detention continues to be a prominent national issue. In August 2004, the High Court of Australia said the continued and potentially indefinite detention of failed asylum seekers who had asked to leave but had nowhere to go was constitutionally valid. [1]

A related issue is the constitutional validity of the continued detention for the protection of the community of prisoners who have completed their original sentence.

Early in 2004, the High Court heard arguments in *Fardon v Attorney General (Qld)*, concerning orders made under Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003* (the Act) detaining prisoners for their potential dangerousness to the community after expiry of their original prison terms.[2]

The issue has implications for the Commonwealth: if the Act is held to be constitutional, the Federal Government could refuse to release others, such as convicted terrorists, even if they have served their time in prison.

The Act: a closer look

The Act was passed by the Queensland Parliament in June 2003 as a reaction to the highly publicised release of sex offenders where there was a strong public perception, rightly or wrongly, of a high propensity to re-offend in a sexual manner.[3] The Explanatory Memorandum to the Act noted:

> Recently, there has been growing community concern about the release of convicted sex offenders, not only because of the abhorrent nature of these offences, but because of the lack of evidence that some offenders have been rehabilitated, after refusing to participate in sexual offender treatment programs.[4]

Covering persons *declining* to control their sexual instincts, for example by refusing to complete a specifically developed sex offender treatment program, the Act fills a legislative gap: Queensland legislation only provided for persons *unable* to control their sexual instincts, for example due to medical reasons or a mental illness.

Key provisions and structure

The Act allows Queensland's Attorney-General to apply for orders for the continued detention or the supervised released of certain prisoners. Section 3 sets out the objects of the legislation which can be summarised as:

- achieving adequate community protection by making provision for the continued detention or supervised release of certain prisoners, and
- continuation of 'control, care or treatment' of those prisoners with a view to rehabilitation.

The Attorney-General can bring an application to the court in relation to a 'prisoner', defined as a person detained in custody for a serious sexual offence. A 'serious sexual offence' is defined as 'an offence of a sexual nature' that involved violence or was committed against children.

The Act devises a two-tiered process with each tier creating an individual threshold to overcome before a final order can be made.

The preliminary hearing (section 8)

Under section 8, the court has the power to set a date for the final hearing and to make either or both of the following orders:

- risk assessment order—this order enables the court to order the prisoner to undergo psychiatric assessments through two different psychiatrists, and
- interim detention order—can be made if the court is satisfied that the prisoner may be released but considers it necessary that the prisoner should be detained until the matter is finally decided.

However, before the court can make any of the above orders, the Attorney-General must satisfy the court that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of an order available under the Act. The prisoner will be considered to be such a danger if there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody as such or if released without a supervision order.

The final hearing (section 13)

For the final hearing, the court will receive evidence to determine whether the prisoner will present a serious danger to the community in the absence of an order made under the Act.

When considering the application, the court's paramount consideration is the need for adequate protection of the community.

Further, the court is required to have regard to information derived

from various sources listed in subsection 13(4) of the Act, including:

- psychological reports prepared under the risk assessment order
- information as to offending patterns or a possible propensity to commit serious sexual offences, or
- possible participation in rehabilitation programs and the prisoner's success in such programs.

The legislation imposes very high evidentiary standards. The court must be satisfied 'to a high degree of probability' that the evidence is of sufficient weight to support the order.

Only if the court is satisfied that the prisoner will be an unacceptable risk to the community, the court can make either of the following orders:

- continuing detention order—an order under which the prisoner is kept in continued detention, or
- supervision order—the prisoner is released after serving the initially imposed sentence, however, the release is subject to conditions the court thought appropriate to protect the community.

In addition to the two statutory options, the court has considered the possibility of a third option: to refuse to make any final order under section 13 despite finding that there is an unacceptable risk to the community.[5]

The review of a continued detention order

Even though the order to keep the prisoner in detention is made for an indefinite term, Part 3 of the Act prescribes that the order must be reviewed:

- annually, or
- at any time on application by the prisoner.

The review is conducted before the court in a similar manner to the final hearing in of the original application process described above, including the requirement to prepare psychiatric reports, the high evidentiary standards and community protection as the court's paramount consideration.

As the evidentiary burden remains with the Attorney-General, it was noted that the term 'renew' instead of 'review' would be more appropriate to describe the review process.[6]

The appeal process

Finally, each order made by the court at the preliminary, final or review stage, is appealable to the Queensland Court of Appeal (Court of Appeal).

Judicial consideration of the Act to date

To date, the court has had several opportunities to deal with applications made under the Act and determinations were made in the following cases.

***Attorney-General v Fardon* [2003] QSC 379**

This was the first application brought against a prisoner under the Act. This case is the platform for the High Court challenge and will be dealt with in more detail below.

***A-G v Watego* [2003] QSC 367**

This application for continued detention was brought against the prisoner within a very short period of time before his release. Considering the prisoner's detention and the problems he faced to secure legal representation, the court dismissed the application on the basis that Mr Watego was denied procedural fairness because he had no appropriate time to prepare a sufficient defence.

The appeal to the Court of Appeal was unsuccessful.

***A-G v Nash* [2003] QSC 377**

This application for continued detention was also brought only days before the release date of the prisoner. As in *Watego*, the court dismissed the application on the basis that Mr Nash was denied procedural fairness. This matter was not appealed.

***R J Welford, A-G for the State of Queensland v Francis* [2004] QSC 233.**

In this case, the court found that the prisoner would, at the time of the decision, pose an unacceptable risk to the community and ordered detention. However, this case is unusual: the prisoner acknowledged that his detention for the purpose of treatment was warranted. Based on the prisoner's and the community's coinciding 'interest in his rehabilitation', the court, with the assistance of the three psychiatrists involved in this matter, devised a 'release plan' for the prisoner to reduce his dangerousness to the community.[7]

***Attorney-General v W* [2003] QSC 262**

In this matter, the Attorney-General currently seeks a supervision order against W. In the preliminary hearing, the court made a risk assessment with the aim to develop a basis for a supervision plan for W's release. Further, the court made an interim detention order, finding it inappropriate to release the prisoner without a proper release plan in place. The making of a supervision order (and the possible details of such order) will be in issue at the final hearing, expected to be heard later this year.

Constitutional issues

The constitutional concerns raised in relation to the Act were dealt with in the *Fardon* matter.

Based mainly on the High Court's findings in *Kable v Director of Public Prosecution (NSW)*, the main constitutional issue is whether the Act confers upon the court powers

that are incompatible with the exercise by state courts of the judicial power of the Commonwealth under Chapter III of the Constitution.[8]

Separation of powers

The first three chapters of the Constitution set out a system of separation between the judiciary, the executive and the legislature.

While the High Court has taken a relaxed view of the separation between the executive and the legislature, it has rigorously guarded a strict separation, and therewith the independence, of the judiciary.[9]

The judiciary is created by Chapter III of the constitution. By virtue of this chapter, the Constitution confers the judicial power of the Commonwealth on those courts named in section 71 of the Constitution (section 71 courts). These are:

- the High Court of Australia
- other federal courts as created by Parliament, and
- other courts as invested with federal jurisdiction, including State courts.

Although the separation of powers doctrine does not strictly apply to the states, section 71 courts exercise the judicial power of the Commonwealth and are subject to the doctrine. Accordingly, they may not discharge any function that is incompatible with this power, except where such function is incidental to the exercise of the power.[10]

The decision in *Kable*

In *Kable*, the High Court was invited to consider whether a state court's power to order the continued detention of a particular person was such a function incompatible with the judicial power of the Commonwealth.

After characterising the decision process set forth in the relevant legislation and the order made by the court, the majority of the High Court noted that:

- the legislation was aimed at the detention of one particular person, and
- the state court was deprived of any discretion (being the hallmark of judicial power), once it found the person posed a danger to the community.

Accordingly, the state court was required to exercise a non-judicial function repugnant to its role as a section 71 court. The High Court found further that this power could not be conferred upon the state courts despite the states' plenary legislative powers.[11]

Central to this finding was the argument that public confidence in the independence of the judiciary is a paramount aspect of the separation of powers doctrine. This confidence is fragile and could be undermined or destroyed completely where section 71 courts could be seen 'to be no more than subservient agents bending to the will either of the Executive or the Parliament'.[12]

As in *Kable*, the maintenance of the public confidence in the independence of the courts was at the heart of the *Fardon* matter.

The *Fardon* litigation

The constitutional issues have been ventilated at first instance by the court and, on appeal, by the Court of Appeal. Special leave was granted to appeal the matter to the High Court.

Supreme Court of Queensland

At first instance, Mr Fardon attacked the constitutional validity of the interim measures that can be ordered under section 8 of the Act. Particularly, he argued that the powers conferred on the court under the Act were 'repugnant to the judicial process', pointing towards an alleged lack of judicial discretion and a relaxed standard of proof in these hearings. [13]

The court upheld the constitutional validity of this section, finding it inappropriate to examine the provision in isolation. Looking at the Act as a whole, the court concluded that the process to be followed prior to making an order is 'consistent with traditional judicial process' and the public confidence in the court was not threatened.[14]

Queensland Court of Appeal

The decision at first instance was appealed to the Court of Appeal. In essence, the arguments put forward by Mr Fardon were identical to those made at first instance, with the following additions:

- the orders made under the Act are punitive in character and must therefore be made as part of adjudging and punishing criminal guilt
- community protection is not one of the established exceptions according to which detention can be ordered without the finding of guilt, and
- the retrospective lengthening of his sentence would amount to an interference with the finality of the exercise of judicial power.[15]

The Attorney-General countered these arguments by:

- suggesting that the legislation pursues a legitimate non-punitive objective so that it would come within the established exceptions according to which imprisonment can be ordered without a finding of guilt
- pointing towards the judicial nature of the process preceding the orders made under the Act, and
- emphasising that arguing a retrospective lengthening of the sentence would ignore that 'following the expiration of [a] term of imprisonment, [Fardon]

will have been newly detained "under protective legislation"'.[16]

The majority of the Court of Appeal found that the orders made under the Act were not punitive. Rather, they were aimed at protecting the community, a case of legitimate non-punitive detention. The court held that the orders fell 'naturally into the exceptional category as contemplated by' the High Court in earlier judgements.[17] They were not repugnant to the judicial process.[18]

The minority considered that the legislation did not confer true discretion on the judiciary but significantly curtailed any judicial discretion. Further, the prisoner's continued detention was based on a prediction of the prisoner's future conduct, detached from the original sentence. Such prediction would be the 'antithesis of the procedural process', open to arbitrariness and therefore inconsistent with the functions of the courts.[19]

The Court of Appeal upheld the constitutionality of the legislation 2:1, finding that no violation of the separation of powers doctrine had occurred.

High Court of Australia

Mr Fardon appealed the decision of the Court of Appeal to the High Court. He asserted that the Court of Appeal incorrectly characterised the orders made under the Act as non-punitive, maintaining a proper characterisation would render them punitive in nature. Such punitive orders, it was again submitted, could only be made as the result of a process of adjudging and finding criminal guilt. However, criminal guilt is not the basis for the continued detention: the prisoner is detained on the basis of what may be done in the future, rather than on what has been done in the past.

The Attorney-General submitted that, based on the legislative intent and on the essential features of the Act, the Court of Appeal was correct in finding that the legislation is non-punitive in character, being an appropriate case of non-punitive detention. In addition, the Act required the court to undertake an assessment of all the circumstances to determine whether a prisoner is an unacceptable risk. This would constitute an exercise of discretion and should therefore qualify as a judicial function.

The decision is currently pending but is expected in the near future.

Concluding comments

As indicated at the outset, should the High Court find the Queensland legislation to be constitutional, the significance for the Commonwealth could be considerable: it may be possible for the Federal Parliament to pass similar legislation, allowing the executive to request the continued detention of certain classes of persons.

The list of possible classes of persons is long and will only be limited by the scope of the powers conferred on the Federal Parliament under the Constitution.

1. *Al-Kateb v Godwin* [2004] HCA 37, *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Khafaji* [2004] HCA 38. See for a detailed discussion: P. Prince, 'The High Court and indefinite detention– towards a national bill of rights?', *Current Issues Brief*, no. 7, Parliamentary Library, Canberra, 2004.
2. *Fardon v Attorney General (Qld)*, Transcript of the matter heard on 3 March 2004 by the High Court of Australia.
3. R. Giskes, 'The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld): the High Court decision in Kable and applications under the Dangerous Prisoners Act', *research brief*, no. 2004/02, Queensland Parliamentary Library, Brisbane, 2004.
4. Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003, p. 1.
5. *A-G v Fardon* [2003] QSC 200, p. 12–13.
6. *Fardon v Attorney-General (Qld)*, Transcript, op. cit., (per Gummow J).
7. ibid., paragraph 25.
8. *Kable v Director of Public Prosecution (NSW)* (1996) 189 CLR 51.
9. G Moens, *Lumb & Moens' The Constitution of the Commonwealth of Australia annotated*, Butterworths, Australia, 2001, p. 16.
10. *Harris v Caladine* (1991) 172 CLR 84, p. 93.
11. S. Ratnapala, *Australian Constitutional Law*, OUP, Melbourne, 2002.
12. *Nicholas v The Queen* (1998) 193 CLR 173, p. 256.
13. *A-G v Fardon*, op. cit., p. 10.
14. ibid., pp. 17–18.
15. *A-G (Qld) v Fardon* [2003] QCA 416, pp. 5, 26.
16. *A-G (Qld) v Fardon*, ibid..
17. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Kruger v Commonwealth* (1997) CLR 1.
18. *A-G (Qld) v Fardon*, op. cit., p. 10.
19. ibid., p. 25.

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