Double Punishment Under Queensland Law*

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Introduction

Traditionally at common law, a convicted felon lost all civil and proprietary rights. The status of the prisoner was once summed up as a person who 'has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.'[3] The status was enough to make the warden of Kingston Penitentiary in Ontario to declare: 'so long as a convict is confined here I regard him as dead to all transactions of the outer world.'[4] Such were the views on the status of prisoners in the ninetieth century.

In modern times, the general view, in the words of the Brennan J of the US Supreme Court, is that the prisoner is entitled 'to treatment as a 'person' for purposes of due process of law... A prisoner remains a member of the human family... His punishment is not irrevocable'.[5] Prisoners' rights, and the entitlement of prisoners to due process of law, are consolidated in numerous international instruments[6], the most prominent of which, for the purposes of this paper, is the *International Covenant in Civil and Political Rights* (ICCPR). While Australia is a party to the ICCPR, there are persistent issues in the Australian legislative landscape[7] that bring into question

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3 *Ruffin v Commonwealth*, 62 Va 790 (1871).

4 Cited in Calder, W.A., *The Federal Penitentiary in Canada, 1867-1899: A Social and Institutional History* (Ph.D Dissertation, University of Toronto 1975), Chapter. 8, p 3.

5 92 SCt 2726 (1972).

6 The instruments include: The United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR); The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; The United Nations Convention on the Rights of the Child (applies to prisoners under the age of 18); The International Labour Organisation Convention (No. 29) concerning Forced or Compulsory Labour; and The United Nations Declaration of basic principles of justice for victims of crime and abuse of power. For comments on the rights of prisoners see generally, Rodley, N., *The Treatment of Prisoners under International Law*, Oxford University Press: 2000, Second Edition.

7 See for instance the issues raised in *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1; *MIMA v Al Masri* (2003) 126 FCR 54 (15 April 2003); *Al-Kateb v Godwin* (2004) 78 ALJR 1099; and *MIMA v Al Khafaji* (2004) 208 ALR 201HCA 38. See also the discussions and commentary in Blay, S. and Piotrowicz, R., 'The Awfulness of Lawfulness' (2001) 21 *Australian Yearbook of International Law* 1-19; Blay, S., 'Mandatory Sentencing and International Law: no Logic and too Many Questions', (2000) 74 *Australian Law Journal* 363-368.

the consistency of Australian domestic law with the nation's international human rights obligations. One such issue, highly relevant to the status of prisoners in Australian society, is presented by Queensland's *Dangerous Prisoners (Sexual Offenders) Act* 2003 (hence, the '*DPSOA*').[8]

The purpose of this paper is to outline an argument that the *DPSOA* breaches Article 14(7) of the ICCPR. Specifically, it is argued that the *DPSOA*, which authorizes post-sentence incarceration in a prison without a fresh crime and finding of guilt following a criminal trial, is in breach of the principle that a person cannot be punished twice for the same offence.

First, this paper deals with the background and a broad outline of the *DPSOA*. Second, it discusses the facts and circumstances surrounding the application filed with the United Nations Human Rights Committee by the Prisoners' Legal Service (Queensland) on behalf of Robert John Fardon, the first person to be incarcerated under the DPSOA. Third, the paper argues that despite the recent opinion of some members of the High Court that imprisonment can be ordered for 'non-punitive' purposes, imprisonment under the legislation is plainly punitive, and that the United Nations Human Right Committee is likely to share this opinion.

The Dangerous Prisoners (Sexual Offenders) Act 2003: An Overview

Criminal justice systems in all Australian jurisdictions have struggled with the issue of how best to deal with repeat offenders. Up until the most recent wave of 'preventive detention' legislation, indefinite sentencing regimes were adopted that contemplated review of offender behaviour and responses to rehabilitation efforts in the later parts of a term of imprisonment.[9] However these reforms do not appear to have satisfied a number of prominent and vocal advocates of preventive detention, who have plainly captured the imagination of a number of State Governments.[10] The political urge to appear to have responded to periodic media reports of paedophilia and other types of violent sexual crime has hastened the pace of legislative experimentation. In the normative vacuum that exists in a system of law without constitutionally-protected human rights, these experiments have taken a radical turn. If an offender can be incarcerated indefinitely after a trial, and that incapacitates an offender by removing him or her from the community, then why not re-incarcerate the offender after the completion of the sentence where there is a *perception* that the offender has a propensity to re-offend? That is the thrust of the DPSOA.

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[8] And, correlatively, the legislation mooted for introduction in New South Wales and Western Australia along similar lines.

[9] See McSherry, B., 'Indefinite and preventive detention legislation: from caution to an open door', (2005) 29 *Crim L J* 94-110; *R v Moffatt* (1997) 91 A Crim R 557 (challenging the *Sentencing Act* 1991 (Vic), s 18). See also *Felman v Law Institute* (1997) 150 ALR 363 per Kenny JA.

[10] As Ms Hetty Johnson, a victim's rights campaigner remarked on the ABC's *Law Report* Program on 9 November 2003, in the context of a discussion of the *Fardon* case, "What's happening here is we're just pussyfooting around. If what we're trying to do is protect the community, protect innocent children, then let's do it. And if it means turning the law on it's head, then let's do that too".

The problem with preventive detention is that it sits very uncomfortably with the presumptions of the common law that the punishment must be proportionate to the crime and that the liberty of the individual is sacrosanct. Additionally, preventive detention sits uncomfortably with international standards on human rights. And, herein lies the problem. Imprisonment for what a person *is likely to do* is, by its very essence, predictive of what may or *may not* occur in future (the problem of 'false positives').[11] Since there exists the possibility that a predicted offence may never occur, which renders any consideration of the proportionality of the response otiose, preventive detention is always an extraordinary step to take.

Secondly, since the logic of preventive detention is that an offender-detainee has the potential to offend if released, it permits *indefinite detention* so long as the detainer is able to 'prove' that the detainee has the potential to meet the detainer's predictions of what the detainee is likely to do. But what constitutes acceptable, cogent evidence' of 'dangerousness'?[12] By its very nature, preventive detention of this nature allows for the imprisonment for 'criminal types' rather than for criminal conduct as such.[13]

Thirdly, since preventive detention permits the continuation of incarceration after an offender has served his or her scheduled sentence, it has the inherent element of permitting an offender to be punished twice for the same offence. This issue of course turns on whether preventive detention is punitive in character or not. The punitive nature of preventive detention is a substantive issue in this paper; we discuss it later. For the moment we note that the debate over preventive detention in Australia is not new. Historically, it has found few if any supporters outside party politics in this country. On the other hand significant doubts have been expressed over its merits.

Almost a decade ago, a briefing paper to the NSW Parliament considered the nature and significance of a number of these issues. The Paper noted that while there exists a small number of 'career' violent offenders who do present a continuing risk:

> There are relatively few offenders who are 'dangerous' in the sense that they pose a continuing real danger of serious harm to members of the public**.** Most serious crimes against the person are committed by people who have not previously offended, and most offenders convicted of violent offences do not repeat their crimes**.**[14]

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[11] See McSherry, B., 'Risk assessment by mental health professionals and the prevention of future violent behaviour', (2004) No 281 *Trends and Issues in Crime and Criminal Justice* 1-6; Johnson, B., 'Prophecy With Numbers', (2005) 7 *University of Technology, Sydney Law Review* 116-139.

[12] There is a voluminous literature on this issue. For a telling critique of the 'science' of contemporary approaches to risk prediction in this context see Campbell, T.W., 'Sex offenders and Actuarial Risk Assessments: Ethical Considerations' (2003) 21 *Behavioural Sciences and the Law* 269-279, 275.

[13] McSherry, n 11.

[14] Figgins and Simpson, *Dangerous Offenders Legislation: An Overview*, Briefing Paper Number 14/97 New South Wales Parliament, (Executive Summary).

On the issue of how to classify the ‘dangerous offender’ and how to predict the likelihood of offending in the community, the Paper said, in terms worth quoting at length:

> Although 'dangerousness' can be said to involve the likelihood that a person will inflict serious harm on another, it is notoriously difficult to define exactly what the elements of 'dangerousness' are. The concept and its implications for the criminal law were discussed in detail in a United Kingdom report in 1981 (the Floud Report). Danger, notes Floud, 'is a thoroughly ambiguous concept, and we may well ask whether it has any place in the administration of criminal justice, and, if it be conceded that it has, how are we to define and identify ‘dangerous’ offenders for legal purposes'. Floud went on to observe that: 'The question of penalties for serious offences - even for the worst cases of such offences - must not be confused with the question of protecting the public from the few serious offenders who *do* present a continuing risk and who *are* likely to cause further serious harm'. This was based on the observation that few serious offenders repeat their serious offences, so that there is no reason, in most cases, to keep them out of circulation on that account for very long periods of time.
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> In fact, it has been argued that the concept of dangerousness is 'so insidious that it should never be introduced in penal legislation'. Floud states that 'dangerousness' is a concept which is not at all objective, since what is dangerous is a matter of judgement or opinion - a question of what one is prepared to put up with. The Floud Report, having cited the problems of definition and prediction, commented:
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> It is worth noting that no-one dismisses the practical problem. That is, no-one denies the existence of a minority of serious offenders who present a continuing risk. The argument is all about degrees of risk, perceptions of danger and justifiable public alarm, the difficulty of deciding whether or not someone is 'dangerous' and the legitimacy of confining people for what they *might* do as well as for what they have actually done.
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> Attempts to determine if a person is 'dangerous' raise a number of difficult questions, including:
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> - What constitutes 'serious harm'?
> - How likely must it be that the offender will cause serious harm?[9]
> - How can the likelihood of the offender causing serious harm be predicted?[15]

As one author notes, while dangerous offender legislation commonly contains lists of crimes that arguably qualify for sentencing with a predictive component, there have been very few attempts to articulate in any coherent manner the principles upon which these selections are based.[16]

Whatever the criticism against preventive detention may be, the reality is that it is a politically attractive tool for any government in search of avenues in the criminal justice system to deal with *perceptions* of continuing criminal behaviour. Preventive detention law, usually labelled as ‘Dangerous Offenders’ legislation, is a

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15 *Ibid*, p 4.

16 Walker, N., (ed), *Dangerous People*, Blackstone Press: 1996, 10.

loud and ostensible demonstration to the electorate that the government is taking serious measures to protect the community against crime.

The earliest attempt to introduce the type of preventive detention described above was made in Victoria with the introduction of *Community Protection Act* 1990 (Vic).[17] The Act was passed specifically to detain a Mr Gary David a prisoner, after his term of imprisonment had expired. Mr David had previously been convicted of two counts of attempted murder in 1980, had a long history of threatening behaviour. Towards the end of his scheduled sentence in 1990, there were community concerns that he might re-offend. This led the Victorian Government to enact the *Community Protection Act* 1990. The Act empowered the Supreme Court to order his preventive detention in a psychiatric in-patient service, prison or other institution for up to six months, if the Court was satisfied on the balance of probabilities, that he was a serious risk to the safety of any member of the public; and was likely to commit any act of personal violence to another person. Detention orders were so made by the Supreme Court upon application by the Attorney-General. Mr David died in custody in 1993.

In 1994, the New South Wales Government believed that they faced a similar problem as Victoria in the case of Mr Gregory Kable. Kable had been convicted and sentenced to prison for the manslaughter of his wife. While serving his sentence, Mr Kable had written threatening letters which led to serious concerns that upon his release he would be a danger to those he had threatened. The New South Wales Parliament enacted the *Community Protection Act* 1994 (NSW). Unlike the Victorian legislation, the New South Wales Act initially had a general application. However, in the course of the debates over the bill in the Parliament, it became applicable specifically to Mr Kable. The Act provided for Kable to be detained following the expiry of his scheduled sentence for up to six months, by order of the NSW Supreme Court, on the application of the Director of Public Prosecutions. The condition was that the court had to be satisfied on reasonable grounds that he was more likely than not to commit a 'serious act of violence' and that it was appropriate for the protection of a particular person or persons or the community generally, that he be held in custody. As a result of the legislation, which was plainly designed to ensure that he remained incarcerated, Mr Kable was ordered to return to prison.

In 1996, following a challenge by Mr Kable, the High Court declared the *Community Protection Act* 1994 (NSW) constitutionally invalid. The Court found that the Act imposed functions on the Supreme Court that were incompatible with the exercise of federal judicial power.[18] For all practical purposes, preventive detention

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[17] See Wood, D, 'A One Man Dangerous Offenders Statute – The *Community Protection Act* 1990 (Vic)' (1990) 17 *MULR* 497; Williams, C R, 'Psychopathy, Mental Illness and Preventative Detention: Issues Arising from the David Case' (1990) 16 *Monash U LR* 161; Fairall, P., 'Violent offenders and community protection in Victoria – the Gary David experience', (1993) 17 *Criminal Law Journal* 40-54.

[18] See further Hanks, P., Keyzer, P. and Clarke, J., Australian Constitutional Law: Commentary and Materials, LexisNexis: 2004, 7th Edition, 427-436; Keyzer, P.,'Liberty Is Dead: To What End The Separation of Judicial Power of the Commonwealth?' A Paper Presented to the 2004 National Conference of the Australian Association of Constitutional Law; Wheeler, F., 'The *Kable* doctrine and state legislative power over state courts', (2005) 20(2) *Australasian Parliamentary Review* 15-30;

legislation appeared destined for the history books until the DPSOA came along. The explanatory memorandum that accompanied the Act explained:

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

Section 3 of the *DPSOA* states the objective of the legislation as follows:

> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

The DPSOA came into force on 6 June 2003, three days after it was introduced into the unicameral Queensland Parliament. It had received the support of 98 of the 99 parliamentarians, with one abstention. It authorizes the Supreme Court of Queensland to order post-sentence imprisonment of persons serving sentences for serious sexual offences. The procedure is as follows. The Attorney-General makes an application pursuant to section 5 of the Act[19] and pursuant to section 8 of the Act[20] that there are

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Meagher, D., 'The Status of the Kable Principle in Australian Constitutional Law', (2005) 16(3) *Public Law Review* 182-187; Gray, A., 'Standard of proof, unpredictable behaviour and the High Court of Australia's verdict on preventative detention laws', (2005) 10(1) *Deakin Law Review* 177-207.

[19] Section **5 provides:**

5. Attorney-General may apply for orders

(1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.
(2) The application must--
(a) state the orders sought; and
(b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and
(c) be made during the last 6 months of the prisoner's period of imprisonment.
(3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (preliminary hearing) to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order.
(4) The return date for the preliminary hearing must be within 28 business days after the filing.
(5) A copy of the application and any affidavit to be relied on by the Attorney-General must be given to the prisoner within 2 business days after the filing.
(6) In this section--
prisoner means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section.

[20] **8 Preliminary hearing**

(1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
(2) If the court is satisfied as required under subsection (1), it may make--
(a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and
(b) if the court is satisfied the application may not be finally decided until after the prisoner's release day--

reasonable grounds for believing that there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody. If the Court makes an order under s 8, a s 13 hearing follows.[21] If the Court finds to a high degree of probability that there is an unacceptable risk that the prisoner will commit a serious sexual offence if the prisoner is released from custody at the end of his or her sentence then the Court will make a 'continuing detention order' and send the person back to prison. A serious sexual offence is defined in the *Dangerous Prisoners (Sexual Offenders) Act* as an offence of a sexual nature against children or involving violence whether committed in Queensland or outside Queensland (see the *Schedule - Dictionary*).

Importantly, a person subject to a continuing detention order made pursuant to section 13 remains a prisoner despite the expiry of the term of his or her sentence[22]

(i) an order that the prisoner's release from custody be supervised; or
(ii) an order that the prisoner be detained in custody for the period stated in the order.

21 **13 Division 3 orders**
(1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a serious danger to the community).
(2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence--
(a) if the prisoner is released from custody; or
(b) if the prisoner is released from custody without a supervision order being made.
(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it 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 decision.
(4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following--
(a) the reports prepared by the psychiatrists under section 112 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;
(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;
(g) the prisoner's antecedents and criminal history;
(h) the risk that the prisoner will commit another serious sexual offence if released into the community;
(i) the need to protect members of the community from that risk;
(j) any other relevant matter.
(5) If the court is satisfied as required under subsection (1), the court may order--
(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (continuing detention order); or
(b) that the prisoner be released from custody subject to the conditions it considers appropriate that are stated in the order (supervision order).
(6) In deciding whether to make an order under subsection (5)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.
(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1).

22 *DPSOA*, s 14 (1)(a).

and such an order is taken to be a warrant committing the prisoner into custody for the purposes of the Queensland *Corrective Services Act 2000*.[23] Furthermore, a person subject to an order made pursuant to s 13 of the *DPSOA* is not eligible for post-prison community based release programs under the *Corrective Services Act*.[24]

Mr Fardon and the Dangerous Prisoners (Sexual Offenders) Act

Robert Fardon is a prisoner who resides at Wolston Correctional Centre in outer-suburban Brisbane, Queensland. His criminal history dates from 12 February 1965, when he was aged 16 years, and consists mostly of minor property and other non-violent offences. However Mr Fardon has also been convicted of three serious sexual offences. On 17 April 1967, Fardon, then aged 18 years, was convicted of attempted carnal knowledge of a girl under the age of 10 years. He was placed on a bond. On 20 June 1979 he was convicted of the offences of indecent dealing with a female under 14 years, rape and unlawful wounding. He was sentenced to serve 12 months, 13 years and 6 months respectively. Less than 3 weeks after his release from prison in relation to these offences, Mr Fardon was convicted for the offences of rape, sodomy and assault occasioning actual bodily harm in relation to an adult woman. The sentence commenced on 30 June 1989 and finished on 29 June 2003.

On 17 June 2003, shortly before Mr Fardon's release from prison, the Queensland Attorney-General filed an originating application under section 5 of the *Act* for an order that Fardon be detained in custody for an indefinite period pursuant to section 13 of the Act. On 27 June 2003, Muir J ordered the interim detention of the respondent until 4.00 pm on 4 August 2003.[25] This was the first of a series of 'detention' orders made under the *DPSOA*. The 4 August order was extended to 3 October 2003 by Philippides J and on 2 October 2003 Atkinson J extended the 'interim detention' of Fardon until further order. On the basis the law was valid, White J of the Supreme Court of Queensland ordered on 6 November 2003 that the Appellant be detained pursuant to s 13 of the *DPSOA* on 6 November 2003.[26] More recently, Mr Fardon was re-imprisoned under the 'annual review' provisions of the *DPSOA* in May 2005.[27]

In the meantime, constitutional challenges to the DPSOA progressed through the court system. On 9 July 2003 Muir J of the Supreme Court of Queensland held that s 8 of the *DPSOA* constitutionally valid.[28] On 23 September 2003 the Court of Appeal of Queensland (De Jersey CJ and Williams JA; McMurdo P dissenting) held that ss 8 and 13 of the *Dangerous Prisoners (Sexual Offenders) Act* were

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23 *DPSOA*, s 50.

24 *DPSOA*, s 51.

25 See Keyzer, P., Southwood, S. and Pereira., 'Pre-emptive imprisonment for dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act* 2003: the constitutional issues', (2004) 11(2) *Psychiatry, Psychology and Law* 244-253.

26 [2003] QSC 379.

27 [2005] QSC 137.

28 *Attorney-General (Q) v Fardon* [2003] QSC 200.

constitutionally valid.[29] Finally, the High Court of Australia dismissed Mr Fardon's constitutional challenge on 1 October 2004.[30]

The treatment of the *Fardon* case before the High Court of Australia has significant implications for the relationship between Australian domestic law and international (human rights) law. It therefore requires an extensive analysis for the purposes of this paper.[31] At the High Court, Fardon's constitutional argument had five threads.[32] It was argued that sections 8 and 13 of the *DPSOA* are repugnant to Ch III of the Constitution because those provisions purport to give a Ch III Court the power to:

A. authorize the Supreme Court to order the civil commitment of a person to prison;

B. authorize the Supreme Court to order the detention of a person in prison on the basis that they are at risk of re-offending in the future in the absence of a crime, a trial and a conviction;

C. authorize the Supreme Court to order the imprisonment of a person in circumstances that do not require the application of established principles relating to civil commitment for mental illness;

D. authorize the Supreme Court to order the punishment of a class of prisoners selected by the legislature in a manner which is inconsistent with the essential character of a court and inconsistent with the nature of judicial power; and

E. to subject a prisoner to double punishment for previous crimes.

A majority of the Court (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; Kirby J dissenting) dismissed the appeal.

On the final, 'no double punishment' point that is the focus of this article, Mr Fardon had argued that the *DPSOA* imposes double punishment because it requires a judge of the Supreme Court of Queensland to order the detention in prison of someone convicted and sentenced for a criminal offence, who has satisfied the penalty imposed at sentence, without any further determination of criminal guilt justifying the use of judicial power.[33] Further, a Court making an order under it is *required* to have regard to the prior offences of a person in determining whether he should continue to be a prisoner or not in circumstances where no new crime has been committed. The conclusion that the DPSOA punishes a person for their prior offences is reinforced by

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29 *Fardon v Attorney-General (Q)* [2003] QCA 416.
30 *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519.
31 *Fardon v Attorney-General (Q)* [2003] QCA 416.
32 Previously, see Keyzer, Pereira and Southwood, *op.cit*.
33 *Fardon v Attorney-General (Queensland)* [2003] QCA 416 at [80] per McMurdo P.

ss 13(4)(c) and (d). .[34] The continued imprisonment of the Appellant pursuant to ss 8 and 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) is punishment because by force of ss 8 and 13 (and then by effect of ss 8(3) and 50) of the Act, the Appellant is a prisoner in a prison. He is subject to substantially the same regime of imprisonment as if convicted of a criminal offence but without being charged, tried, or convicted of an offence against the criminal law of Queensland. He is being held there pursuant to Queensland corrective services legislation under which he was imprisoned for the duration of his sentence. His status remains that of a prisoner. Such imprisonment is the ultimate punishment of our system of justice. Nor could it be said that the scheme under the Act is incidental to the sentence imposed on the Appellant on 30 June 1989. The scheme does not turn on that sentence or finding of guilt.[35]

It is a fundamental maxim of the law that a person may not be punished twice of the same crime: *nemo debet bis vexari pro eadem causa*.[36] Fardon argued that double punishment is repugnant to Ch III of the Constitution, and specifically noted the incompatibility of the DPSOA with Article 14(7) of the *International Covenant on Civil and Political Rights* Mr Fardon argued that quite apart from our history and traditions, the notion that imprisonment could be ordered by a court in circumstances where there had been no fresh crime, no trial in accordance with judicial process, and no finding of criminal guilt breaks the nexus between crime and punishment that is part of the fundamental logic of our system of law.[37] The function of punishment is to communicate the censure an offender deserves for his or her *past* crime. One is not punished *in advance*, except, perhaps, in places where the rule of law does not apply. The focus of judicial power on past events is not accidental. Judicial power is characterized by the application of the law to past events or conduct.[38] The effect of an order based on the type of risk assessment contemplated by sections 8 and 13 of the *Dangerous Prisoners (Sexual Offenders) Act* is to imprison someone for something that they *might* do in the future. This is totally different to the situation in which a person who has been convicted of a crime is sentenced to an indeterminate period for reasons including that there is a risk that person will re-offend in the future.[39] In that situation, the exercise of judicial power is fastened to a set of facts established in a judicial process and the decision to order an indeterminate sentence on the ground of community protection involves a discretionary judgment regarding the relative weight of the goals of retribution and deterrence informed by all available and relevant material.

On the Chapter III point, Fardon argued that a judicial order authorizing indefinite or indeterminate detention of a person who has demonstrated that they can be dangerous may be consistent with Ch III of the Constitution *if* it is part of a

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34 It was specifically argued in the High Court of Australia that this aspect of the *DPSOA* renders it inconsistent with Art 14(7) of *the International Covenant on Civil and Political Rights*.

35 *Fardon v Attorney-General (Queensland)* [2003] QCA 416 at [81] per McMurdo P.

36 *Rogers v The Queen* (1994) 181 CLR 251 at 273; *Pearce v The Queen* (1998) 194 CLR 610 at 625; *The Queen v Carroll* (2002) 194 ALR 1.

37 *Azzopardi v The Queen* (2001) 205 CLR 50 at 65.

38 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188; *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

39 *McGarry v The Queen* (2001) 207 CLR 121.

sentencing process *upon* a finding of criminal guilt.[40] Demonstrating the inconsistency of the DPSOA with state practice in other countries, Fardon argued that legislation authorizing courts to order such 'preventive sentences' operates in a number of common law jurisdictions, but there is nothing like this in those countries.[41] Public confidence in the courts and the criminal justice process cannot be maintained if the courts are required to authorize the deprivation of the liberty of persons, not on the basis that they have breached any law, but on the basis that there is a risk they will offend in the future.[42]

A defining characteristic of criminal proceedings is the consequence of *punishment by imprisonment.* It is impossible to divorce one from the other, and any law that inflicts imprisonment is properly characterized as punitive in nature.[43] In *Witham v Holloway*, Brennan, Deane, Toohey and Gaudron JJ said that the potential for imprisonment in contempt proceedings gave rise to a conclusion that such proceedings are correctly classified as criminal in nature. This is because:[44]

> 'Punishment is punishment, whether it is imposed in the vindication of or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines… constitute punishment'.[45]

On that score, the *DPSOA* is plainly punitive. Section 50 of the Act provides:

> 'An order of the court or the Court of Appeal under this Act that a prisoner be detained in custody for the period stated in the order is taken to be a warrant committing the prisoner into custody for the *Corrective Services Act* 2000.'

Section 51 of the Act provides:

> 'A prisoner subject to a continuing detention order, an interim detention order or an order under section 41 (2) is not eligible for post-prison community based release under *the Corrective Services Act* 2000, chapter 5.'

Fardon argued that it is no answer to the above propositions to assert that the Act is not punitive because its stated purpose is community protection. That is doublespeak. One of the purposes of punishment by imprisonment is protection of the community.[46] It was argued that the power of imprisonment, the exclusive province of courts exercising judicial power in accordance with traditional judicial processes, cannot be

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40 See ie. *R v Moffatt* [1998] 2 VR 229.

41 Contrast *R v Moffatt* [1998] 2 VR 229 (Victoria); *R v Leitch* [1998] 1 NZLR 420 (New Zealand); *R v Johnson* 2003 SCC 45 (Canada); *R v Parole Board; Ex p Giles* [2003] UKHL 42 (United Kingdom); *Kansas v Hendricks* 521 US 346 (1997) (United States).

42 *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51 at 98, 107.

43 Federal legislation must be characterized by reference to its operation and effect, not merely by reference to the purposes of the parliament enacting it: see *Ha v New South Wales* (1997) 189 CLR 465 17 498; *Re Wakim; Ex parte McNally* (1999) 198 CLT 511 at 572.

44 (1995) 183 CLR 525.

45 (1995) 183 CLR 525 at 534; see also McHugh J at 545.

46 *R v Radich* [1954] NZLR 86 at 87; *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at 377.

outflanked by legislation purporting to authorize the exercise of the judicial power of imprisonment under the guise of civil commitment proceedings.[47]

Double Punishment and the *Fardon* Case: The Human Rights Dimension

As noted above, it is a fundamental principle of the common law that one cannot be punished twice for the same crime. The international law position is well summed up in Article 14(7) of the ICCPR that states:

> No one shall be liable to be tried or *punished* again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country (emphasis added)

Interestingly enough, in spite of the potential implications of preventive detention for double jeopardy, the issue was addressed only by Gummow and Kirby JJ. In addressing the issue, Gummow J noted:

> It is accepted that the common law value expressed by the term 'double jeopardy' applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted. The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure. It did not implicate the common law principle…[48]

What is central to his Honour's observation is that the law does not countenance double jeopardy; but preventive detention *does not* amount to being punished twice or an increase in the punishment originally imposed on the offender. In reaching this conclusion, his Honour referred to the decision of the House of Lords in *R (Giles) v Parole Board*[49] in which Their Lordships drew a distinction between deprivation of liberty for an indeterminate term by a court order and by administrative decision, and held that a sentence imposed by an English court for a longer period than would be commensurate with the seriousness of the offences for which there had been convictions, did not attract the operation of Art 5(4) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[50]

Kirby J's treatment of the issue was quite different. His Honour argued in his dissenting opinion that: 'the influence of the International Covenant on Civil and Political Rights upon Australian law is large, immediate and bound to increase, particularly in statutory construction'. He thus argued by implication that the ICCPR values must inform the construction of statutes such as the DPSOA. He accordingly noted that:

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47 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-29.

48 *Fardon v AG of the State of Queensland* ([2004] HCA 46), [74]

49 [2004] 1 AC 1 at 25-34 per Lord Hope of Craighead, 38-45 per Lord Hutton; Lord Bingham of Cornhill, Lord Steyn, Lord Scott of Foscote agreeing at 20, 21, 45.

50 *Fardon v Attorney-General of the State of Queensland* (2004) 78 ALJR 1519, [65].

> the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess'[51]

As is evident from the observations from Their Honours, in an analysis of preventive detention, the issue turns on whether one can justifiably construct preventive detention as 'punitive'. As argued earlier in this paper, we are of the view that preventive detention as permitted and constructed under the DPSOA is punitive in character. This view finds substantial support in state practice and international human rights standards.

In his decision in the *Fardon* case, Gummow J cited the House of Lords decision in *Giles v Parole* Board in support of his view that preventive detention is not punitive. We therefore begin with *Giles v Parole Board* in our analysis of state practice on preventive detention. The facts of the case may be summarised as follows: the appellant Giles pleaded guilty in the Crown Court at Nottingham to two offences, committed on different occasions. On 10 January 1997, he was sentenced to consecutive terms of four and three years' imprisonment. However, in passing that sentence the judge observed that it was necessary to pass a custodial sentence which *was longer* than the sentence which would be commensurate with the seriousness of the offences in order to protect the public and one of the appellant's victims in particular from serious harm from him. The judge was exercising a judicial power conferred by relevant legislation in the United Kingdom. For all practical purposes then, his sentence incorporated a preventive element. Giles appealed on the basis that the preventive element of his sentence constituted 'arbitrary detention because he did not have the right, after he had served the punitive part of his sentence, to apply to a court to decide whether it was still necessary to detain him in order to protect the public'. It was thus contended that the preventive aspect of his detention violated Article 5(4) of the European Convention which provides that:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

Giles' counsel argued that:

> a longer than commensurate determinate sentence comprises two distinct components. The first is punitive and on the expiration of this part the second, preventative phase of the sentence commences. The lawfulness of detention in this phase depends on whether the prisoner continues to pose an unacceptable risk. Dangerousness is a characteristic susceptible to change over time. The pronouncement of sentence by the sentencing judge is not, and is not capable of being, decisive as to the lawfulness of detention throughout the preventative phase. This is because the court can do no more than estimate for how long the offender may continue to pose an unacceptable risk. To prevent arbitrary detention the court can only authorise detention in the preventative phase as long as the offender continues to pose a danger. The lawfulness of detention falls to be re-determined in accordance with article 5(4) by reference to the question of ongoing dangerousness as soon as the punitive phase ceases to govern

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[51] Ibid.,[125]

> detention, and by reason of the changeable quality of dangerousness, at reasonable intervals thereafter.

It is evident from the facts that the issues raised in *Giles* are fundamentally different from those of *Fardon*. Unlike the situation in *Giles,* in *Fardon* the issue was whether the application for and the imposition of a preventive sentence *after* the appellant has served his original sentence is a breach of his human rights. It is to be noted that in *Giles* there was no application made *after* the appellant had served his sentence. Indeed, the case was decided after he had been let out on licence. The courts had nonetheless taken on the case because in the words of Lord Bingham of Cornhill, it raised 'an important point of principle'.[52] The issue of principle that the House of Lords was concerned with in *Giles* was whether the imposition of a sentence *at the time of conviction,* longer than is 'commensurate with the seriousness' of a person's crime is consistent with Article 5(4) of the European Convention. In examining the issue, Lord Hope sited the view of the European Human Rights Commission in *Mansell v United Kingdom*[53] that:

> Such an 'increased' sentence is, …, no more than the usual exercise by the sentencing court of its ordinary sentencing powers, even if the 'increase' has a statutory basis.

His Lordship thus concluded as did the rest of the Court that the longer than 'commensurate' that was imposed on the appellant was no violation of Article 5(4) of the Convention.

What emerges from *Giles* is the distinction between detention for a period the length of which is embodied in the sentence of the court at the time of conviction on the one hand and the application for and subsequent imposition of a further period of detention after the completion of the initial sentence without further trial. *Giles* belongs to the former category, while *Fardon* is in the latter category. A state of affairs that permits the detention of a person after they have served the original sentence for which they were convicted without further trial will be in breach of Article 5(4). This brings us to the consistency of the *Fardon* case with international human rights law.

International Human Rights Jurisprudence on Preventive Detention

As noted earlier, Article 5 of the European a Convention states that:

> '(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> (a) the lawful detention of a person after conviction by a competent court
> …
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

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52 *Giles v Parole Board* [2004] 1 AC 1[5].

53 Application No 32072/96.

As noted in *Giles* the '[d]etention in accordance with a lawful sentence of imprisonment imposed by a judge on a prisoner for an offence of which he has been convicted [satisfies] these requirements'.[54] This is well evidenced by the jurisprudence of the Strasburg Court in cases such as *Winterwerp v The Netherlands*[55], *De Wilde, Ooms and Versyp v Belgium (No 1).*[56] However the essence of the jurisprudence in all these cases points to the initial conviction and not the subsequent issue of further detention without trial. This point is well made in *Iribarne Perez v France* [57] in which the Court stated:

> The review required by article 5(4) is incorporated in the decision depriving a person of his liberty when that decision is made by a court at the close of judicial proceeding; this is so, for example, where a sentence of imprisonment is pronounced after 'conviction by a competent court' within the meaning article 5(1)(a) of the Convention. Only the 'initial decision' is contemplated, not 'an ensuing period of detention in which new issues affecting the lawfulness of the detention might subsequently arise.[58]

The United Nations Human Rights Committee considered the issue of preventive detention in a New Zealand Communication in 2002. In this Communication, the authors were three complainants who argued that their preventive detention sentences were in breach of the New Zealand's obligations under the ICCPR.[59] Given the similarity of the background of the complainants to that of Mr Fardon, it is useful to provide a more detailed account of the complainants.

The first complainant was Mr Rameka who was found guilty of two charges of rape, one charge of aggravated burglary, one of assault with intent to commit rape, and indecent assault. Pre-sentence and psychiatric made available to the court noted inter alia his 'previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that that there was a 20% likelihood of further commission of sexual offences'. For the first count of rape, he was sentenced to preventive detention 'concurrently to 14 years' imprisonment in respect of the second charge of rape, to two years' imprisonment in respect of the aggravated burglary and to two years' imprisonment for the assault with intent to commit rape'.

The second complainant, Mr Harris pleaded guilty to 11 counts of sexual offences which he had committed over a three month period against a minor. He was accordingly found guilty by the High Court at Auckland. He had two prior convictions for unlawful sexual interference with minors for which he was sentenced to six years' imprisonment, and concurrently to four years' on the remaining counts. The Solicitor-General appealed his sentence on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. In June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each

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54 Per Lord Hope of Craighead [24].
55 (1979) 2 EHRR 387.
56 (1971) 1 EHRR 373.
57 (1995) 22 EHRR 153.
58 Ibid, 173-174, para 30.
59 Communication No. 1090/2002: New Zealand. 15/12/2003. CCPR/C/79/D/1090/2002.

count. In imposing the sentence, the Court had noted that 'no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence'[60]

The third complainant Mr. Tarawa was found guilty of one charge of rape, two charges of 'unlawful sexual connection', indecent assault, burglary, two charges of aggravated burglary, two charges of kidnapping, being an accessory after the fact, three charges of aggravated robbery, demanding with menaces, and unlawfully entering a building. He had previous multiple offences involving breaking into homes and engaging in sexually-motivated violence, including two rapes. Some of the offence was committed while on bail. He was sentenced to preventive detention in respect of the three sexual violation charges. On appeal to the New Zealand Court of Appeal, it was held that given his background the preventive detention sentence was appropriately open to the sentencing judge.

In September 2001, the Judicial Committee of the Privy Council rejected all three authors' applications for special leave to appeal. The authors subsequently applied to the Human Rights Committee to seek redress. Citing several authorities, the authors complained *inter alia* that

> it was arbitrary to impose a discretionary sentence on the basis of evidence of future dangerousness, as such a conclusion cannot satisfy the statutory tests of 'substantial risk of re-offending' or 'expedient for the protection of the public' in the individual case, and that 'on the facts none of them fit the statutory tests of being a 'substantial risk', or that preventive detention was 'expedient for protection of the public'/[61]

The authors also noted that the Committee had previously recommended a revision of 'the provisions relating to 'indeterminate sentence of preventive detention' contained in [New Zealand's] Criminal Justice Amendment Act in order to bring the Act into full consistency with articles 9 and 14 of the Covenant'.[62]

The admissibility of preventive detention complainants before the UNHRC

A primary issue in considering any issues brought before the Committee under the optional Protocol is that of admissibility. Before considering any claims contained in a communication, the Human Rights Committee *must*, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol. In its responses to the authors claims, New Zealand had argued inter alia that the claims were not admissible before the Committee because the authors were not 'victims' within the meaning of the Optional Protocol. The essence of the state's argument was that '[w]hile the authors are currently serving sentences, …they have not yet served the period that they would

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60 Ibid.

61 Ibid.

62 CCPR/C/79/Add.47; A/50/40, paras 179 and 186 (3 October 1995)..

have had to serve had they been sentenced to a finite sentence. Rather, they are currently serving the ordinary deterrent part of their sentence, and the preventive aspect has yet to arise'[63] It is important to note that as in *Giles* case, preventive detention was imposed in all three instances at the time of conviction by the courts. By its very nature, the preventive element of the detention becomes operative after the finite sentence has been served. The logic of the New Zealand argument then seemed to be that a prisoner subject to preventive detention cannot bring a claim to the Committee unless and until they have started to serve the preventive part of their sentence. Not surprisingly, the Committee disagreed.

In rejecting the New Zealand contention, the Committee noted in its majority opinion as follows:

> [The authors] having been sentenced to and begun to serve such sentences, will become effectively subject to the preventive detention regime after they have served …their [finite] sentence. As such, it is essentially inevitable that they will be exposed, after sufficient passage of time, to the particular regime, and they will be unable to challenge the imposition of the sentence of preventive detention upon them at that time…. The Committee accordingly does not consider it inappropriate that the authors argue the compatibility of their sentence with the Covenant at an earlier point, rather than when [finite terms of] imprisonment have elapsed. The communication is thus not inadmissible for want of a victim of a violation of the Covenant.

It is thus clear that preventive detention issues are admissible before the Committee.

The UNHRC Perspective

Even though the Committee had earlier recommend the revision of the 'indeterminate sentence of preventive detention' contained in [New Zealand's] Criminal Justice Amendment Act in order to bring the Act into full consistency with articles 9 and 14 of the Covenant',[64] the Committee's majority decision in the New Zealand Communication made no specific reference to the issue of double jeopardy as noted in Article 14(7) of the Covenant. The general thrust of the majority decision was on the opportunity for periodic review of preventive detention. The majority opinion thus stated:

> The Committee considers that the … authors' detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues.[65]

The Committee concluded that two of the authors 'have not demonstrated…that the future operation of the sentences they have begun to serve will amount to arbitrary

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63 Communication No. 1090/2002: New Zealand. 15/12/2003. CCPR/C/79/D/1090/2002, Para 4.8.

64 CCPR/C/79/Add.47; A/50/40, paras 179 and 186 (3 October 1995).

65 Communication No. 1090/2002: New Zealand. 15/12/2003. CCPR/C/79/D/1090/2002, Para 4.8.para 7.3.

detention, contrary to article 9, once the preventive aspect of their sentences commences'[66]

Since preventive detention had been imposed by the courts at the time of conviction in each of the three case before the courts, the issues of double jeopardy and the consistency preventive detention with Article14(7) understandably did not arise. There was only one trial in each instance. In each case, the court considered the crimes of the accused person and passed the finite and preventive sentence within the context of the single trial for the crimes committed. It is significant to note that the issue presented to the UNHRC in the New Zealand Communication was far milder than the human rights propriety of the application for and imposition of a preventive term of imprisonment *after* the initial conviction. As Kirby J noted in *Fardon ,* the DPSOA 'involves a later judge being required, in effect, to impose new punishment beyond that fixed by an earlier judge, without any intervening offence, trial or conviction.'[67]

It is our view that if the Committee had been presented with a case as we have in *Fardon* it would have had no difficulty in concluding that the DPSOA is a breach of Article 14(7). This view is well supported by the approach of the minority in the New Zealand Communication. We note that in the Communication, even though double jeopardy had not be raised as an issue by the authors, the minority rightly took issue with and commented on it in these terms:

> In our view, the arbitrariness of such detention, even if the detention is lawful, lies in the assessment made of the possibility of the commission of a repeat offence. The science underlying the assessment in question is unsound. How can anyone seriously assert that there is a '20% likelihood' that a person will re-offend?
>
> To our way of thinking, preventive detention based on a forecast made according to such vague criteria is contrary to article 9, paragraph 1, of the Covenant.
>
> However far any checks made when considering parole may go to prevent violations of article 9, paragraph 4, of the Covenant, it is the very principle of detention based solely on potential dangerousness that I challenge, *especially as detention of this kind often carries on from, and becomes a mere and, it would not be going too far to say, an 'easy' extension of a penalty of imprisonment.* (emphasis added)
>
> While often presented as precautionary, measures of the kind in question are in reality penalties, and this change of their original nature constitutes a means of circumventing the provisions of articles 14 and 15 of the Covenant.
>
> For the defendant, there is no predictability about preventive detention ordered in such circumstances: the detention may be indefinite. To rely on a prediction of dangerousness is tantamount to replacing presumption of innocence by presumption of guilt

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66 Ibid.

67 *Fardon v Attorney General of the State of Queensland* [182]

> Paradoxically, a person thought to be dangerous who has not yet committed the offence of which he/she is considered capable is less well protected by the law than an actual offender[68]

While this view is admittedly that of the minority, it is nonetheless logical and persuasivec. As the opinion noted, the institution of preventive detention offers the potential to officials who may wish to evade the constraints of articles 14 to do so. In the case of *Fardon,* the PDSOA made this potential a reality.

After the High Court decision, Mr Fardon has exhausted all local remedies and has a legitimate basis for bringing his claim to the UNHRC under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), to which the Commonwealth of Australia is a party. In any issue before the UNHRC, the question that will rightly be in contention is the international legality of the element of the DPSOA that permits the application for and subsequent imposition of preventive imprisonment after a prisoner has served the sentence for which he or she is lawfully convicted. While preventive detention is not an uncommon institution in the world, this element of the DPSOAI is unique.

After the High Court decision in *Fardon* there is now no doubt that the DPSOA is a valid piece of legislation in Australian law. However, as Kirby J queried: 'can it be said that, by enacting the Act, the Queensland Parliament has, within its legislative powers, adopted a law that deliberately involves a form of double punishment which is nevertheless valid and binding?'[69] In so far as the Australian domestic legal system is concerned the answer appears to be in the affirmative. However, as we have argued elsewhere[70], while the DPSOA has been found to be constitutionally valid in Australia, in the context of human rights, the legal validity of any law cannot be determined by reference to its internal consistency with domestic law. It must ultimately be assessed by reference to international norms and standards. By bringing his case to the UNHRC, the Committee will ultimately make a determination on the validity of the legislation in so far as Australia's human rights obligations are concerned. The High Court's decision in *Fardon* may not be the last word on the *DPSOA.*

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68 Communication No. 1090/2002: New Zealand. 15/12/2003. CCPR/C/79/D/1090/2002. (Jurisprudence) Individual Opinion of Committee members Mr. Prafullachandra, Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Glèlè Ahanhanzo and Mr. Hipólito Solari Yrigoyen (15 December 2003).

69 *Fardon v Attorney General of the State of Queensland* (2004) 78 ALJR 1519 at [182].

70 Blay, S. and Piotrowicz, R., 'The Awfulness of Lawfulness' (2001) 21 *Australian Yearbook of International Law* 1-19; Keyzer, Pereira and Southwood, n 25; Keyzer, 'Liberty Is Dead', n 18.