

## Between Scylla And Charybdis<sup>1</sup> And Slippery Slopes

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### AUSTRALIA'S APPROACH TO DANGEROUS INDIVIDUALS

Unfortunately there are a small number of individuals in this world who are severely anti-social.<sup>2</sup> They are not amenable to treatment by medication or other psychiatric intervention. Yet their antecedent criminality demonstrates a propensity for dangerousness that warrants their permanent incapacitation or at least their exclusion from civil society until they no longer pose a threat to the community. In many respects, society's fear of these anti-social individuals and its disillusionment with the capacity of the corrections system to rehabilitate them is reflected in increasingly punitive sentencing.<sup>3</sup> Provision for indefinite sentencing or extremely long sentences which make it unlikely that dangerous offenders will ever be released is now common.<sup>4</sup> Some jurisdictions have gone one step further and adopted preventative detention premised upon an offender's potential to commit future harm.

Preventative detention of individuals who have already completed sentences proportional to the harm their crimes inflicted is, however, antithetical to many precepts of liberal democracy,<sup>5</sup> contrary to

<sup>1</sup> Homer's *Odyssey* refers to Odysseus being caught between Scylla (a six-headed monster) and Charybdis (a whirlpool).

<sup>2</sup> For example, Charles Sobhraj, Ted Bundy, John Gacy, Jeffery Dahmer, Raman Raghav, Harold Shipman

<sup>3</sup> Paul H Robinson 'Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice' (2001) 114 *Harvard Law Review* 1429.

<sup>4</sup> Eg s 65 *Sentencing Act* (NT); Part 10 *Penalties and Sentences Act 1992* (Qld); ss 18A – C *Sentencing Act 1991* (Vic); Part 14 *Sentencing Act 1995* (WA); Part 2 Div 3 *Criminal Law (Sentencing) Act 1988* (SA); s 19 *Sentencing Act 1997* (Tas); s 61 *Crimes (Sentencing Procedure) Act 1999* (NSW). Note however that the application of these provisions is reserved for exceptional cases where it is demonstrably necessary to protect society from physical danger. Otherwise the principle of proportionality in sentencing should prevail: *McGarry v The Queen* (2001) 207 CLR 121; *Thompson v The Queen* (1999) 165 ALR 219; *Veen v R (No. 2)* (1988) 164 CLR 465 at 472.

<sup>5</sup> Richard L Lippke 'No Easy Way Out: Dangerous Offenders and Preventative Detention' (2008) 27 *Law and Philosophy* 383 at 397.

fundamental tenants of criminal justice,<sup>6</sup> and potentially in breach of international human rights obligations.<sup>7</sup> There are other more pressing pragmatic problems, not least of which is the difficulty of accurately predicting future human behaviour and, in particular, dangerousness.<sup>8</sup> Designing a process which fairly and accurately investigates the question of dangerousness, and militates against the natural tendency to engage in the over inclusiveness that the fear of dangerousness generates has also proven to be problematic.<sup>9</sup> Moreover, the efficacy of preventative detention as a means of reducing heinous forms of offending has yet to be proven.<sup>10</sup>

Consequently, navigating between the utilitarian goal of preventing probable serious and irreparable harm, and the principle of protecting individual liberty from undue encroachment is fraught, and as the title to this paper suggests much like navigating between Scylla and Charybdis. Nonetheless, a number of state Australian parliaments have forged ahead, and like Odysseus who chose to pass by Scylla and sacrifice a few sailors rather than the whole crew, enacted legislation, which allows the courts to make continuing detention orders where there is a serious risk of re-offending for particular classes of offences.<sup>11</sup> Two Australian High Court decisions, *Kable v Director of Public Prosecutions*<sup>12</sup> and *Fardon v Attorney-General*<sup>13</sup> have examined the constitutional validity of these enactments.

The argument that preventative detention is per se unconstitutional was rejected by the High Court in *Fardon v Attorney-General*. Earlier *Kable v Director of Public Prosecutions* had invalidated the *Community Protection Act 1994* (NSW), an Act which applied solely to Gregory Kable and empowered the Supreme Court of New South Wales to make an order for detention if satisfied on reasonable grounds that it was probable that he would commit a serious act of violence. A majority of the High Court found that the Act invested the State Supreme Court with powers which were incompatible with

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<sup>6</sup> Bernadette McSherry 'Sex, Drugs and "Evil" Souls: The Growing Reliance on Preventative Detention Regimes' (2006) 32 *Monash University Law Review* 237 at 269 - 272; Malcolm M Feeley 'Actuarial Justice and the Modern State' in Gerben Bruinsma, Henk Elffers & Jan de Keijser (eds) *Punishment, Places and Perpetrators* (2004) at 62.

<sup>7</sup> Patrick Keyzer 'The "Preventative Detention" of Serious Sex Offenders: Further Considerations of the International Human Rights Dimensions' (2009) 16 *Psychiatry, Psychology and Law* 262; Patrick Keyzer & Sam Blay 'Double Punishment? Preventative Detention Schemes Under Australia Legislation and their Consistency with International Law: The Fardon Communication' (2006) 7 (2) *Melbourne Journal of International Law* 407.

<sup>8</sup> Victoria Sentencing Advisory Council *High Risk Offenders: Post-Sentence Supervision Orders and Detention* (2007) at 2.2; Cynthia Calkins Mercado & James RP Ogloff 'Risk and the Preventative Detention of Sex Offenders in Australia and the United States' (2007) 30 *International Journal of Law and Psychiatry* 49; Bernadette McSherry above n 6 at 266 - 268; Norbert Nedopil 'The Boundaries of Courtroom Expertise' (2002) 13 (3) *Journal of Forensic Psychiatry* 494

<sup>9</sup> Eric S Janus 'Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences' (2000) 18 *Behavioral Sciences and the Law* 5 at 17.

<sup>10</sup> The majority of violent and sexual offences are committed by family members and often go unreported: Victoria Sentencing Advisory Council *High Risk Offenders: Post-Sentence Supervision Orders and Detention* (2007) at 2.2.6. See further James Vess 'Preventative Detention Versus Civil Commitment: Alternative Policies for Public Protection in New Zealand and California' (2005) 12 *Psychiatry, Psychology and Law* 357 at 364.

<sup>11</sup> *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Dangerous Persons (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA);

<sup>12</sup> (1996) 189 CLR 51

<sup>13</sup> (2004) 223 CLR 575

its dual role as a repository of state and federal jurisdiction. According to the majority, the law impaired the institutional integrity of the State Supreme Court by granting it powers that resulted in the court having the appearance of ‘rubber stamping’ an executive detention order.<sup>14</sup>

The legislation examined in *Kable* was distinguished by the High Court in *Fardon*. The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) considered in *Fardon* was an Act of general application that reposed a substantial degree of discretion upon the court as to whether an order should be made, and if so the type of order that should be made (including release under supervision). The court’s discretion was to be exercised according to a justiciable standard, namely whether the defendant posed a serious danger to the community, which was informed by specified (that is clear and known rather than arbitrary) factors. The rules of evidence applied to applications for an order, and hearings were open to the public and run in accordance with ordinary judicial processes. There was also an inbuilt right of appeal. As a result, the High Court upheld the preventative detention of dangerous sexual offenders facilitated by the Queensland legislation.

*Fardon v Attorney- General* constitutes a qualification of former statements from the High Court that detention ‘exists only as an incident of the exclusively judicial function of adjudging and punishing guilt’.

<sup>15</sup> However, arguably condoning preventative detention and other preventative measures restricting movement and association has created a ‘slippery slope’ which threatens to blur the distinction between punishment and protection, and makes it easier to extend preventative measures to persons not proven to have committed any crime. *Fardon* certainly appeared to provide a stronger than otherwise imprimatur for Australian legislatures to apply preventative detention to persons suspected of engaging in terrorism.<sup>16</sup> Although these have yet to be fully tested, the High Court decision of *Thomas v Mowbray*,<sup>17</sup> which upheld the constitutional validity of another preventative measure, the control order (limiting movement, communication and association), indicates that: (a) provided a reasonable and necessary link can be drawn between preventative detention and a relevant legislative power; and (b) that the legislation empowering the court to make the detention order does not dictate the outcome of proceedings but leaves the matter to be determined by a court based on legally enforceable standards, that preventative detention orders for suspected terrorists who have yet to commit any crime will also be valid.<sup>18</sup> For the High Court the creation of preventative measures even

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<sup>14</sup> (1996) 189 CLR 51 at 106 per Gaudron J; at 121 per McHugh J & at 134 per Gummow J. See further *Forge v ASIC* (2006) 228 CLR 45 at [63 – 64] and *Director of Public Prosecutions v George* (2008) 102 SASR 246 at [104].

<sup>15</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27. See further comments of Gleeson CJ in *Thomas v Mowbray* (2007) 233 CLR 307 at [18].

<sup>16</sup> Part 2A *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Emergency Powers) Act* (NT); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Police Powers) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2006* (WA); Div 105 *Criminal Code* (Cth).

<sup>17</sup> (2007) 233 CLR 307.

<sup>18</sup> In *Thomas v Mowbray* no evidence was led to show that Thomas had engaged in any terrorist linked activities since his return from Afghanistan 18 months earlier: Andrew Lynch ‘Thomas v Mowbray: Australia’s ‘War on Terror’ Reaches the High Court’ (2008) 32 *Melbourne University Law Review* 1182 at 1187.

when applied to the innocent was largely a political matter provided the application of such measures was left to an independent and impartial judiciary.<sup>19</sup> However, given that the evidence relied upon by the Australian Federal Police to support the control order in this instance, an interview tainted by involuntariness, had earlier been excluded in criminal proceedings against Thomas by the Victorian Court of Appeal, and that a jury had acquitted him of the charges which constituted the very allegations proffered to demonstrate his dangerous terrorist tendencies, manipulation of the court hearing the application for the control order is debatably still open for conjecture.<sup>20</sup> Further, that blurring of punishment and protection referred to earlier is underscored by the lack of any evidence supporting the efficacy of preventative detention or control orders. There is nothing to suggest that control orders over neophytes like Thomas have made an impact on Australia's national security or that the encroachment upon civil liberties that they impose has led to higher levels of public safety elsewhere.<sup>21</sup> Consequently, one wonders what evidence was led to demonstrate that the making of the order in *Thomas v Mowbray* would substantially assist in preventing a terrorist act.<sup>22</sup>

#### OUTLAWING CRIMINAL ORGANISATIONS

The new battleground over risk based approaches to public safety has now shifted to organised crime legislation.<sup>23</sup> Politically, this legislation was precipitated by an increase in violence among outlaw motorcycle gangs, including a very shocking incident at an Australian airport where one bike gang member was beaten to death in front of horrified onlookers.<sup>24</sup> However, the legislation, in fact, applies to any organisation involved in serious crime,<sup>25</sup> and as one commentator has remarked has the potential to ban any organisation that, 'in the eyes of the Attorney-General (commenting on the SA legislation), is seen as a 'risk to public safety and order.'<sup>26</sup>

The legislation introduces a series of control orders whereby members of outlawed organisations can be prohibited from associating or communicating with each other; can be prohibited from entering certain

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<sup>19</sup> (2007) 233 CLR 307 at [108] per Gummow & Crennan JJ.

<sup>20</sup> Lynch (2008) above n 18.

<sup>21</sup> Ibid at 1194.

<sup>22</sup> This is a pre-condition for the making of a control or preventative order in all Australian legislation.

<sup>23</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Serious and Organised Crime (Control) Act 2008* (SA). The South Australian legislation is currently under challenge in the SA Supreme Court. On 11 June 2009 the Northern Territory government introduced the *Serious Crime Control Bill 2009* into Parliament. Queensland is planning similar legislation: Jeremy Pierce 'Motorcycle gang laws will be watertight, says Anna Bligh' *Courier Mail* August 24, 2009 available at <http://www.news.com.au/couriermail/story/0,23739,25970082-3102,00.html> [accessed 3<sup>rd</sup> September 2009].

<sup>24</sup> Karlis Salna 'Anti-Bikie Laws 'Will Spark Violence' *Sydney Morning Herald* August 5, 2009 available at <http://news.smh.com.au/breaking-news-national/antibikie-laws-will-spark-violence-20090805-e9zk.html> [accessed 3<sup>rd</sup> September 2009].

<sup>25</sup> Hence the legislation could apply to small, informally organised groups such as gangs of alleged organised shoplifters and indeed any organisation which the government regards as 'criminal.' It could also apply to organisations such as Greenpeace whose members sometimes break the law such as the law of trespass to publicise their message.

<sup>26</sup> Andreas Schloenhardt 'Mafias and Motorbikes: New Organised Crime Offences in Australia' (2008) 19 *Current Issues in Criminal Justice* 259.

premises or vicinities; or, prohibited from possessing certain articles. Additionally, the New South Wales legislation provides that the effect of the control orders is to revoke any license or authority the subject of the order may have had to carry on a prescribed activity such as selling or repairing motor vehicles, operating a tow truck, operating a pawn broking business, selling liquor or acting as a security agent.<sup>27</sup> Thus we have moved down the slope from locking up persons proven to be capable of inflicting serious harm, to locking up or seriously infringing upon the liberty of persons suspected of inflicting future harm to creating guilt by association.

The legislation operates in two stages. First, the Police Commissioner is empowered to apply for a declaration that a particular organisation is a 'declared organisation'. In New South Wales the application must be made to a Supreme Court judge, but in South Australia the application is made to the Attorney-General (a member of the State government). The Judge or the Attorney-General must be satisfied that members of the subject organisation associate for the purpose of serious criminal activity and that the organisation represents a risk to the public safety of the State. Neither the Supreme Court judge nor the Attorney-General are bound by the rules of evidence and reasons for their determinations do not have to be given (except on an application for review).<sup>28</sup>

Second, once an organisation is a 'declared organisation' a Magistrate (in SA) or a Supreme Court judge (in NSW) may make a control order against any member<sup>29</sup> of the organisation or person regularly associating with members of the organisation, or a person who has engaged in serious criminal activity and regularly associates with persons who engage in serious criminal activity. When making the control order, in South Australia, the Court is directed to consider whether the defendant's behaviour and antecedents demonstrate a risk that the defendant will engage in serious criminal activity, the extent to which the order will prevent the defendant engaging in serious criminal activity, any legitimate reason the defendant may have for associating with any specified person, and any other relevant factor.<sup>30</sup> However in New South Wales, the Court must merely be satisfied that there are 'sufficient grounds' to make the control order.<sup>31</sup> The burden of proving that an association is legitimate, and therefore that an exemption from the control order should apply, lies upon the defendant.

Disturbingly, in South Australia no information provided by the Police Commissioner to the Attorney-General can be disclosed to any person including the organisation and its members, the subject of the declaration.<sup>32</sup> Likewise during an application for a control order to the Court the Commissioner is not

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<sup>27</sup> S 27 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

<sup>28</sup> S 13 *Crimes (Criminal Organisations Control) Act 2009* (NSW); s 13 *Serious and Organised Crime (Control) Act 2008* (SA).

<sup>29</sup> The definition of member is very broad and includes 'prospective members' and persons who identify themselves as belonging to the organisation: s 3 *Serious and Organised Crime (Control) Act 2008* (SA); s 3 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

<sup>30</sup> S 14 *Serious and Organised Crime (Control) Act 2008* (SA)

<sup>31</sup> S 19 (3) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

<sup>32</sup> S 13 (2) *Serious and Organised Crime (Control) Act 2008* (SA).

required to disclose any information which the Commissioner regards as criminal intelligence and once the Commissioner makes that determination, the Court must take steps to protect its confidentiality.<sup>33</sup>

In New South Wales, the Court may determine that relevant information should be protected from disclosure. Once that determination is made, the Court must take steps to maintain the confidentiality of the information.<sup>34</sup> The NSW legislation probably differs in this respect from the earlier SA legislation as a result of the High Court decision in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*.<sup>35</sup> In that case the High Court rejected a challenge to anti-fortification legislation providing for the non-disclosure of certain information upon a Supreme Court review of a removal notice because the decision to maintain secrecy was confined to instances where the Court determined that disclosure may prejudice the operations of the Commissioner. If the section gives the Commissioner unilateral power to determine the existence of such prejudice as the South Australian legislation appears to do, it may illegitimately constrain the independent performance of the Court's review powers.

Another problem with the South Australian legislation is that it provides that the Court must make a control order if satisfied that the defendant is a member of the declared organisation,<sup>36</sup> whereas in New South Wales the legislation provides that the Court may make a control order.<sup>37</sup> This suggests that the Court, like the Court in *Kable* has been endowed with the role of a rubber stamp. However, in *Director of Public Prosecution v George*<sup>38</sup> a similarly worded provision was held to be permissive rather than mandatory such that the term 'must' had to be interpreted as 'may' and so it was found that the Court's discretion was not usurped. Even so, it remains difficult to see how the court itself will balance liberty of person and security of person in a hearing where the defendant bears the onus of proving that an order should not be applied when the evidence supporting the application against the defendant remains secret.

Like the preventative measures considered in *Thomas v Mowbray* and the orders for preventative detention examined by *Fardon* the efficacy of control orders in the fight against organised crime is open to question. Similar legislation has been operating elsewhere and has apparently resulted in more not less public violence. According to a submission given to the Queensland government, (also considering enacting organised crime legislation), when comparable laws were introduced into Canada bike gang related violence escalated rather than decreased and there has been no appreciable decline in Canadian

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<sup>33</sup> S 21 *Serious and Organised Crime (Control) Act 2008* (SA).

<sup>34</sup> S 28 (3) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

<sup>35</sup> (2008) 234 CLR 532. Similarly in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, the High Court rejected a challenge to s 28A *Liquor Licensing Act 1997* (SA) which protected information classified as 'criminal intelligence' by the Police Commissioner from disclosure in liquor licensing hearing. Under s 28A (5b) *Liquor Licensing Act 1997* (SA) in its own proceedings the court determined whether the information was criminal intelligence. Consequently it was held that the Court was not being dictated to by the government but retained a discretion to maintain confidentiality.

<sup>36</sup> S 14 (1) *Serious and Organised Crime (Control) Act 2008* (SA).

<sup>37</sup> S 14 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

<sup>38</sup> (2008) 102 SASR 246.

organised crime since their inception.<sup>39</sup> Others have commented that the provisions only target the most visible and easily targeted groups and that they fail to capture sophisticated loosely based criminal networks that do not depend upon hierarchical structures and public displays of solidarity.<sup>40</sup> This was also the view of the Australian Parliamentary Joint Committee on the Australian Crime Commission which recently examined various State legislative responses to organised crime and in particular, the model adopted by the *Serious and Organised Crime (Control) Act 2008* (SA).<sup>41</sup> Indeed, the Report quoted from a number of submissions disapproving the transplantation of the terrorism model of legislation examined in *Thomas v Mowbray* to organised crime.<sup>42</sup> While stopping short of outright condemnation of the SA model, the Committee's report preferred the individual targeting of high risk criminals similar to the United Kingdom's Serious and Organised Crime Prevention Orders (SPCOs).<sup>43</sup> If one accepts that as the Parliamentary Joint Committee appeared to accept that the measures outlined in the organised crime legislation are ineffective then it becomes less difficult to conclude that their *raison d'être* is punitive and that the extension of criminal liability to group participation is both dangerous and unwarranted. It seems that only when our appellate courts are also prepared to make that leap that they will abandon their 'virulent strain of legal positivism'<sup>44</sup> and characterise these measures as unlawful bills of attainder.<sup>45</sup>

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<sup>39</sup> Bond University Media Release 24 April 2009 quoting Professor Paul Wilson available at [http://www.fullstory.com.au/html/s02\\_article/article\\_view.asp?article\\_id=571&nav\\_cat\\_id=-1&nav\\_top\\_id=-1](http://www.fullstory.com.au/html/s02_article/article_view.asp?article_id=571&nav_cat_id=-1&nav_top_id=-1). Similar comments are found in Australia Parliamentary Joint Committee on the Australian Crime Commission *Report on Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (August 2009) at 4.89 – 4.91.

<sup>40</sup> Andreas Schloenhardt (2008) above n 26 at 278.

<sup>41</sup> Australia Parliamentary Joint Committee on the Australian Crime Commission *Report on Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (August 2009) at 2.108.

<sup>42</sup> *Ibid* at 4.119 – 4.122.

<sup>43</sup> *Ibid* at 4.188 & 6.113.

<sup>44</sup> Paul Fairall and Wendy Lacey 'Preventative Detention and Control Orders under Federal Law: The case for a Bill of Rights' (2007) 31 *University of Melbourne Law Review* 1072 at 1073.

<sup>45</sup> *Polyukohvic v Commonwealth* (1991) 172 CLR 501 holding that the doctrine of the separation of powers prohibited the Federal legislature from providing for the legislative or executive adjudication of guilt and the imposition of punishment.