

# Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia

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*According to their stated objectives, the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) and the Dangerous Sexual Offenders Act 2006 (WA) are aimed at protecting the community by detaining dangerous sex offenders after the expiration of their sentences.*

*This paper questions the scientific validity and reliability of psychiatric assessments of sex offender dangerousness. It also considers whether preventative detention imposes additional punishment on sex offenders and/or punishes them for their propensities.*

ONE of the most intractable problems in criminal justice is the question of how to deal with violent sexual recidivists.<sup>1</sup> In January 2003, notorious paedophile Dennis Ferguson had served his 14 year sentence. He walked from prison a free man amid a storm of protest.<sup>2</sup> Ferguson's release, and the ensuing media frenzy, prompted the Queensland government to consider how sexual offenders might be detained in prison, even after they have served their sentences.<sup>3</sup>

The answer was found in the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) ('DPSOA'), passed in June 2003. The DPSOA provides mechanisms to deal with prisoners who have committed sexual offences and, at the end of their sentences, are still considered to pose an unacceptable risk of sexual re-offending. The DPSOA

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1. *Fardon v Attorney-General (Qld)* [2004] HCA 46, [12] (Gleeson CJ).
2. G Hussey, 'Outcry Greets Paedophile's Release', *The 7.30 Report*, 9 Jan 2003, <<http://www.abc.net.au/7.30/stories/s760658.htm>>.
3. B McSherry, 'Indefinite and Preventative Detention Legislation: From Caution to an Open Door' (2005) 29 *Crim LJ* 94, 100.

allows the Attorney-General to apply for a Supreme Court order that the prisoner's detention be continued indefinitely. Alternatively, the court can order that the prisoner's post-sentence release be subject to a targeted regime of supervisory conditions designed to reduce the risk of sexual offending.<sup>4</sup> The objects of the DPSOA are expressed to include provision for treatment and facilitating rehabilitation.<sup>5</sup> However, the primary purpose of the scheme is undoubtedly to enhance community protection by providing for increased levels of control over a particular class of offender.<sup>6</sup>

The DPSOA passed unopposed through Queensland's unicameral parliament on 4 June 2003, without consideration by the Scrutiny of Legislation Committee.<sup>7</sup> It entered into force on 6 June 2003. An application for the first continuing detention order was lodged in relation to Robert Fardon just 11 days later.<sup>8</sup> Since the DPSOA commenced, and as at the time of writing, at least seven continuing detention orders have been made in Queensland.

The DPSOA thus became the first legislation in Australia to allow for post-sentence preventative detention. Other jurisdictions have followed with legislative schemes closely based on the Queensland model.<sup>9</sup> In Western Australia, a legislative response was triggered by community concern over serial rapist Gary Narkle.<sup>10</sup> According to the Western Australian Attorney-General, the Dangerous Sexual Offenders Act 2006 (WA) ('DSOA') was passed to keep Narkle and his ilk off the streets of Perth.<sup>11</sup> The

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4. Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) (DPSOA) ss 5, 13.
  5. *Ibid* s 3(b).
  6. *Ibid* s 3(a); Queensland, *Parliamentary Debates*, Legislative Assembly, 3–4 Jun 2003, 2484, 2579 (R Welford, Attorney-General).
  7. Queensland, *Parliamentary Debates*, 4 Jun 2003, 2518 (P Wellington).
  8. The application was lodged in relation to RJ Fardon on 17 June 2003: see *A-G (Qld) v Fardon* [2003] QSC 379, [2].
  9. Crimes (Serious Sex Offenders) Act 2006 (NSW); Dangerous Sexual Offenders Act 2006 (WA) (DSOA). See New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 Mar 2006, 21730 (C Scully, Minister for Police); Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 Nov 2005, 7005–06 (J McGinty, Attorney-General).
  10. Narkle was charged with three counts of deprivation of liberty, three counts of sexual penetration without consent, one count of attempted sexual penetration without consent, three counts of sexual penetration without consent causing bodily harm and one count of indecent assault against a 17-year-old complainant. He successfully appealed against conviction and a retrial was ordered: *Narkle v The Queen* [2003] WASCA 233. The retrial would have been Narkle's second retrial, but the victim elected not to subject herself to the ordeal of testifying again. Apart from that set of charges, Narkle's history included sexual offences against 13 other women and girls. Following his appeal, Narkle was released from custody but by the time of the DSOA parliamentary debates he was back in custody, awaiting trial for the alleged rape of a 16-year-old: see L Eliot 'A Year after His Release from Jail, Narkle Faces New Rape Charge', *The West Australian*, 19 May 2005, 10. Ironically, the DSOA could not have applied to Narkle at the time of the DSOA debates because he was being held on remand: Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 Nov 2005, 7145, (S Walker, Shadow Attorney-General). The DSOA applies only to offenders 'under sentence of imprisonment': s 8.
  11. Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 Nov 2005, 7148, (J McGinty, Attorney-General).

DSOA came into operation on 13 May 2006. New South Wales has also passed analogous legislation.<sup>12</sup>

This paper discusses the operation of the DPSOA and the DSOA by reference to their legislative objects and considers whether these Acts are well-adapted legislative means of achieving their posited aims.

Part 1 of the paper considers the legislative framework and the operation of the DPSOA since it commenced. The DSOA is discussed in Part 1.1. The DSOA is almost identical, but some important differences will be highlighted. The focus of this paper generally is on preventative detention; post-release supervision orders, although a significant feature of both Acts, are beyond the scope of this paper and will not be discussed.

Part 2 considers the background to preventative detention in Australia. This section of the paper considers whether the DPSOA and the DSOA represent a departure from established criminal justice practice in Australia or whether they are closely analogous to existing or previous regimes. This section also briefly considers the constitutional challenge in *Fardon v Attorney-General*,<sup>13</sup> which confirmed the validity of the DPSOA and cleared the path for the subsequently enacted DSOA.

Part 3 considers the primary rationale for preventative detention and its relationship with established sentencing principles. The incapacitation of dangerous sex offenders is thought to be necessary to enhance community protection. This section considers the evidence of recidivism which underscores the need for community protection and also considers how preventative detention coheres with a normative sentencing regime built around the primacy of proportionality.

Part 3.1 assesses the evidence available to courts by which a determination can be made that an offender is an unacceptable risk of re-offending. It will be argued that both Acts are underpinned by an assumption that the field of psychiatry is able to contribute scientific insight to the question of dangerousness in particular cases.<sup>14</sup> The methodologies of psychiatric assessments will be considered together with legal and scientific critiques of their use in a forensic context. Consideration will also be given to the capacity of other forms of evidence to shed light on the question of the prisoner's likely future recidivism.

Part 4 considers the second legislative object of treating and rehabilitating this class of prisoners.<sup>15</sup> This section considers whether sex offenders are susceptible

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12. Crimes (Serious Sex Offenders) Act 2006 (NSW) came into effect on 3 April 2006.

13. Above n 1.

14. Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) ss 8(2), 13(4); Dangerous Sexual Offenders Act 2006 (WA) ss 14(2)(a), 7(3).

15. The DPSOA refers to the object of providing 'control, care or treatment ... to facilitate their rehabilitation': s 3(b). The DSOA refers merely to 'control, care or treatment': s 4(b).

to rehabilitation and whether the schemes implement measures directed at the achievement of that aim.

It will be concluded that, although the legislative objects are worthy and legitimate aims, preventative detention under the DPSOA and DSOA is not a well-adapted means of achieving them.

In light of that conclusion, Part 5 considers whether there are any non-purposive impacts which might influence our assessment of the schemes. Section 5.1 considers whether these schemes of preventative detention might be punitive. If so, are fundamental sentencing norms, such as the principles of proportionality and finality, thereby undermined? This section also considers this question in light of the rule against double jeopardy.<sup>16</sup>

Section 5.2 considers whether preventative detention under the DPSOA and DSOA punishes propensity. It is a legislative requirement that evidence of propensity, if any, must be taken into account in determining whether a person is a serious danger to the community.<sup>17</sup> The notion of propensity will be examined to ascertain how it is used under the Acts. The section also considers whether reliance on propensity is prejudicial and whether it breaches the principle of legality, which provides that the law punishes criminal acts, not criminal types.

Meanwhile, a parallel undercurrent will flow through the paper. That undercurrent is the idea that, under our liberal democratic system, detention severely abrogates one of our most fundamental rights. Indeed, imprisonment, qua the suspension of liberty, is the worst form of punishment that our criminal justice system inflicts.<sup>18</sup> That idea irresistibly directs attention to the moral defensibility of preventative detention under these schemes. That question will not, however, be directly addressed in this paper.

## 1. OPERATION OF THE DPSOA

Shortly after the DPSOA commenced, the Queensland Attorney-General declared the legislation to be ‘the first of its kind anywhere in Australia’.<sup>19</sup> The unique feature of the DPSOA was that it allowed an order to be sought in the last six months of a prisoner’s sentence that would authorise the indefinite detention of that prisoner even after the expiry of his or her sentence.<sup>20</sup> An application under the DPSOA can only be brought by the Attorney-General and only in relation to a prisoner serving

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16. Criminal Code (Qld) s 16; *R v Carroll* (2002) 77 ALJR 157; *Pearce v The Queen* (1998) 156 ALR 684.

17. DPSOA s 13(4)(c); DSOA s 7(3)(c).

18. J Dawes, ‘Prisons and Imprisonment’ in A Goldsmith, M Israel & K Daly (eds), *Crime and Justice: A Guide to Criminology* (Sydney: Law Book Co, 2006) 329, 331.

19. Queensland, *Parliamentary Debates*, Legislative Assembly, 26 Nov 2003, 5128, (R Welford, Attorney-General).

20. DPSOA ss 5(2)(c), 13(5)(a). See DSOA s 8(3).

a sentence for a ‘serious sexual offence’.<sup>21</sup> That term is defined to mean an offence of a sexual nature involving violence or committed against children.<sup>22</sup>

The application is filed together with supporting affidavits and a preliminary hearing date is set down for within 28 days.<sup>23</sup> Copies are served on the prisoner who may file his or her own material in response. The prisoner is entitled to be heard at both preliminary and final hearings and legal aid is available to resist the making of any order under the DPSOA.<sup>24</sup>

At the preliminary hearing, if the court is satisfied that there are reasonable grounds for believing that the prisoner is a serious danger to the community, it may make an interim detention order and an order that the prisoner undergo examination by two court-nominated psychiatrists.<sup>25</sup>

Each psychiatrist will examine the prisoner, consider his or her medical, psychiatric and prison records, and prepare a report which must indicate the psychiatrist’s assessment of the level of risk that the prisoner will commit another serious sexual offence.<sup>26</sup> Reasons must be provided in support of the assessment.<sup>27</sup>

At the final hearing the court can make a continuing detention order or order that the prisoner be released at the end of his or her sentence subject to appropriate conditions (a supervision order).<sup>28</sup> However, in either case, the court can only make an order if the Attorney-General discharges the onus of proving that the prisoner is a ‘serious danger to the community’.<sup>29</sup> The prisoner will be found to be a serious danger to the community if there is an ‘unacceptable risk’ that the prisoner will commit another ‘serious sexual offence’.<sup>30</sup> The term ‘unacceptable risk’ is undefined in the legislation but the Supreme Court of Western Australia has held that a risk is unacceptable if ‘it is a real risk of substance, not merely a remote possibility’.<sup>31</sup>

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21. DPSOA s 5(1), (6).

22. DPSOA s 2, Schedule.

23. DPSOA s 5. The DSOA requires that the preliminary hearing take place within 14 days: s 11(2).

24. DPSOA ss 5(5), 6; Legal Aid (Qld), *Grants Handbook* (Brisbane: Legal Aid, 2006). The respondent under the DSOA must be given notice of the application and may file affidavits in response for the preliminary hearing, but is only entitled to appear at the final hearing: ss 8(5), 12, 44.

25. DPSOA ss 8, 9. See DSOA s 14. The test at the preliminary hearing under the DSOA is somewhat lower than under the DPSOA: *DPP (WA) v Williams* [2006] WASC 140, [28]. The court needs only to be satisfied that there are reasonable grounds for believing that the court *might* find that the offender is a serious danger to the community: DSOA s 14(1).

26. DPSOA s 11(1), (3), (8). See DSOA ss 37, 38.

27. DPSOA s 11(2). See DSOA s 37(2)(b).

28. DPSOA s 13(5). See DSOA s 17(1).

29. DPSOA s 13(1), (7). See DSOA s 7(2).

30. DPSOA s 13(2). See DSOA s 7(1).

31. *Western Australia v Latimer* [2006] WASC 235, [16] (Murray J).

The court can only make an order if it finds ‘by acceptable and cogent evidence’ and to a ‘high degree of probability’ that the evidence is of ‘sufficient weight to justify the decision’.<sup>32</sup> A civil standard of proof therefore applies, but does not necessarily equate with the familiar ‘balance of probabilities’ standard. The courts have declined to define precisely the measure of the standard, instead indicating that the standard encompassed by the term ‘high degree of probability’ is sufficiently flexible to deal appropriately with what is at stake, viz, the liberty of someone not accused of committing any crime.<sup>33</sup>

In considering whether the prisoner is a serious danger to the community the court must have regard to the matters listed in section 13(4), including the psychiatrists’ reports, any other medical, psychiatric or psychological materials, the offender’s criminal history and antecedents, participation, if any, in rehabilitation programs and any other relevant matters.<sup>34</sup> The paramount consideration is, however, the need to ensure adequate community protection.<sup>35</sup>

Both the Attorney-General and the prisoner can appeal any decision made under the DPSOA within one month.<sup>36</sup> An appeal does not operate as a stay, but if the appeal is unlikely to be finalised before the prisoner’s release day, the Court of Appeal may order that the prisoner be detained pending the appeal outcome.<sup>37</sup>

Once made, the continuing detention order is expressed to apply indefinitely.<sup>38</sup> Indeed, it has been held that there is no power to make a continuing detention order for a finite period.<sup>39</sup> The Acts do, however, provide for annual reviews. An obligation is imposed directly on the court to conduct a review ‘at the end of one year after the order first has effect’ and then ‘at intervals of not more than one year after the last review’.<sup>40</sup> The obligation to apply for those reviews is imposed on the Attorney-General.<sup>41</sup>

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32. DPSOA s 13(3). See DSOA s 7(2).

33. *A-G (Qld) v Fardon* [2003] QSC 331, [31]–[32] (Atkinson J); *Fardon*, above n 8, [23]–[25] (White J); *A-G (Qld) v Van Dessel* [2006] QSC 16, [17] (White J). In *DPP (WA) v Williams* [2007] WASC 95, while McKechnie J accepted that the usual beyond reasonable doubt standard of proof had been expressly overridden by s 7(2), he nonetheless opined that the applicable standard was beyond reasonable doubt because of the potentially drastic consequences for the respondent: [2]. The comments are likely to be obiter because McKechnie J did not refer in his conclusion to the standard of proof applied.

34. DPSOA s 13(4). See DSOA s 7(3).

35. DPSOA s 13(6). See DSOA s 17(2).

36. *Ibid* ss 31, 32(1). On application, the Court of Appeal may extend the appeal period: s 32(2). No time limit is prescribed for appeals under the DSOA: DSOA s 34.

37. DPSOA s 41. See DSOA s 35.

38. DPSOA s 13(5)(a). See DSOA s 25.

39. *A-G (Qld) v Van Dessel* [2006] QCA 285, [14] (Jerrard JA).

40. DPSOA s 27(1); DSOA s 29.

41. DPSOA s 27(2). The obligation to apply for an annual review under the DSOA is imposed on the DPP: s 29.

The first application under the DPSOA was made in relation to Robert Fardon on 17 June 2003. Fardon had been convicted of rape, sodomy and assault occasioning bodily harm in 1989 and had been sentenced to 14 years' imprisonment. That sentence was due to expire on 30 June 2003. The Attorney-General sought an order for indefinite detention and on 27 June an interim order was granted.<sup>42</sup> On 6 November 2003 Queensland's first continuing detention order came into effect.<sup>43</sup>

The Queensland Minister for Police and Corrective Services revealed that in June 2006 there were 834 sex offenders in custody in Queensland prisons.<sup>44</sup> Clearly, not all of those offences would have involved children or violence. Suitable subjects for applications under the Act are identified from among those offenders by the Serious Sexual Offenders Review Committee, an inter-departmental committee formed of senior officers from the Department of Justice and Attorney-General, Queensland Corrective Services and the Queensland Police Service. All offenders serving two years or more for a sexual offence are considered by the Committee.<sup>45</sup> In the period between the Act's commencement and October 2006, the Committee considered whether to apply for orders in relation to 371 offenders.<sup>46</sup>

Since the DPSOA commenced, the Queensland Attorney-General has applied for continuing detention orders in relation to at least 28 offenders.<sup>47</sup> Although the legislation expresses no preference for continuing detention orders over supervision orders, the Queensland government may have anticipated that continuing detention orders would be the default order and that supervision orders would be made as an alternative.<sup>48</sup> In line with that supposition, the Attorney-General has applied for

42. *Fardon*, above n 8, [2].

43. The order was granted by White J in *Fardon*, *ibid*.

44. Queensland Parliament, 'Evidence to Estimates Committee B', 12 Jul 2006, 63 (J Spence, Minister for Police and Corrective Services).

45. Bravehearts Inc., 'The Management and Treatment of Child Sex Offenders', Position Paper (2005) 18, <<http://www.bravehearts.org.au/positionstatement.ews>>; Queensland Parliament, *ibid* 62. In Western Australia, the analogous committee is the Dangerous Sexual Offenders Committee: Western Australian Parliament, 'Evidence to Estimates Committee', 24 May 2007, E476 (J McGinty, Attorney-General).

46. Queensland Corrective Services, 'Assessment Management and Supervision of Sex Offenders in Queensland' (2006) 7, <[www.dcs.qld.gov.au/Publications/Corporate\\_Publications/Miscellaneous\\_Documents/index.shtml](http://www.dcs.qld.gov.au/Publications/Corporate_Publications/Miscellaneous_Documents/index.shtml)>.

47. See *A-G (Qld) v Fardon* [2003] QSC 200; *A-G (Qld) Watego* [2003] QSC 367; *A-G (Qld) Nash* [2003] QSC 377; *A-G (Qld) Francis* [2004] QSC 128; *A-G (Qld) v W* [2004] QSC 262; *A-G (Qld) v Foy* [2004] QSC 428; *A-G (Qld) v Downs* [2005] QSC 16; *A-G (Qld) v G* [2005] QSC 71; *Van Dessel*, above n 33; *A-G (Qld) v Hansen* [2006] QSC 35; *A-G (Qld) v Yeo* [2006] QSC 63; *A-G (Qld) v Twigg* [2006] QSC 107; *A-G (Qld) v Bickle* [2006] QSC 130; *A-G (Qld) v Friend* [2006] QSC 131; *A-G (Qld) v McLean* [2006] QSC 137; *A-G (Qld) v Waghorn* [2006] QSC 171; *A-G (Qld) v O'Rourke* [2006] QSC 196; *A-G (Qld) v B* [2006] QSC 227; *A-G (Qld) v Sutherland* [2006] QSC 268; *A-G (Qld) v Toms* [2006] QSC 298; *A-G (Qld) v Beattie* [2006] QSC 322; *A-G (Qld) v Robinson* [2006] QSC 328; *A-G (Qld) v Wright* [2006] QSC 389; *A-G (Qld) v HTR* [2007] QSC 19; *A-G (Qld) v Ward* [2007] QSC 33; *A-G (Qld) v Murray* [2007] QSC 036; *A-G (Qld) v Reynolds* [2007] QSC 52.

48. Queensland, *Parliamentary Debates*, Legislative Assembly, 3 Jun 2003, 2485 (R Welford, Attorney-General). In that speech, the Attorney-General described supervision orders as 'an alternative to custodial detention'.

detention in every case examined by the author, even where counsel has conceded before the court that detention was not in fact necessary and a supervision order would provide adequate protection for the community.<sup>49</sup> However, the Queensland Court of Appeal has held that an order for supervised release is generally preferable and that continuing detention will only be ordered when the court determines that a supervision order cannot provide adequate community protection.<sup>50</sup>

Since the DPSOA commenced, and as at the time of writing, Queensland courts have granted seven continuing detention orders.<sup>51</sup> Two prisoners subject to those orders have since been granted supervised release.<sup>52</sup> One died in custody.<sup>53</sup> Four prisoners whose sentences have expired are therefore currently detained in Queensland prisons under indefinite preventative detention orders.

## 1.1 Operation of the DSOA

The DSOA is ‘nearly identical’ to Queensland’s DPSOA, but it does have some unique features.<sup>54</sup> First, it applies to a broader range of offenders than the DPSOA.<sup>55</sup> Like the Queensland Act, the DSOA applies to offenders who have committed a ‘serious sexual offence’, but the term is defined differently.<sup>56</sup> The definition is drawn from section 106A of the Evidence Act 1906 (WA)<sup>57</sup> and includes any Criminal Code offence referred to in Part B of Schedule 7, which provides for a maximum penalty of 7 years or more imprisonment.<sup>57</sup> So, unlike the DPSOA, the definition can encompass sexual offences against adults that involve no separate element of violence.<sup>59</sup> The DSOA also applies to offenders who have been released into the community on parole.<sup>60</sup> Moreover, even if an offender is discharged from his sentence of

49. See eg *Hansen* above n 46, [1], [20]; *Sutherland*, above n 46, [42]; *Reynolds*, above n 46, [1]; *B* above n 46, [2].

50. *A-G (Qld) v Francis* [2006] QCA 324, [39]; *A-G (Qld) v Fardon* [2006] QCA 512, [26]. The WA Supreme Court has taken the same position: *Williams*, above n 33, [53]; *DPP (WA) v Mangolamara* [2007] WASC 71, [63].

51. Orders for continuing detention were made in the following cases: *Fardon*, above n 8; *A-G (Qld) v Francis* [2004] QSC 233; *A-G (Qld) v Pearce* [2005] QSC 314; *A-G (Qld) v Yeo* [2006] QSC 063; *Waghorn*, above n 46; *Beattie*, above n 46; *Robinson*, above n 46.

52. *Francis* above n 49; *A-G (Qld) v Fardon* [2006] QSC 275 upheld in *Fardon*, above n 49.

53. ‘Pedophile Dies in Custody’, *The Australian*, 23 Jun 2006, <<http://www.theaustralian.news.com.au/story/0,20867,19564059-1702,00.html>>.

54. *Williams*, above n 25, [2].

55. Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 Nov 2005, 7280 (J McGinty, Attorney-General).

56. DSOA s 8(1).

57. DSOA s 3.

58. Evidence Act 1906 (WA) s 106A.

59. Western Australia, *Parliamentary Debates*, above n 54. The definition of ‘serious sexual offence’ under the DPSOA applies to sexual offences involving violence or against children: DPSOA s 2, Schedule.

60. DSOA ss 3, 8. The definition of ‘under sentence of imprisonment’ in s 3 mirrors the Sentence Administration Act 2003 (WA) s 66; Western Australia, *Parliamentary Debates*, *ibid* 7295. The DPSOA applies only to prisoners while they remain in custody: s 2.



imprisonment altogether, an order under the DSOA may still be made, provided the application was lodged before the sentence was discharged.<sup>61</sup>

Second, the DSOA authorises the Director of Public Prosecutions ('DPP') to apply for orders under the Act,<sup>62</sup> whereas in Queensland that role is exclusively conferred on the Attorney-General.<sup>63</sup>

Finally, the objects clause of the DSOA has deleted the express reference to rehabilitation that appears in the DPSOA. Section 4(b) provides that an object is 'to provide for continuing control, care, or treatment, of persons of a particular class'.<sup>64</sup> However, it may be that the deletion is of no significance because, as was conceded during the parliamentary debates, the concept of 'treatment' includes rehabilitation, and therapeutic intervention is expressly anticipated by the Act.<sup>65</sup> Moreover, courts have interpreted the DSOA as imposing an obligation on the Crown to make rehabilitative services available to offenders affected by the Act.<sup>66</sup>

Since the DSOA commenced, at least six continuing detention orders have been sought but only one has been finally granted.<sup>67</sup> One order has been made for detention on a preliminary basis,<sup>68</sup> two supervision orders have been granted<sup>69</sup> and in two cases, *DPP v Williams*<sup>70</sup> and *DPP v Mangolamara*,<sup>71</sup> the applications for continuing detention orders were dismissed. *Mangolamara*<sup>72</sup> will be discussed below in Part 3.1.

In *Williams*,<sup>73</sup> McKechnie J accepted that the prosecution had proved that the respondent was a serious danger to the community because there would be an

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61. DSOA s 10.

62. DSOA s 8. The Attorney-General explained that conferring power on the DPP was more consonant with the division of powers between the Attorney-General and the DPP: Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 Nov 2005, 7297 (J McGinty, Attorney-General). The Western Australian Attorney-General can, under the DSOA, perform functions conferred on the DPP: s 6.

63. DPSOA s 5.

64. The DPSOA formulation is the same with the following additional words at the end: 'to facilitate their rehabilitation': s 3(b).

65. Western Australia, *Parliamentary Debates*, Legislative Council, 14 Mar 2006, 278 (S Ellery). See eg DSOA ss 7(3)(e), (f), 18(2)(b).

66. *Mangolamara*, above n 49, [203]; *Western Australia v Alvisse* [2007] WASC 129, [37], [59].

67. At the time of writing, a continuing detention order was granted in *Latimer*, above n 31. Orders have been sought in: *DPP (WA) v Paul Douglas Allen a.k.a. Paul Alan Francis Deverell* [2006] WASC 160; *Latimer*, above n 31; *DPP (WA) v Alvisse* [2006] WASC 279; *Williams*, above n 33; *DPP v Mangolamara*, *ibid*; *DPP (WA) v Manning* [2007] WASC 134.

68. *Manning*, *ibid*.

69. *Allen*, above n 67; *Alvisse*, above n 66.

70. Above n 33.

71. Above n 49.

72. *Ibid*.

73. Above n 33.

unacceptable risk that Williams would commit a serious sexual offence if not regulated by some form of order.<sup>74</sup> However, the DPP failed to present evidence regarding whether that risk could be ameliorated by an appropriately framed supervision order.<sup>75</sup>

McKechnie J held that the applicant bore the onus of establishing to the requisite standard of proof, not merely that the respondent was an unacceptable risk, but that the particular order sought was the most appropriate way of managing that risk.<sup>76</sup> McKechnie J held that the DPP had failed to establish that the risk of re-offending by the respondent was not manageable with a supervision order. Under those circumstances, McKechnie J considered that the DPP had failed to discharge his onus of proving that the only order which would adequately protect the community was an order for continuing detention.<sup>77</sup> The author understands that an appeal has been lodged against the decision in *Williams*.<sup>78</sup> It is perhaps worth observing that once a finding is made under section 7 that an offender is an unacceptable risk, section 17 expresses the court's power to make either of the available orders in non-mandatory terms.<sup>79</sup> In other words, on the face of the legislation the court seems to have three choices available: it may make a continuing detention order, a supervision order or no order at all.<sup>80</sup>

## 2. HISTORICAL BACKGROUND OF PREVENTATIVE DETENTION

Generally, in Australia, detention is understood as applying for punitive purposes following lawful conviction for a specified past crime.<sup>81</sup> However, the DPSOA and DSOA are not unique as examples of detention for purposes other than as punishment for a crime.

In *Lim v Minister for Immigration*,<sup>82</sup> Brennan, Deane and Dawson JJ stated:

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74. Ibid [43].

75. Ibid [54], [55], [63].

76. Ibid [6].

77. Ibid [54].

78. The Court of Appeal overturned McKechnie J's decision on 4 October 2007 in *DPP v Williams* [2007] WASCA 206. The court held that, once a finding had been made that an offender was an unacceptable risk of committing another serious sexual offence (and is hence a serious danger to the community), there is no discretion under s 17 not to make one the two orders provided: [68].

79. DSOA s 17(1). See above n 78.

80. In *Mangolamara*, above n 49, Hasluck J observed that the court is faced with a difficult task if evidence regarding a supervision order is inadequate: [71]. Hasluck J cited McHugh J in *Fardon*, above n 1, who held that, once the court has found that the respondent is an unacceptable risk, the DPSOA (which relevantly uses the same form of expression) provides three discretionary options: [34], cited in *Mangolamara* at [53]. Other judges consider that once a finding of unacceptable risk is made, the court is constrained, in the paramount interests of community protection, to make one of the orders provided in the Act: *Latimer*, above n 31, [21] (Murray J), cited in *Mangolamara*, above n 49, [70]. See above n 78.

81. Dawes, above n 18, 331.

82. [1992] HCA 64.

The involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of law, but he can be punished for nothing else'.<sup>83</sup>

Their Honours then qualified that proposition by reference to various exceptions:

- detention in remand, to ensure the accused's availability at a pending trial;
- detention in cases of mental illness or infectious disease;
- detention of non-citizens while migration claims are assessed or pending deportation;
- detention by parliament, to punish contempt; and
- detention by military tribunals, to punish breaches of discipline.<sup>84</sup>

It seems clear that this list of exceptional cases was not intended to be exhaustive.<sup>85</sup> However, there is a common thread which runs through these cases: apart from the final two examples, the exceptions are primarily non-punitive in purpose and detention is of a short-term or otherwise finite duration.<sup>86</sup> The final examples of extra-judicial detentions are clearly punitive, but are analogous (in this context) to detention following judicial conviction.

In the Queensland Court of Appeal, De Jersey CJ considered that preventative detention under the DPSOA fell within the above exceptions by analogy with detention of the mentally ill.<sup>87</sup> But that analogy works far more conformably with section 18 of the Criminal Law Amendment Act 1945 (Qld) ('CLAA'), a predecessor of the DPSOA, which also provides for the indefinite detention of sex offenders. Section 18 provides that a sex offender can be detained at the Governor's pleasure, provided that a psychiatrist and another medical practitioner report that the offender is incapable of controlling his sexual instincts and that such incapacity is curable with appropriate treatment.

The CLAA provision was rarely used in practice. It did not apply to cases where an offender was capable, but refused to control his urges; nor to cases where there was an uncontrollable drive, but where the condition was untreatable. Simply put, the CLAA provision was out of touch with medical understandings of sexual offending.<sup>88</sup>

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83. Ibid [23] (Brennan, Deane & Dawson JJ), citing AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London: Macmillan, 1959) 202.

84. *Lim*, ibid [24], [29]; McSherry, above n 3, 109; P Keyzer, C Pereira & S Southwood, 'Pre-emptive Imprisonment for Dangerousness in Queensland under the Dangerous Prisoners (Sexual Offenders) Act 2003: The Constitutional Issues' (2004) 11 PPL 244, 247.

85. *Lim*, ibid [9] (Gaudron J); *Fardon* above n 1, [154], [155] (Kirby J).

86. McSherry, above n 3, 109; *Fardon*, above n 1, [155] (Kirby J).

87. *Attorney-General (Qld) v Fardon* [2003] QCA 416, [42] (de Jersey CJ).

88. Queensland, *Parliamentary Debates*, Legislative Assembly, 3 Jun 2003, 2484 (R Welford, Attorney-General).

The preventative regime of the DPSOA has also been compared to indefinite sentencing regimes which are now widespread throughout Australia.<sup>89</sup> One example is Part 10 of the Penalties and Sentences Act 1992 (Qld) ('PSA'). That regime provides that an indefinite sentence is conditioned on a finding that an offender 'is a serious danger to the community', which can only be made if the court is satisfied '(a) by acceptable, cogent evidence; and (b) to a high degree of probability, that the evidence is of sufficient weight to justify the finding'.<sup>90</sup> The applicable legal test and standard of proof for indefinite sentencing is therefore the same as under the DPSOA and the DSOA. This indefinite sentencing provision applies only to sentencing offenders convicted of violent offences where a sentence of life imprisonment is available.<sup>91</sup>

Some consider that indefinite sentencing regimes provide justification for continuing detention orders. Gleeson CJ opined that if –

it is lawful and appropriate for a judge to make an assessment of danger to the community at the time of sentencing, perhaps many years before an offender is due to be released into the community, it may be thought curious that it is inappropriate for a judge to make such an assessment at or near the time of imminent release, when the danger might be assessed more accurately.<sup>92</sup>

Of course, Gleeson CJ's view presupposes that indefinite sentencing is itself justified, a proposition which is doubted by some commentators (and consideration of which is beyond the scope of this paper).<sup>93</sup> However, there is a fundamental difference between indefinite sentencing and preventative detention which challenges the validity of the comparison; that is, the former is imposed as a direct consequence of a judicial finding of guilt for a specified past criminal offence. And the indefinite sentence must still be proportionate to the crime. In *Chester v The Queen*,<sup>94</sup> a decision of a Western Australian sentencing judge to order indefinite detention was challenged. The High Court held that:

It is now firmly established that our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism

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89. Sentencing Act 1995 (WA) s 98; Sentencing Act 1995 (NT) s 65; Criminal Law (Sentencing) Act 1988 (SA) s 23; Sentencing Act 1997 (Tas) s 19; Sentencing Act 1991 (Vic) s 18A.

90. Penalties and Sentences Act 1992 (Qld) ss 163(3)(b), 170. The language of s 13(1) & (3) of the DPSOA replicate that used in the PSA. Cf Sentencing Act 1995 (WA), which allows an indefinite sentence to be ordered following a finding on the balance of probabilities that the offender is likely to be a danger to society: s 98.

91. Penalties & Sentences Act 1992 (Qld) ss 162, 163(1). Cf Sentencing Act 1995 (WA), which provides that an indefinite sentence may be ordered in relation to any indictable offence where an unsuspended prison term is ordered: s 98(1).

92. *Fardon*, above n 1, [2] (Gleeson CJ).

93. Eg D Ruschena, 'Determining Dangerousness: Whatever Happened to the Rules of Evidence?' (2003) 10 PPL 122.

94. (1988) 165 CLR 611.

of the offender... In the light of the background of settled fundamental legal principle, the power to direct or sentence to [indefinite detention] should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm.<sup>95</sup>

Preventative detention, on the other hand, is imposed because of the risk that someone might offend in the future. The nexus with past offending is purely historical.<sup>96</sup> The principle of proportionality propounded in cases such as *Chester*<sup>97</sup> and *Veen (No 2)*<sup>98</sup> is subverted because the expiry of the sentence discharges any requirement for proportionality.

In recent times, there have also been two other pieces of somewhat unusual Australian legislation which might claim to be ancestors of the DPSOA and DSOA. These Acts were unusual because they were each expressed to apply exclusively to a specific individual. The first was the Community Protection Act 1990 (Vic) (CPA). The purpose of the CPA was to provide for the safety of members of the public by providing for Supreme Court proceedings to preventatively detain Garry Ian David.<sup>99</sup>

Section 8 provided that David could be detained if the court was satisfied, on the balance of probabilities, that he was likely to commit an act of personal violence to another person.<sup>100</sup> David had been serving a sentence of 14 years for two counts of attempted murder. While in prison he made extravagant threats and engaged in 'bizarre and frightening fantasies' involving mass murder and urban warfare. He was also a serial self-mutilator who received considerable media attention and, according to Fairall, became an object of societal fear and loathing.<sup>101</sup>

A preventative detention order was made against David in September 1990.<sup>102</sup> He eventually died in prison in 1992, by which time the order had been twice extended. The constitutional validity of the legislation was never tested.<sup>103</sup>

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95. Ibid 618.

96. Keyzer, Pereira & Southwood, above n 84, 248.

97. Above n 94.

98. [1988] HCA 14.

99. D Wood, 'A One Man Dangerous Offenders Statute: The Community Protection Act 1990 (Vic)' (1990) 17 MULR 497, 499. Section 1 of the *Community Protection Act 1990* (Vic) provided that the purposes of the Act were: '(a) to provide for the safety of members of the public and the care or treatment and the management of Garry David, a person who has been convicted of attempted murder and other offences and is, or has been, in a psychiatric in-patient service; and (b) to provide for proceedings to be instituted in the Supreme Court for an Order for the detention of Garry David.'

100. P Fairall, 'Violent Offenders and Community Protection in Victoria – The Gary David Experience' (1993) 17 Crim LJ 40, 42.

101. Ibid 40–41.

102. CR Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising From the David Case' (1990) 16 Mon L Rev 161, 163; Order of Fullagar J, VSC, 18 Sep 1990.

103. P Fairall, 'Imprisonment Without Conviction in New South Wales: *Kable v Director of Public Prosecution*' (1995) 17 Syd LR 573, 574–75.

The second piece of legislation was the Community Protection Act 1994 (NSW) ('the NSW CPA'). Like the Victorian CPA, the NSW CPA applied to just one man, Gregory Wayne Kable. The NSW Act provided that a detention order could be made provided the court was reasonably satisfied that Kable was more likely than not, if released, to commit a serious act of violence.<sup>104</sup> Kable's imminent release from custody after serving just 4 years for the manslaughter of his wife provided the impetus for the New South Wales Act. While in prison, Kable made threats against relatives of his dead wife who were, in his view, not complying with Family Court orders regarding his children. The media became interested and his pending release became a hot political issue.<sup>105</sup>

Kable challenged the constitutional validity of the NSW CPA. The High Court upheld his challenge. The Court reasoned as follows: Chapter III of the Constitution allows State courts to be invested with Commonwealth judicial power. A basic principle underpinning Chapter III, derived from the doctrine of the separation of powers, is that courts which exercise Commonwealth judicial power must be, and must appear to be, independent of both State and Commonwealth legislatures and executive governments. State or Commonwealth legislation that undermines the role and integrity of State courts as repositories of Commonwealth judicial power would therefore be invalid.<sup>106</sup>

The majority held that the NSW CPA was invalid because it imposed a function on the NSW Supreme Court which was incompatible with the exercise of Commonwealth judicial power because it undermined the integrity of that court. The majority judges, Toohey, Gaudron, McHugh and Gummow JJ, relied on different features of the Act to reach their conclusions.<sup>107</sup> McHugh and Gummow JJ considered that the NSW CPA was repugnant to the exercise of Commonwealth judicial power because it provided the court with no real discretion regarding the making of the order. The court would thus be used as an instrument of the executive, to rubber-stamp a political decision to incarcerate a citizen at the end of his sentence, without any intervening finding of guilt.<sup>108</sup>

Toohey and Gaudron JJ, on the other hand, emphasised the extraordinary consequences to liberty of a scheme of preventative detention based, not on proven guilt for a particular past offence, but on speculative assessments of future likelihood to offend.<sup>109</sup>

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104. Community Protection Act 1994 (NSW) s 5(1)(a).

105. *Kable v DPP (NSW)* [1996] HCA 24, [4] (Brennan CJ), [2] (Dawson J); Fairall, above n 103 573, 573–74.

106. *Ibid* [19]–[22] (McHugh J), [25]–[27] (Gaudron J), [73]–[74] (Gummow J); [30] (Toohey J).

107. *Ibid*; Brennan CJ & Dawson JJ were in the minority.

108. *Ibid* [40] (McHugh J); [36] (Gummow J).

109. *Ibid* [28] – [30] (Toohey J); [22]–[25] (Gaudron J).

The decision in *Kable* was one of the central planks of Fardon's High Court challenge to the constitutional validity of the DPSOA.<sup>110</sup> However, a very differently constituted High Court rejected that challenge.<sup>111</sup> Gleeson CJ validated the DPSOA by analogising its scheme of preventative detention to indefinite sentencing provisions. He held that there is nothing inherent in preventative detention that compromises the institutional integrity of courts.<sup>112</sup> Callinan and Heydon JJ held that preventative detention under the DPSOA was protective rather than punitive and drew analogies with involuntary detention of the mentally ill and those suffering from contagious diseases.<sup>113</sup> Gummow J (with whom Hayne J agreed) identified as critical the exclusive application of the DPSOA to prisoners who have been convicted of offences of the same type as those which the DPSOA aims to prevent. To that extent, he found the necessary nexus with prior conviction secured by the usual judicial processes.<sup>114</sup> McHugh J emphasised the fact that, unlike *Kable's* case, the DPSOA was of general application. He held that to invalidate legislation under the doctrine of repugnancy with Chapter III of the Constitution, more is required than mere departure from traditional processes, even if combined with the removal of important substantive rights. On this view, legislation will be invalid under the *Kable* principle only if it leads reasonable people to think that the capacity of state courts to impartially administer federal jurisdiction has been compromised.<sup>115</sup>

Kirby J was the sole dissident. He held that the principle in *Kable* protected the institutional integrity of the courts from what were, in his view, efforts to attract electoral support with ill-considered laws, which, by virtue of their inconsistency with traditional judicial process, are repugnant to the constitutional framework.<sup>116</sup> The inconsistency with traditional judicial process arose in part from the DPSOA's provision for the imposition of punishment, either for crimes which have not yet been committed, or as a system of double punishment for past crimes or because of a perceived propensity to commit crimes of a certain type.<sup>117</sup> Kirby J did not accept that the true nature of the DPSOA could be considered protective because estimations of dangerousness were notoriously unreliable and basically involved little more than guesswork.<sup>118</sup> In his view, the DPSOA was invalid.<sup>119</sup>

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110. *Fardon*, above n 1.

111. Only McHugh & Gummow JJ participated in both decisions. In the *Fardon* case, the High Court was constituted by Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

112. *Fardon*, above n 1, [12], [20] (Gleeson CJ).

113. *Ibid* [217], [219] (Callinan & Heydon JJ).

114. *Ibid* [108], [114] (Gummow J); [109] (Hayne J).

115. *Ibid* [41], [42] (McHugh J).

116. *Ibid* [135], [140], [142] (Kirby J).

117. *Ibid* [148], [162], [163], [168] (Kirby J).

118. *Ibid* [169] (Kirby J).

119. *Ibid* [193] (Kirby J).

### 3. THE NEED FOR COMMUNITY PROTECTION

Preventative detention is generally thought to be justified by the perceived need for such a scheme in the interests of community protection.<sup>120</sup> In *Veen v The Queen [No 2]*,<sup>121</sup> Deane J noted that:

The protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people ... if he were to be released as a matter of course at the end of what represents a proper punitive sentence.<sup>122</sup>

According to this view, sentencing on the basis of proportionality confers inadequate protection. A case in point was *Veen*, involving a conviction for manslaughter. Despite the existence of compelling diminished responsibility factors, Veen was sentenced to life imprisonment, primarily on the basis of community protection.<sup>123</sup> The sentence was reduced on appeal to 12 years. The High Court held that:

A sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.<sup>124</sup>

Veen killed again just 10 months after his release.<sup>125</sup>

In *McGarry v The Queen*,<sup>126</sup> an indefinite sentence was also overturned on appeal. McGarry was convicted of a single count of indecent dealing for masturbating in front of a girl under 13. The sentencing judge considered McGarry's extensive history of sex offending and ordered a sentence of five years' imprisonment. However, he also concluded that McGarry was a continuing danger and ordered his indefinite imprisonment pursuant to section 98 of the Sentencing Act 1995 (WA).<sup>127</sup> The High Court overturned the indefinite sentence. A few months after his release, McGarry offended again, this time indecently assaulting a 14 year-old girl.<sup>128</sup>

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120. CR Williams, 'Coping with the Highly Dangerous: Issues of Principle Raised by Preventive Detention', Paper presented at Serious Violent Offenders: Sentencing, Psychiatry and Law Reform Conference (Canberra, 29–31 Oct 1991) 11, 12; Queensland, 'Parliamentary Debates', Legislative Assembly, 4 Jun 2003, 2579 (R Welford, Attorney-General).

121. Above n 98.

122. *Ibid* [9] (Deane J).

123. Williams, above n 120, 13; *Chester*, *ibid* [2] (Mason CJ, Brennan Dawson & Toohey JJ).

124. *Chester*, *ibid* [8] (Mason CJ, Brennan, Dawson & Toohey JJ).

125. *Ibid* [2], [3]; Williams, above n 120, 13.

126. [2001] HCA 62.

127. *Ibid* [2], [6].

128. McSherry, above n 3, 98, citing ABC, *News Online*, 'Man Jailed Indefinitely Over Sex Offences', 12 Nov 2004, <[www.abc.net.au/news/newsitems/200411/s1242640.htm](http://www.abc.net.au/news/newsitems/200411/s1242640.htm)>.



There seems to be growing public support for incapacitative policies and ever more punitive approaches to recidivism.<sup>129</sup> However, research suggests that social anxiety about sexual assault, especially among women, may be out of proportion with real levels of risk.<sup>130</sup>

Hanson and Bussiere conducted an analysis of 61 sexual offender recidivism studies from six different countries, including Australia.<sup>131</sup> They found that an average of 13.4 per cent of more than 23 000 offenders in the sample sexually re-offended in the average 4–5 year follow-up period.<sup>132</sup> In studies with follow-up periods of 15 – 20 years, recidivism rates never exceeded 40 per cent.<sup>133</sup> Thornton sampled sex offenders in Britain and found about a 20 per cent sexual recidivism rate over a 10 year follow-up period.<sup>134</sup> Lievore's report reviewed studies from a number of countries and found recidivism rates of between 10 and 20 per cent.<sup>135</sup>

Those statistics are likely to underestimate real recidivism rates because, as noted by the authors, an unknown number of sex offences go undetected.<sup>136</sup> Even so, one point that can be made about the recidivism data is that it does not demonstrate that recidivism in any particular case is statistically probable. In any event, the pertinent issue under the DPSOA and DSOA is not recidivism generally but whether the particular prisoner before the court is likely to re-offend.

Professor Williams argues that preventative detention policies necessarily reflect a political preference for the claims of potential future victims over the claims of potential future detainees.<sup>137</sup> That is doubtless true, but popular or electoral support may not be enough to legitimate this type of preventative detention unless it can demonstrate a sound justificatory foundation. That is because majoritarianism offers few safeguards against the abuse of unpopular minorities. In *Fardon*, Kirby J noted that:

[The] protection of the legal and constitutional rights of minorities in a representative democracy such as the Australian Commonwealth is sometimes

129. E Richardson & A Freiberg, 'Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria' (2004) 4 *Criminal Justice* 81, 82, 85; McSherry, above n 3, 105.

130. C Carcach & S Mukherjee, 'Women's Fear of Violence in the Community' (1999) 135 *Trends & Issues in Crime & Criminal Justice* 2; D Lievore, *Recidivism of Sexual Offenders* (2004) 72 *Line Facts Info*, 9; H Figgis & R Simpson, 'Dangerous Offenders Legislation: An Overview', NSW Parliamentary Library (NSW Parliament, 1997) 17.

131. K Hanson & M Bussiere, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 66 *J Consulting & Clinical Psych* 348, 350.

132. *Ibid* 351, 357.

133. *Ibid*.

134. D Thornton, R Mann, S Webster, L Blud, R Travers, C Friendship & M Erikson, 'Distinguishing and Combining Risks for Sexual & Violent Recidivism' (2003) *Annals NY Acad Sci* 225.

135. Lievore, above n 130, 29.

136. Hanson & Bussiere, above n 131, 351; Lievore, *ibid* 26.

137. Williams, above n 120, 18.

unpopular. This is so whether it involves religious minorities, communists, illegal drug importers, applicants for refugee status, or persons accused of offences against anti-terrorist laws. Least of all is it popular in the case of prisoners convicted of violent sexual offences or offences against children. Yet it is in cases of such a kind that the rule of law is tested. As Latham CJ pointed out long ago, in claims for legal protection, normally, 'the majority of the people can look after itself': constitutional protections only really become important in the case of 'minorities, and, in particular, of unpopular minorities'.<sup>138</sup>

If a policy of incapacitation is justified by reference to community protection, it would seem to be necessary to have reliable methods with which to identify those who represent a genuine threat to the community. In the terms of the DPSOA and the DSOA, it would be necessary to have access to cogent acceptable evidence by which a conclusion can be reached to a high degree of probability that there is an unacceptable risk that a specific person will commit a serious sexual offence.<sup>139</sup> The next section considers whether such evidence is available.

### 3.1 The reliability of predictions of dangerousness

As noted above, prior to making a finding that a prisoner is a serious danger to the community, the DPSOA and the DSOA require that two court-appointed psychiatrists each prepare a report indicating their opinion of the level of risk that the prisoner will commit another serious sexual offence if released.<sup>140</sup> Those reports must be taken into account in the making of the final order.<sup>141</sup>

Seemingly, the Acts are premised on the assumption that psychiatrists can indeed predict violent behaviour, even in relation to people who suffer no mental illness.<sup>142</sup> This assumption is supported by the High Court's insistence that psychiatric assessments of dangerousness must be obtained before an indefinite sentence can be made.<sup>143</sup> The scientific foundations of this assumption warrant further consideration.

Broadly, there are three methods used by psychiatrists to assess 'dangerousness'.<sup>144</sup> The first method can be described as 'unstructured clinical judgment'. This method draws on the professional expertise and experience of the clinician to calculate dangerousness based on interviews and observation and taking into account the

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138. *Fardon*, above n 1, [143] (Kirby J) (citations omitted).

139. DPSOA s 13(2), (3); DSOA s 7.

140. DPSOA s 11; DSOA s 37.

141. DPSOA s 13(4)(a); DSOA s 7(3)(a).

142. *Ruschena*, above n 93, 126.

143. See eg *Thompson v The Queen* [1999] HCA 43, [2]. *McGarry*, above n 126, [31] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

144. K Douglas, J Ogloff & S Hart, 'Evaluation of a Model of Violence Risk-Assessment Among Forensic Psychiatric Patients' (2003) 54 *Psychiatric Services* 1372.

offender's history. This problem with this method is that it is highly subjective, meaning that dangerousness assessments by different clinicians cannot be assured of consistency.<sup>145</sup> This method is also considered to have inadequate predictive validity for use in forensic contexts.<sup>146</sup> Douglas et al consider that among risk assessment researchers, there is now 'relative consensus' that this method 'possesses inadequate interrater reliability and predictive validity'.<sup>147</sup>

The second method involves prediction by application of statistically-based actuarial models to formulaically produce a probability estimate of dangerousness.<sup>148</sup> There are a range of actuarial tools available and they are generally much more accurate than unstructured clinical judgment. However, these actuarial approaches are criticised because they fail to take important individual or situational risk factors into account, thereby ignoring the uniqueness of individuals and implicitly denying their autonomy.<sup>149</sup> Shea illustrates the danger of this approach, 'saying that 50/100 people are violent is not the same as saying that someone is 50 per cent likely to be violent. That individual might be 100 per cent not likely to commit violence'.<sup>150</sup>

The third method is 'structured clinical judgment' ('SCJ'), which combines both of the methods described above. A range of predictive SCJ instruments have been developed which take into account static risk factors (eg, gender, ethnicity, age, marital status and criminal history) and dynamic risk factors (eg, substance use/abuse, sexual arousal patterns, social skills, environmental factors and personal attitudes). These predictive tools are preferred to actuarial methods alone because dynamic factors are more reliable predictors of violence. On the other hand, they are also more difficult to measure, are open to subjective interpretation and are variable between offender types.<sup>151</sup>

In cases under the DPSOA, psychiatrists have variously used all of the above methods in formulating their opinions. For example, in both *Attorney-General v Robinson*<sup>152</sup> and *Attorney-General v Yeo*,<sup>153</sup> Dr Kar exclusively used unstructured clinical judgement as a basis for assessing those prisoners to be dangerous sexual

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145. Lievore, above n 130, 39; K Douglas, M Yeomans & D Boer, 'Comparative Validity Analysis of Multiple Measures of Violence Risk in a Sample of Criminal Offenders' (2005) 32 *Criminal Justice & Behaviour* 479, 480.

146. Lievore, *ibid* 39; Douglas, Yeomans & Boer, *ibid* 480.

147. Douglas, Yeomans & Boer, *ibid*. 'Interrater reliability' refers to the extent to which results can be duplicated by a different clinician.

148. Douglas, Ogloff & Hart, above n 144, 1372; Lievore, above n 130, 39.

149. K Douglas & J Ogloff, 'Multiple Facets of Risk for Violence: The Impact of Judgmental Specificity on Structured Decisions about Violence Risk' (2003) 2(1) *International J Forensic Mental Health* 19, 21; Lievore, *ibid* 39.

150. P Shea, *Psychiatry in Court: The Use(fulness) of Psychiatric Reports and Psychiatric Evidence in Court Proceedings*, 2nd edn (Sydney: Hawkins Press, 1996) 158.

151. Lievore, above n 130, 39–40.

152. Above n 46.

153. Above n 46.

psychopaths.<sup>154</sup> Most of the other psychiatrists referred to in the cases used both actuarial tools and SCJ approaches. Thus, in *Attorney-General v Francis*,<sup>155</sup> Professor Nurcombe and Dr Lawrence used actuarial and SCJ methods,<sup>156</sup> as did Dr Grant and Professor James in *Robinson*,<sup>157</sup> and Professors James and Ogloff and Drs Moyle and Boettcher in *Fardon*.<sup>158</sup> However, in the latter case, White J noted that Professor James and Dr Boettcher seemed more comfortable with and dependent upon unstructured clinical judgment to make their assessments.<sup>159</sup> Psychiatrists in Western Australia also seem to be using a combination of the three assessment methods discussed above.<sup>160</sup>

The main problem with relying on assessments of risk produced by any of these methods is that there are valid reasons for concern about the reliability of the techniques. Some psychiatrists candidly admit that their track record in accurately predicting dangerousness is poor and prospects for improvement, even with new prediction tools, are limited.<sup>161</sup>

Numerous studies have been conducted to assess the reliability of predictive tools, but the results reveal disturbing levels of predictive inaccuracy.<sup>162</sup> Rogers and Shuman cite a 2004 study which found that ‘forensic psychologists were inaccurate nearly two-thirds (64 per cent) of the time at identifying cases with sexually violent recidivism’.<sup>163</sup> The same study found that predictions by practising forensic psychologists were slightly less accurate than those of their graduate students and that the confidence of the psychologists in the accuracy of their predictions was actually higher in cases where the prediction was inaccurate.<sup>164</sup>

Shea, a forensic psychiatrist, writes that ‘the proportion of erroneous judgments of dangerousness (by psychiatrists) is so uncomfortably high that no-one can fail to be depressed’.<sup>165</sup> He examined a number of studies, concluding that ‘psychiatric predictions of dangerousness were not at all accurate.... Those evaluated as

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154. *Robinson*, above n 46, [66]; *Yeo*, *ibid* [25]–[26]. Dr Kar’s reports were not prepared pursuant to the DPSOA but for sentence management purposes. Section 13(4)(b) provides that the court must have regard to psychiatric assessments even if not prepared specifically for DPSOA purposes.

155. *Francis*, above n 50.

156. *Ibid* [15].

157. Above n 46, [18] – [21], [26].

158. Above n 8, [78] – [87].

159. *Ibid* [78].

160. *Mangolamara*, above n 49, [91], [99], [131]; *Williams*, above n 33, [14], [24], [43].

161. Shea, above n 150, 155.

162. R Rogers & D Shuman, *Fundamentals of Forensic Practice: Mental Health and Criminal Law* (2005) 364; Shea, *ibid* 165; McSherry, above n 3, 106; Ruschena, above n 93, 126.

163. Rogers & Shuman, *ibid* 364, citing RL Jackson, R Rogers & DW Shuman, ‘The Adequacy and Accuracy of Sexually Violent Predator Evaluations: Contextualized Risk Assessment in Clinical Practice’ (2004) 3 *Int’l J Forensic Mental Health* 115.

164. Rogers & Shuman, *ibid*.

165. Shea, above n 150, 155.

dangerous were no more dangerous than those assessed as non-dangerous'.<sup>166</sup> The American Psychiatric Association and the Royal Australian and New Zealand College of Psychiatrists have also both concluded that predictions of dangerousness are too inaccurate for use in a forensic context.<sup>167</sup>

Rogers and Shuman note that most contemporary risk assessment tools were developed rapidly in the United States to meet forensic needs after the introduction of sexually violent predator statutes in the 1990s.<sup>168</sup> They claim that ambiguities in the standards have not yet been resolved and there is an appreciable absence of empirical data.<sup>169</sup> In their view, most of the techniques remain essentially experimental.<sup>170</sup>

Other related problems with psychiatric assessments of risk have also been noted. First, inaccuracies are not randomly distributed: there seems to be a tendency of psychiatrists to over-predict dangerousness.<sup>171</sup> That might be the result of general professional conservatism or, as studies examined by Shea have shown, it might flow from an unconscious skewing of results in the perceived interests of a 'client'.<sup>172</sup>

Secondly, studies show that the conclusions of different clinicians, even when relying on the same predictive instruments, vary widely.<sup>173</sup> Rogers and Shuman note that both science and sound clinical practice require that results be reproducible. An important measure of the reliability of a scientific method is *interrater reliability* – that is, that the results do not vary based on the individual assessor.<sup>174</sup>

Problems with interrater reliability have been revealed in cases under the DPSOA. In *Attorney-General v McLean*,<sup>175</sup> one psychiatrist used predictive instruments to identify the prisoner as a 'high risk' of committing another serious sexual offence; another psychiatrist used the same instruments to conclude that the prisoner was a

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166. Ibid 157.

167. Ruschena, above n 93, 126, citing APA, *Statement on Psychiatric Dangerousness* (1983); H Figgis & R Simpson, *Dangerous Offenders Legislation: An Overview*, Briefing Paper 14/97 (Sydney: NSW Parliament, 1997), citing Social Development Committee, *Inquiry into Mental Disturbance and Community Safety: Interim Report: Strategies to Deal with Persons with Severe Personality Disorder Who Pose a Threat to Public Safety* (Melbourne: Vic Parliament, 1990), citing RANZCAP's submission (1992).

168. Rogers & Shuman, above n 163, 364.

169. Ibid 335.

170. Ibid 341.

171. B McSherry, 'Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour' (2004) 281 *Trends & Issues in Crime and Criminal Justice* 2; Shea, above n 150, 157; *Attorney-General (Old) v Francis* [2005] QSC 381, [73] (Mackenzie J, citing Prof. Nurcombe).

172. Shea, *ibid* 92.

173. Ibid 157; Rogers & Shuman, above n 163, 361.

174. Rogers & Shuman, *ibid* 361.

175. Above n 46.

‘low risk’.<sup>176</sup> In *Attorney-General v Fardon*,<sup>177</sup> one psychiatrist assessed the prisoner as 25-50 per cent likely to re-offend; another assessed that risk as 70-75 per cent.<sup>178</sup> The use of different tools can also lead to opposing conclusions. In *Attorney-General v O'Rourke*,<sup>179</sup> the offender's risk of recidivism was assessed at 35 per cent with one predictive tool and at 58 per cent with another.<sup>180</sup>

In the United States, questions have been raised about the validity of SCJ tools developed in Canada. The concern is that, because SCJ tools rely on actuarial data, cultural and ethnic differences might render the results inapplicable outside the country where the tool was developed.<sup>181</sup> Similar questions have been asked in the Australian context. Indeed, in *Attorney-General v McLean*,<sup>182</sup> Professor Nurcombe accepted that the actuarial risk indices he used might have produced bias against the indigenous Australian who was the subject of his report.<sup>183</sup> McKechnie J responded to identical concerns in *DPP v Williams*,<sup>184</sup> where he rejected evidence based on the STATIC-99 recidivism assessment tool, as ‘less accurate with ethnic groups other than white Canadians’ and insufficiently reliable to meet the standard of proof required by the Act.<sup>185</sup>

The validity of predictive estimates might also be affected by the use of tools developed for one offender subgroup, on offenders of another subgroup. In *Attorney-General v Francis*,<sup>186</sup> an actuarial tool developed for Canadian child molesters was used on an indigenous offender whose adult victim was his de facto wife. In evidence, Professor Nurcombe agreed that the validity of that particular tool was, under the circumstances, untested.<sup>187</sup>

Many of the psychiatrists who have given evidence in these cases have candidly admitted that the reliability of risk assessment techniques has not yet been demonstrated.<sup>188</sup> Professor Nurcombe, a psychiatrist who has delivered a number of

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176. Ibid [35], [44]. Drs James and Lawrence both used PCL-R, VRAG & SORAG predictive instruments. The results achieved by Dr Lawrence were in the ‘high risk’ range. The results achieved by Dr James were in the ‘low risk’ range. Notwithstanding that result, Dr James concluded that the risk of McLean's recidivism was high.

177. Above n 33.

178. Ibid [64] (assessment by Dr Moyle), [58] (assessment by Dr James).

179. [2006] QSC 196.

180. Ibid [17].

181. Rogers & Shuman, above n 163, 357.

182. Above n 46.

183. Ibid [26] (Dutney J, citing Prof Nurcombe's report).

184. Above n 33.

185. Ibid [35], [36], [43].

186. Above n 171.

187. Ibid [67].

188. See eg *Fardon*, above n 8, [78], discussing the views of Dr Moyle and Prof. Ogloff; *Attorney-General (Old) v Fardon* [2005] QSC 137, [83], discussing the views of Dr Neilssen; *Attorney-General (Old) v Francis*, ibid [67], discussing the views of Prof. Nurcombe & [119], noting agreement by Drs Moyle & Hogan. See also *Williams*, above n 33, [20], [24]; *Mangolamara* above n 49, [99].

reports under the DPSOA, has apparently accepted that ‘it [is] doubtful that the accuracy of prediction of sexual violence will ever exceed 50 per cent notwithstanding improved research designs correcting flaws in earlier methodology’.<sup>189</sup> Dr Moyle and Professor Ogloff have also emphasised that ‘present scientific tools did not permit a determination, with a reasonable degree of accuracy, of an individual’s likelihood of being violent or re-offending sexually’.<sup>190</sup> Dr Nielszen opined that the risk assessment techniques currently available do not allow the likelihood of future offending to be predicted with a “‘high enough degree of probability to meet the standard of evidence required by the Act’”.<sup>191</sup>

In *Attorney-General v Sutherland*,<sup>192</sup> McMurdo J held that the applicant must prove more than a risk of re-offending; what must be proved is an *unacceptable* risk.<sup>193</sup> Both Acts stipulate that this finding must be based on acceptable cogent evidence.<sup>194</sup> The Macquarie Dictionary defines ‘cogent’ as ‘compelling’ or ‘convincing’.<sup>195</sup> It is argued that psychiatric and psychological risk assessment techniques are, as yet, unable to demonstrate a sufficiently high rate of predictive reliability to meet this description.

In most cases, the only other significant types of evidence will be drawn from the prisoner’s criminal history, his antecedents and prison records; in other words, from evidence which looks at the prisoner’s *past* conduct.<sup>196</sup> It is a well-known aphorism that nothing predicts behaviour like behaviour.<sup>197</sup> But in this context, heavy reliance on evidence of past conduct to predict future conduct effectively reverses the burden of proof. This is because the very same factor which operates as a criterion for an application for an order is again used as evidence to support the granting of it. It is worth observing that in no case brought under either Act have the courts refused to find that the prisoner was a serious danger. The only two cases under the DPSOA where applications were dismissed were decided on the grounds of procedural unfairness.<sup>198</sup>

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189. *Francis*, *ibid* [67] (Mackenzie J, citing Prof. Nurcombe); [119], noting that all reporting psychiatrists agreed that predictions were ‘imprecise’. See also *Fardon*, above n 8, [78] citing Dr Moyle & Prof. Ogloff.

190. *Fardon*, *ibid* [78].

191. *Fardon*, above n 8, [83] (Moynihan J, quoting Dr Nielszen’s evidence).

192. Above n 46.

193. *Ibid* [29].

194. DPSOA s 13(3); DSOA s 7(2).

195. *Macquarie Dictionary*, 4th edn (2005).

196. DPSOA s 13(4).

197. Shea, above n 150, 159.

198. *Watego*, above n 46, [43]; *Nash*, above n 46, [12]. In both cases the lack of procedural fairness stemmed from inadequate notice of the application given to the respondents. In *Watego*, the application was filed seven days before the expiry of his sentence: *Watego*, [1], [3]. By the time notice was served and a legal aid lawyer was able to take instructions, only about one day was left for the lawyer to prepare the case: *Watego*, [35], [36]. In *Nash*, the application was filed six days before the expiry of sentence: *Nash*, [1]. Presumably, the same problem cannot arise under the DSOA because s 10 provides that an application can

However, the problem seems to have been recognised by the Western Australian courts. In *Mangolamara*,<sup>199</sup> Hasluck J dismissed the DPP's application, holding that, although the DSOA mandates that the psychiatric reports be taken into account, the rules of evidence still apply, and facts and methodologies underlying the assessment process had not been proven in evidence.<sup>200</sup> Hasluck J pointed to features of the psychiatric assessment instruments which undermined their reliability as predictive tools. First, the evidence did not establish whether the instruments used to inform psychiatric reports were developed for purposes of forensic predictions or for contextually distinct treatment purposes.<sup>201</sup> Second, the evidence established that the instruments (indeed, the psychiatric evidence as a whole) purported to assess the risk of *any* type of sexual re-offending, rather than the type with which the DSOA was exclusively concerned, viz, *serious* sexual offending.<sup>202</sup> Third, the instruments used were developed for English and Canadian offenders and the validity of their use on the indigenous respondent was unknown.<sup>203</sup> Under those circumstances, Hasluck J formed the view that little weight should be given to those parts of the reports informed by the assessment tools.<sup>204</sup>

Moreover, other parts of the psychiatric reports, informed by unstructured clinical assessments, were based on a single interview with the respondent and only a brief consideration of the other materials.<sup>205</sup> Hasluck J held that the evidence as a whole failed to prove, to the requisite high degree of probability, that there was an unacceptable risk that the respondent would re-offend in the absence of a continuing detention order.<sup>206</sup> Like the *Williams* case,<sup>207</sup> no evidence was put before the court regarding the appropriateness of a supervision order to manage any risk of re-offending.<sup>208</sup>

Establishing a risk of re-offending in any particular case is arguably so speculative that it challenges the moral defensibility of preventative detention under these Acts. If decisions about an offender's dangerousness are not founded on sufficiently certain predictions of future conduct, the protective foundation of the DPSOA and the DSOA crumbles.

The next section of the paper considers whether preventative detention is sufficiently well-adapted to achieve its rehabilitative and treatment functions.

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proceed, even if the offender is discharged from sentence, provided the application is lodged before the offender's release.

199. Above n 49.

200. *Ibid* [165], [137].

201. *Ibid* [165], [171].

202. *Ibid* [165], [177].

203. *Ibid* [165]–[166].

204. *Ibid* [164]–[165].

205. *Ibid* [167], [97], [122].

206. *Ibid* [177].

207. *Williams*, above n 33, discussed above in Part 1.1.

208. *Mangolamara* above n 49, [180], [188], [193].



#### 4. THE REHABILITATION AND TREATMENT OBJECTS

An object of both Acts is to ‘provide continuing control, care or treatment’ of certain sex offenders.<sup>209</sup> The DPSOA adds that this is to ‘facilitate their rehabilitation’. Despite the references to treatment and rehabilitation within the objects, it seems that no special provisions were made when either Act was passed to ensure that adequate and appropriate rehabilitative services would be made available to affected offenders.<sup>210</sup>

Early treatment programs developed for sex offenders failed to demonstrate success convincingly; however, developments in recent years have shown significant improvements in treatment outcomes.<sup>211</sup> Lievore has surveyed the international literature evaluating sex offender treatment programs and has concluded, albeit cautiously, that best practice programs do indeed work.<sup>212</sup> The cost-effectiveness of programs is also demonstrable because even small reductions in recidivism save the community more than the programs cost to deliver.<sup>213</sup>

Courts have made it clear that the aim of providing effective rehabilitation or treatment under the Acts is of vital importance.<sup>214</sup> The Queensland Court of Appeal has indicated that a failure to provide institutionally-based rehabilitative facilities could, in a particular case, justify a court’s refusal to order continuing detention. The failure more generally to provide treatment programs might justify the court refusing to make any order at all under the DPSOA.<sup>215</sup> These are potentially important dicta because Queensland courts have already found that their attempts to fashion rehabilitative orders have been undermined by the failure of Corrective Services to provide the necessary resources and the inability under the DPSOA to make continuing detention orders subject to enforceable conditions.<sup>216</sup>

In *Attorney-General v Francis*,<sup>217</sup> a custodial rehabilitation plan was carefully developed by three psychiatrists who had seen the prisoner and reported comprehensively on his treatment needs. The plan was designed to be implemented over the period of a year while Francis was in continuing detention, to enable him to work towards readiness for possible release at the first annual review. The court

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209. DPSOA s 3(b); DSOA s 4(b).

210. Keyzer, Pereira & Southwood, above n 84, 249; *Mangolamara* above n 49, [158]; *Alvisse*, above n 66, [38], [47].

211. Lievore, above n 130, 89; R Parker, ‘The Effectiveness of Sexual Offender Treatment’ in D Biles, *Sentence and Release Options for High-Risk Sexual Offenders* (Canberra: Dept of Justice and Community Safety, 2005) 43.

212. Lievore, *ibid* 91, 102.

213. Parker, above n 211, 43; Lievore, *ibid* 89.

214. See eg *Fardon*, above n 8, [101] (White J); *Alvisse*, above n 66, [37] (Murray J). See also the dicta of Gummow J in *Fardon*, above n 1, [113].

215. *Francis*, above n 50, [24], [30] & [31] (Keane & Holmes JJA & Dutney J).

216. *Francis*, above n 171, [26], [133]; *McLean* above n 47, [32].

217. Above n 51.

noted that the success of the plan depended on both the prisoner and the government.<sup>218</sup> Byrne J stated that the agreement by all parties to this detailed plan for Francis' rehabilitation was fundamental to his decision to make the order for continuing detention.<sup>219</sup> Indeed, Byrne J made 'strenuous efforts to ensure that what was being proposed was feasible and that both the applicant and the respondent were committed to its implementation'.<sup>220</sup>

Sixteen months later at the first review, most elements of the plan remained unimplemented. No supervening events had occurred; Corrective Services had simply failed to put in place the necessary measures to ensure that the plan was implemented.<sup>221</sup>

On the review, Mackenzie J noted that there was a clear responsibility on the custodian to provide rehabilitative services:

Undue protraction of incarceration of the person because administrative procedures either do not exist to enable him to rehabilitate sufficiently to be released, or to prove that the actual risk in his case is not unacceptable, or because the administrative procedures unduly delay such rehabilitation or proof, is hard to convincingly justify. The Act is, after all, intended by its terms to allow continued detention only for as long as the unacceptable risk to the community clearly exists. It is not intended to lock up people and throw away the key if they may have prospects of rehabilitation.<sup>222</sup>

A valid question arises as to why targeted treatment programs are not made available to prisoners earlier, during their sentences. Somehow, it seems not entirely reasonable to deny a prisoner the rehabilitative services he or she needs and then demand his or her post-sentence detention on grounds that he or she remains unrehabilitated. However, there are cases that suggest this may be exactly what is happening.

In *Attorney-General v Twigge*,<sup>223</sup> Twigge's treatment needs were medically identified in a pre-sentence report. The sentencing judge directed that the prisoner receive appropriate treatment and counselling. Twigge was identified early as being suited for the Sexual Offenders Treatment Program ('SOTP') but the program was not made available for him until after he was eligible for post-prison community release (PPCR). His application for PPCR was then denied on grounds that he had not completed the SOTP.<sup>224</sup>

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218. *Ibid* [5]–[8].

219. *Ibid* [8].

220. *Francis*, above n 171 [13].

221. *Ibid* [10], [11], [27], [133], [134].

222. *Ibid* [33]; see also [31], [32].

223. Above n 47.

224. *Ibid* [14], [15].

In *Attorney-General v McLean*,<sup>225</sup> the SOTP was not offered at Lotus Glen where McLean was imprisoned. Later he was rejected for inclusion in an indigenous SOTP because his security classification was too high.<sup>226</sup>

In *Attorney-General v W*,<sup>227</sup> W was not referred to the SOTP until late in his sentence. He was then refused entry into the program because he had less than 15 months left to serve. Under the particular program's protocols, prisoners required a minimum of 15 months to undertake the program.<sup>228</sup>

The provision of post-release support services is also important to prevent rehabilitative lapses. In *State of Western Australia v Alvisse*,<sup>229</sup> a supervision order was carefully designed in accordance with expert advice to provide a community-based treatment plan which included anti-libidinal and psychotropic medication, attendance at a SOTP and counselling.<sup>230</sup> Two months after his release from prison, Alvisse called police asking for help because he felt tempted to 'do it again'.<sup>231</sup> He was taken into custody and an application was brought under section 22 of the DSOA for the supervision order to be replaced with a continuing detention order.<sup>232</sup> It seems that, because of under-resourcing or poor inter-agency cooperation, many aspects of his treatment plan had not been implemented.<sup>233</sup> Six weeks after his release into the community Alvisse had received no medication at all. An initial mental health assessment had only just been made and even after two months, he had received no counselling, nor had he been accepted into any SOTP.<sup>234</sup>

It seems to be well-understood that the risk of recidivism can be significantly reduced with appropriate support and supervision of releasees. And yet, three years after the DPSOA commenced, there was still no supervised housing where recent releasees could be reintegrated back into the community by staged release.<sup>235</sup> This led Mackenzie J on two occasions to take the unusual judicial step of drawing attention to the pressing need for funding of suitable accommodation.<sup>236</sup> Late in 2006, a Transitions Program was finally developed which, inter alia, identifies and funds suitable post-release accommodation in the community.<sup>237</sup> This program is currently

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225. Above n 46.

226. Ibid [13]–[15].

227. Above n 47.

228. Ibid [4].

229. Above n 66.

230. Ibid [13], [33], [32].

231. Ibid [14].

232. Ibid [19].

233. Ibid [33], [38], [47].

234. Ibid [33], [47].

235. See *Hansen*, above n 46, [28]–[29]; *Francis*, above n 171 [135]–[137].

236. *Hansen*, ibid [28]–[29]; *Francis*, ibid [135]–[137].

237. Queensland Corrective Services, *Assessment Management and Supervision of Sex Offenders in Queensland* (2006) 7, <[www.dcs.qld.gov.au/Publications/Corporate\\_Publications/Miscellaneous\\_Documents/index.shtml](http://www.dcs.qld.gov.au/Publications/Corporate_Publications/Miscellaneous_Documents/index.shtml)>.

being reviewed after recent community outrage following the discovery that a DPSOA releasee was being housed in a residential neighbourhood.<sup>238</sup> The government is now considering an alternative proposal to house future DPSOA releasees on prison grounds.<sup>239</sup>

The matter of supervisory services was probably brought into sharp focus by the Queensland Court of Appeal, with its decision in *Attorney-General v F*.<sup>240</sup> At the annual review of the order, Mackenzie J ordered that F's detention be continued because Corrective Services would not commit the resources necessary for the intensive supervision F would need if released.<sup>241</sup> The Court of Appeal held that the decision involved an error of law because the DPSOA implicitly imposed an obligation on the Department to make supervisory resources available.<sup>242</sup> The Court held that:

If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.<sup>243</sup>

The planned movement of offenders into staged release programs is to be encouraged as an important step in rehabilitation. Where necessary, treatment can and should be ongoing; indeed, community-based sex offender treatment programs generally demonstrate greater rehabilitative successes than institutional programs. They also cost less to deliver.<sup>244</sup>

Courts in both Queensland and Western Australia have placed considerable emphasis on the rehabilitative and treatment functions of the Acts.<sup>245</sup> Despite the judicial emphasis, it is argued that post hoc efforts at rehabilitation are insufficient to purposively support these schemes. Arguably, a much greater commitment would need to be made by governments in terms of funding and expertise before these Acts could be considered sufficiently well-adapted to achieve their rehabilitative and treatment objects.

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238. T Chilcott, 'Where to From Here?', *The Courier Mail*, 3 Nov 2007, 53.

239. J Spence, Minister for Police & Corrective Services, *Cabinet to Consider Changes to Sex Offender Management*, Ministerial Statement, 1 Nov 2007, <[www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=54866](http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=54866)>.

240. *Francis*, above n 49.

241. *Ibid* [36].

242. *Ibid* [37].

243. *Ibid* [39].

244. Lievore, above n 130, 89; Parker, above n 212.

245. *Francis*, above n 49; *WA v Alvisse*, above n 66.

## 5. NON-PURPOSIVE CONSEQUENCES OF PREVENTATIVE DETENTION

This paper has argued that the DPSOA and the DSOA are not well-adapted to achieving their legislative objects, and hence cannot be adequately justified by reference to those objects. Part 5 considers whether the schemes under the DPSOA and the DSOA involve other, non-purposive consequences which should be taken into consideration in any assessment of the schemes.

### 5.1 Is preventative detention punitive?

This section considers whether preventative detention under the Acts might, in effect, impose additional punishment for what are societally considered to be particularly repellent crimes. If so, two important and related questions arise. The first is whether the provision of additional punishment is inconsistent with well-established sentencing principles, and if so, whether those principles are thereby undermined. The second question is whether the principle of double jeopardy is breached.

To consider the first question, a brief consideration of sentencing theory is necessary. The dominant theory underpinning sentencing practices in western democracies is retributivism and in particular, the ‘just deserts’ version of retributivism.<sup>246</sup> That theory provides that criminals deserve punishment, and punishment is thereby justified by the moral wrongness of the criminal’s act. The severity of the punishment is limited by the just deserts principle which provides that punishment must be proportionate to the crime and to the criminal’s culpability.<sup>247</sup> The theory supports notions of individual moral responsibility and autonomy because punishment is directly related to choices made by the criminal.<sup>248</sup>

Other important sentencing principles are deterrence and rehabilitation.<sup>249</sup> These are consequentialist principles; their normative claim is that punishment is justified because of desirable social impacts. Retribution on the other hand is a non-consequentialist principle; it claims that punishment is justified – indeed has been earned by the criminal – regardless of societal benefits.<sup>250</sup>

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246. D Dolinko, ‘Three Mistakes of Retributivism’ (1992) 39 UCLA L Rev 1623; M Bagaric, ‘Sentencing: The Road to Nowhere’ (1999) 21 Syd L Rev 597, 599; I Potas, *Sentencing Manual: Law Principles and Practice in New South Wales* (Sydney: Law Book Co, 2001) 18.

247. Bagaric, *ibid* 601; Dolinko, *ibid* 1626.

248. Williams, *above n* 120, 13.

249. Queensland, *Parliamentary Debates*, Legislative Assembly, 4 Jun 2003, 2579 (R Welford, Attorney-General).

250. Dolinko, *above n* 244, 1626–7.

The sentencing guidelines in section 9(1) of the Penalties and Sentences Act 1992 (Qld) (PSA) embrace these three principles and also refer to denunciation and community protection as valid sentencing purposes. However, no legislative guidance is given on how these principles are to interact in application, despite the inevitable tension between them.<sup>251</sup> In Western Australia, sentencing purposes have not been legislatively prescribed.<sup>252</sup> Thus, in both states, it falls to the common law to resolve the tension between conflicting sentencing principles.

In *Veen (No 2)*, the High Court held that conflict between the principles of community protection and proportionality should be resolved in favour of proportionality.<sup>253</sup> Subsequently, in *Chester*,<sup>254</sup> the court unanimously held that proportionality was 'settled fundamental principle' which took precedence over community protection in all but 'very exceptional cases'.<sup>255</sup> In both cases the court noted that it was appropriate in exercising sentencing discretion to have regard to community protection as one factor.<sup>256</sup>

The relationship between proportionality and community protection in sentencing is further complicated because it remains unsettled as to how these schemes of preventative detention will interact with sentencing principles. Two conflicting Queensland Court of Appeal decisions remain unresolved. The first was *R v Farrenkothen; ex parte Attorney-General*,<sup>257</sup> where it was noted that a sentencing judge should not approach the criterion of community protection under the PSA differently by virtue of the possibility of an application being brought in the future under the DPSOA.<sup>258</sup> The opposite is indicated in *R v Robinson*,<sup>259</sup> where the Court of Appeal considered that account should be taken of the DPSOA; sentencing judges no longer need to 'speculate' about an offender's future likelihood to offend because, during the course of a lengthy prison sentence, the extent of the need for community protection will become clearer.<sup>260</sup> If Gleeson CJ's justification for the DPSOA<sup>261</sup> is accepted, then it is suggested that the latter approach must be correct.

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251. Bagaric, above n 244, 605.

252. E Colvin, S Linden & J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Materials*, 4th edn (Sydney: LexisNexis Butterworths, 2005) 774. See Sentencing Act 1995 (WA) s 6.

253. *Veen v The Queen (No 2)*, above n 98, [8]–[12] (Mason CJ, Brennan, Dawson & Toohey JJ).

254. Above n 94.

255. *Ibid* 618.

256. *Ibid* 619; *Veen v The Queen (No 2)*, above n 98, [9] (Mason CJ, Brennan, Dawson & Toohey JJ).

257. [2003] QCA 313.

258. *Ibid* (de Jersey CJ, with whom Mackenzie J agreed).

259. *R v Robinson* [2007] QCA 99.

260. *Ibid* [37]. See obiter to same effect in *R v Neumann; ex parte Attorney-General (Qld)* [2005] QCA 362, [30] (Fryberg J).

261. *Fardon*, above n 1, [2]. Gleeson CJ noted that: 'If it is lawful and appropriate for a judge to make an assessment of danger to the community at the time of sentencing, perhaps many years before an offender is due to be released into the community, it may be thought curious

If, on the other hand, community protection under the DPSOA merely rationalises a policy of haphazard punitivity, then it is suggested that, logically, the former approach must apply. In either case, the regimes of preventative detention under the DPSOA and the DSOA completely destroy the principle of proportionality because prisoners who have borne their proportionate punishment are subjected to additional punishment without having committed an additional offence.

In *Fardon's* case, Callinan and Heydon JJ denied that the DPSOA imposes 'punishment'. In their view, the quality of detention, as either protective or punitive, is determined by its purpose. Provided the DPSOA has a legitimate non-punitive purpose, the scheme, and detention imposed under it, could be characterised according to that purpose.<sup>262</sup> However, as Kirby J noted, deprivation of liberty is the worst punishment that can be inflicted under our criminal justice system.<sup>263</sup> Indeed, the punitivity of incarceration and social isolation is central to the modern philosophy of criminal justice; even the ways prisons are designed, physically and organisationally, reflect the psychology of criminal punishment.<sup>264</sup>

The regime of punishment imposed under the original sentence continues under the DPSOA and the DSOA just as it did before, without the prisoner even having to change cells.<sup>265</sup> In fact, detention under the DPSOA or the DSOA might be even more severe. Queensland Corrective Services automatically changes the security classification of DPSOA prisoners to high, even if they had previously earned a low classification.<sup>266</sup> Naturally, this results in a loss of privileges.<sup>267</sup>

It is a fundamental maxim of our law that a person cannot be convicted or punished twice for the same offence.<sup>268</sup> This is known as the rule against double jeopardy or more particularly in this context, *nemo debet bis puniri pro uno delicto* ('a man shall not be twice punished for the one crime').<sup>269</sup> The rule reflects the public interest in judicial determinations being considered final as well as protecting the interests of individuals.<sup>270</sup> Finality is considered to be a value rooted in notions of personal

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that it is inappropriate for a judge to make such an assessment at or near the time of imminent release, when the danger might be assessed more accurately.'

262. *Fardon*, above n 1, [215], [216], [217], [219] (Callinan & Heydon JJ).

263. *Ibid* [155] (Kirby J).

264. S Sowle, 'A Regime of Social Death: Criminal Punishment in the Age of Prisons' (1994) 21 *Rev Law & Social Change* 497, 539.

265. *Fardon*, above n 1, [161], [165] (Kirby J); Keyzer, Pereira & Southwood, above n 84, 250.

266. The Western Australian Attorney-General expressed the view that maximum security was the only appropriate rating for prisoners subject to the DSOA: Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 Nov 2005, 7305 (J McGinty, Attorney-General).

267. *Fardon*, above n 51, [74], [75].

268. Keyzer, Pereira & Southwood, above n 84, 250; McSherry, above n 3, 108.

269. *Pearce v The Queen* [1998] HCA 57, [89] (Kirby J).

270. *R v Carroll* [2002] HCA 55, [86] (Gaudron & Gummow JJ), [49] (Gleeson CJ & Hayne J), [128] (McHugh J); *Pearce v R* [1998] HCA 57, [73] (Kirby J); M Edgely, 'Truth of Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy' (2007) 7 *QUTLJ* 108, 110.

autonomy because it serves to delineate the ambit of State power by reflecting ideas of limited government and the liberty of the subject.<sup>271</sup> The rule is reflected in section 16 of the Criminal Code (Qld), which prevents double punishment of the same act or omission and section 11 of the Sentencing Act 1995 (WA) which prevents double sentencing on the same evidence.<sup>272</sup>

In *Fardon's* case, Gummow J was the only majority judge to consider whether the DPSOA breached the principle of double jeopardy.<sup>273</sup> He considered the matter within a single paragraph and concluded that preventative detention was not imposed for the same past offence. He argued that the DPSOA 'operated by reference to the [prisoner's] status deriving from that [previous] conviction', but did not increase his punishment or punish him twice for that offence.<sup>274</sup>

From the prisoner's point of view the distinction is exceedingly fine.<sup>275</sup> The prisoner no doubt understands that he is in prison as punishment for committing a particular offence (the index offence). There are no new offences on the table. Arguably, the index offence is much more than a mere condition precedent to a continuing detention order. In any application under the DPSOA or the DSOA, the index offence will be examined in minute detail by the psychiatrists and the judge. It will be the focus of attention in relation to most of the factors which must be considered in order for the court to determine that a prisoner is a 'serious danger'.<sup>276</sup> It is argued that Kirby J's analysis is highly persuasive: effectively what is occurring is that the prisoner is punished further for precisely the same past conduct.<sup>277</sup>

## 5.2 Does preventative detention punish propensity?

Finally, there is another possible consequence of preventative detention under the DPSOA and the DSOA. This section considers whether the Acts, in effect, punish criminals for their propensity to commit crimes of a certain type.<sup>278</sup>

It is a well-recognised principle of law that propensity evidence is so much more prejudicial than it is probative that the general rule is that it is inadmissible in criminal cases.<sup>279</sup> As evidence, propensity is prejudicial because it 'creates undue suspicion', 'causes bias against the accused', and 'tribunals of fact, particularly

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271. *Carroll*, *ibid* [49] (Gleeson CJ & Hayne J).

272. *Western Australia v Bruce* [2004] WASCA 226, 6 (Murray J); *McColgan v Scanlan* (1997) 26 MVR 223.

273. The question of double punishment was argued by counsel: *Fardon v Attorney-General (Qld)* [2004] HCA Trans 39, 2 Mar 2004.

274. *Fardon*, above n 1, [74] (Gummow J).

275. Keyzer, Pereira & Southwood, above n 84, 250.

276. DSOA s 7(3); DPSOA s 13(4).

277. *Fardon*, above n 1, [182], [185] (Kirby J); McSherry, above n 3, 108–09.

278. McSherry, *ibid* 107.

279. Eg *Pfennig v The Queen* (1995) 182 CLR 461.



juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct'.<sup>280</sup>

The Acts provide that evidence of future propensity is not only admissible, but where information on the subject is available, it is a factor that must be considered.<sup>281</sup> An illustration of its use occurred at a Fardon review hearing, where one psychiatrist opposed Fardon's release because his "crime prone" personality [put] him into a "higher risk group".<sup>282</sup>

Propensity has the capacity to be seductively prejudicial because it forms a connective link between known past behaviour and projected future behaviour. It justifies that link with deterministic assumptions which challenge fundamental notions of autonomy.

Judges may not necessarily be immune from making those types of deterministic assumptions. If propensity is prejudicial in relation to judging past behaviour, then, arguably, it is even more so in relation to assessing future behaviour. This is because propensity seems to be arrived at simply by examining the prisoner's past conduct and using that conduct to stereotypically label the offender. If, as the writer has argued, psychiatric predictions of future dangerousness are unreliable, and the judiciary is on notice that the predictions are unreliable,<sup>283</sup> then by what other means can courts determine whether there is an unacceptable risk that the prisoner will commit offences in the future? It is suggested that propensity may be the unacknowledged intuitive means by which these decisions are reached. As noted above, the author has been unable to identify any case where the court has refused to find that the prisoner was an unacceptable risk of future re-offending.<sup>284</sup>

The question of propensity has not yet received detailed judicial consideration. However, in a number of cases the courts have been able to identify a propensity to commit future offences from the prisoners' past criminal conduct and the psychiatric reports.<sup>285</sup>

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280. Ibid 512 (McHugh J).

281. DSOA s 7(3)(c); DPSOA s 13(4)(c).

282. *Fardon*, above n 51, [44] (Lyons J, quoting Dr Moyle), [52].

283. See Part 3.1.

284. In Queensland, the only two cases where applications were dismissed were decided on grounds of procedural unfairness: *Watego*, above n 46; *Nash*, above n 46, discussed above in n 198. In Western Australia two cases were dismissed on grounds that the DPP had failed to present evidence to exclude the possibility of a risk being managed with a supervision order: *Williams*, above n 33, [43]; *Mangolamara*, above n 49, [180]. In the latter case, Hasluck J refused to find that the respondent was an unacceptable risk for the purposes of the continuing detention order, but it is clear from his reasoning that he might have made such a finding if a supervision order had been under consideration: [177], [180], [187].

285. *Attorney-General (Qld) v Beattie* [2006] QSC 322, [36] (Helman J); *Attorney-General (Qld) v Downs* [2005] QSC 016 (Byrne J); *Attorney-General (Qld) v Yeo* [2006] QSC 063, [29] (Philippides J); *Attorney-General (Qld) v Wright* [2006] QSC 389, [25] (Skoien AJ).

An important tenet of the rule of law is the principle of legality: *nulla poena sine lege* (there should be no punishment without law). A vital premise underpinning that principle is that the law punishes criminal acts, not criminal types.<sup>286</sup>

Professor McSherry argues that sex offenders will be detained under these Acts for who they are rather than what they have done. She quotes Foucault who believes that the focus in recent times has shifted from punishing conduct to regulating dangerousness. The problem with classifying individuals as dangerous is that the approach relies on and simultaneously promotes stereotypes, and directs the focus of the inquiry onto the character of the offender rather than the offence.<sup>287</sup> The approach also devalues notions of autonomy by implicitly suggesting that crimes result from qualities inherent in the criminal rather than from choices made by an autonomous actor.

If what is occurring under the DPSOA and the DSOA is detention on the basis of propensity, this would be a disturbing development. In *Fardon*, Kirby J warned of the dangers of punishing ‘criminal archetypes’ by recalling the use of similar laws in Nazi Germany.<sup>288</sup> Arguably, if propensity is a significant determinant, it would be no great leap to preventatively detain on the basis of genetic predisposition. Research is already well-advanced into identifying, for diagnostic purposes, those genes related to anti-social and criminal behaviour.<sup>289</sup> It is possible that such studies have already informed psychiatric conclusions which have been placed before the courts. In *Attorney-General v Robinson*,<sup>290</sup> Dr Kar’s report referred to the prisoner’s ‘genetic basis for a predisposition to serious sexual offending’, a consideration which Lyons J wisely chose to disregard.<sup>291</sup>

## 6. CONCLUSION

This paper has considered the operation of preventative detention under the DPSOA and the DSOA. The DPSOA was introduced in Queensland in 2003 as a novel scheme to detain sex offenders after the expiry of their prison sentences in cases where a court has determined that there is an unacceptable risk of the offender’s committing further serious sexual offences. In 2006, Western Australia passed the DSOA which essentially replicates that scheme.

It has been observed that liberty is a fundamental value in our Australian liberal-democratic system.<sup>292</sup> Accordingly, the general rule is that detention is ordered as

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286. McSherry, above n 3, 107.

287. *Ibid* 107–08.

288. *Fardon*, above n 1, [188]–[189] (Kirby J).

289. K Morley & W Hall, ‘Is there a Genetic Susceptibility to Engage in Criminal Acts?’ (2003) 263 *Trends & Issues in Crime & Criminal Justice* 5.

290. Above n 47.

291. *Ibid* [66].

292. *Fardon*, above n 33, [24] (Atkinson J).

punishment but only for having previously committed a specified criminal offence and only following a fair trial where the offence has been proved beyond reasonable doubt.<sup>293</sup> However, there are well-accepted and legitimate exceptions to that general rule and some unorthodox exceptions.<sup>294</sup> This paper has argued that the DPSOA and the DSOA were most aptly analogous to the schemes imposed under the Victorian CPA and the NSW CPA. Detention under the DPSOA and the DSOA is analogous with these ad hominem schemes because the detention authorised under the latter Acts was similarly conditioned on the supposed dangerousness of the individuals concerned. As noted above, the NSW CPA was found to be constitutionally invalid.<sup>295</sup>

The schemes under the DPSOA and the DSOA were then considered by reference to their legislative objects. The main purpose of both Acts is to ensure community protection by preventing sex offenders from re-offending.<sup>296</sup> Recidivism of sex offenders is an important and vexing issue. According to various studies, rates of provable recidivism vary from 10 per cent to less than 40 per cent, depending (inter alia) on the follow up period.<sup>297</sup> Recidivism is therefore a matter of great concern, but, in any particular case, it is not a statistical probability.

Under those circumstances, it was concluded that preventative detention would be justifiable for the purposes of community protection only if there were reliable methods of identifying those who were likely to re-offend. Indeed, both Acts specify that determinations must be based on satisfaction to a high degree of probability arrived at through acceptable and cogent evidence.<sup>298</sup> The paper then examined the types of evidence available to courts to demonstrate likely future recidivism. The predominant type of evidence, production and consideration of which is mandated under the Acts, are psychiatric assessments.<sup>299</sup> The various methodologies were examined by which psychiatric assessments are made. It was revealed that serious criticisms have been made about the validity and predictive accuracy of these assessments by members of the legal and scientific communities, including by eminent psychiatrists who have delivered reports under the Acts.<sup>300</sup>

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293. *Lim v Minister for Immigration* [1992] HCA 64, [23] (Brennan, Deane & Dawson JJ).

294. *Ibid* [24], [29] (Brennan, Deane & Dawson JJ); McSherry, above n 3, 109; Keyzer, Pereira & Southwood, above n 84, 247.

295. *Kable v DPP (NSW)* [1996] HCA 24.

296. DPSOA ss 3(a), 13(6); DSOA ss 4(a), 17(2).

297. K Hanson & M Bussiere, above n 131, 351, 357; Thornton et al, above n 134, 225; Lievore, above n 130, 29.

298. DPSOA s 13(3); DSOA s 7(2).

299. DPSOA ss 8(2), 11, 13(4)(a); DSOA ss 7(3)(a), 37.

300. Lievore, above n 130, 39; Douglas, Yeomans & Boer, above n 145, 480; Rogers & Shuman, above n 163, 364; Shea, above n 150, 155. In the courts, see *Fardon*, above n 8, [78], discussing the views of Dr Moyle & Prof. Ogloff; *Fardon*, above n 8, [83], discussing the views of Dr Neilssen; *Francis*, above n 171 [67], discussing the views of Prof. Nurcombe, and [119] noting agreement by Drs Moyle & Hogan. See also *Williams*, above n 33, [20], [24] discussing the views of Drs Tanney & Hall.

The conclusion was reached that psychiatric assessments are simply too speculative and lacking in the necessary scientific validity to form the evidentiary foundation for a determination of dangerousness. The other types of evidence available to the courts focus on the prisoner's past circumstances and conduct.<sup>301</sup> It was concluded that past behaviour has the capacity to be highly prejudicial and is not logically probative of future conduct. The conclusion was therefore drawn that none of the available forms of evidence are particularly well-suited to shedding light on the likelihood of recidivism in the circumstances of a particular case.

Another legislative purpose of the DPSOA and the DSOA is concerned with the rehabilitation and treatment of sex offenders.<sup>302</sup> Studies have shown that best-practice rehabilitation programs can deliver positive outcomes.<sup>303</sup> However, when the Acts were passed, no additional resources were made available to implement the rehabilitative purpose.<sup>304</sup> This paper has concluded that, although the courts have emphasised the importance of this object, governments have failed to give treatment the priority that would seem to be necessary to generate positive rehabilitative outcomes.

The author has concluded that the DPSOA and the DSOA are not well-adapted schemes for the achievement of their stated objects. However, these Acts may have other non-purposive consequences. This paper considered whether preventative detention under the DPSOA and the DSOA is, in effect, punitive. If so, sentencing norms and in particular the principle of proportionality are undermined. Furthermore, the principle of double jeopardy is breached.

Another possible consequence of the schemes under the Acts, in effect, is that they punish sex offenders for their propensities. If so, the law is punishing criminal types, not criminal acts, thereby breaching the principle of legality. On the basis of the foregoing, the author considers that the moral defensibility of preventative detention under the Acts is a live issue. That issue, important as it is, will have to be resolved elsewhere.

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301. DPSOA s 13(4); DSOA s 7(3).

303. DPSOA s 3(b); DSOA s 4(b).

303. Lievore, above n 130, 91, 102.

304. Keyzer, Pereira & Southwood, above n 84, 249; *DPP Mangolamara*, above n 49, [158]; *Alvisse*, above n 66, [38], [47].