THE *CRIMES (SERIOUS SEX OFFENDERS) ACT* 2006

The New South Wales Bar Association maintains its strong opposition to the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) which was assented to and commenced on 3 April 2006.

The President has previously described the lightning passage of the Act, without any opportunity for public consultation, as representing a new low point in the legislative processes of this state (*Bar Brief* No 131, April 2006).

The Bar Association reiterates that the legislation is deeply flawed and unacceptably interferes with fundamental human rights and freedoms. The Act, in effect, authorises the continuing detention in gaol of persons on suspicion that they might one day commit a further offence, and imposes a further sentence of up to 5 years in respect of an offence which has not been committed and, at the end of such 5 years, contemplates detention for a further period of up to 5 years in respect of an offence which has not been committed, and so on *ad infinitum.*

The Bar Association accepts that the safety and protection of the community can warrant a statutory system of preventive restraint to deal with persons who have been convicted of violent crimes and who represent a grave threat to the safety of the community if released, as a matter of course, at the end of their sentences.

However, a system which effectively allows indeterminate prison sentences (subject only to the need for a new application for a continuing detention order to be made by the Attorney General every 5 years (s 18(1)(b)), and the requirement that the Commissioner of Corrective Services provide the Attorney General with a report on the offender at intervals of not more than 12 months (s 19(2)) departs dramatically from minimum international standards relating to human rights in the administration of justice. A system of preventive detention which conforms to international human rights standards must be based on periodic orders for continuing detention in an institution which seeks to facilitate the rehabilitation of offenders and provides procedures for regular and thorough review by psychiatric and other experts.

Instead, this legislation enlists the Supreme Court to impose orders for continuing incarceration. An offender who is the subject of continuing detention order is ineligible for release on parole (Sch 1[5]), and the possibility of release lies not in the judgment of experts (such as a Parole Board), but is entirely at the discretion of the Minister.

The Bar Association is concerned that that legislation is irreconcilable with fundamental human rights and freedoms, in particular, in its approach to:

(a) the commencement of proceedings; and

(b) the determination of detention.

Although the High Court held in *Fardon v Attorney-General of Queensland* (2004) 78 ALJR 1519 that similar Queensland legislation was not unconstitutional, it did not consider whether the legislation conformed to Australia's international human rights obligations. On the contrary, Chief Justice Gleeson commented:

> "The constitutional objection to the legislative scheme is not based, or at least is not directly based, upon a suggested infringement of the appellant's human rights. . .
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> "There are important issues that could be raised about the legislative policy of continuing detention of offenders who have served their terms of imprisonment, and who are regarded as a danger to the community when released. Substantial questions of civil liberty arise. This case, however, is not concerned with those wider issues. The outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court." [1]

Commencement of proceedings

The Act empowers the Attorney General to commence proceedings for the continuing detention (s 14) (or the extended supervision (s 6)) of prisoners beyond their otherwise fixed term of imprisonment.

The Bar Association submits that the decision to apply for a continuing detention order under s 14 of the Act is akin to the decision to institute a prosecution. Any such decision-making must be placed in the hands of an independent body, modelled on the Director of Public Prosecutions, free from political and sectional influence.

The United Nations Guidelines on the Role of Prosecutors (1990) emphasise the vital role of prosectors "*as essential agents in the administration of justice*" (Guideline 3). The Guidelines further provide:

> "11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
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> "12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
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> "13. In the performance of their duties, prosecutors shall:
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> "(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
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> "(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect . . ."

[1] *Fardon v Attorney-General for the State of Queensland* (2004) 78 ALJR 1519, at paras [2] and [3].

Determination of detention

Although the Act contemplates a role for the Supreme Court in determining an application for a continuing detention order (s 17), it provides an unacceptably imprecise and uncertain standard for determining whether such an order should be made. The Bar Association draws attention to the following elements of uncertainty and arbitrariness in the decision-making process contemplated by the Act:

(a) Sections 9(2), 17(2) and 17(3) adopt a test of "*satisfied to a high degree of probability that the offender is likely to commit to commit a further serious sex offence if . . .*". In *Boughey v The Queen* (1986) 161 CLR 10 at 21 the High Court held that "*likely*" meant a "*real and not remote chance*" that something would occur. This sets an unacceptably imprecise and low standard of probability that another serious sex offence will be committed, where a finding as to the requisite state of satisfaction has the most far-reaching consequences for the offender's liberty;

(b) Section 17(3) also adopts a test of "*satisfied to a high degree of probability that . . . that adequate supervision will not be provided by an extended supervision order*". The phrase "*adequate supervision*" is ill-defined and ambiguous. Again, this sets an unacceptably imprecise and uncertain standard, where the consequences of a finding as to the requisite state of satisfaction for the offender's liberty are profound; and

(c) The Court is **required** to have regard to the statistical assessments of persons other than the offender, s 9(3) providing that the Supreme Court in determining whether to not to make an extended supervision order must have regard to inter alia "*(d) the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious sex offence*".

The Bar Association submits that such uncertainty and imprecision in the decision-making process is contrary to the prohibition of arbitrary arrest and detention in article 9(1) of the *International Convention of Civil and Political Rights* ("**ICCPR**"). Article 9(1) of the ICCPR provides that:

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

In its General Comment on article 9, General Comment No 8 "Right *to liberty and security of persons*", the United Nations Human Rights Committee has stated:

> ". . . if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted."

In 1990, the United Nations Human Rights Committee confirmed in the case of *Van Alphen v The Netherlands* that "*arbitrariness*" must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. This means that deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable.[2]

The Bar Association submits that the Act provides an unacceptably imprecise and unpredictable statement of grounds for determining whether a continuing detention order should be made, where the making of an order has the effect of imposing upon the offender a sentence of imprisonment of up to 5 years in circumstances where no offence has been committed.

The arbitrary nature of continued detention on the basis of predictions of recidivism is underlined by the unreliability of predictions of the likelihood of individual reoffending. Justice Kirby, in his dissenting judgment in *Fardon*, commented in relation to the reliability of expert prediction (on which no member of the court explicitly took issue):

> "Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked:
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> > '[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate.'
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> "Judges of this Court have referred to such unreliability. Even with the procedures and criteria adopted, 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'. The Act does so in circumstances, and with consequences, that represent a departure from past and present notions of the judicial function in Australia." [footnotes omitted][3]

Similarly as Zedner comments in the context of a discussion about the "balancing" metaphor employed in relation to preventive detention provisions in anti-terrorism laws, as well as other areas:[4]

> "Scholars of criminal justice have acknowledged that determining how far any given threat should be permitted to tip the balance is a difficult task, precisely because risk is impossible to predict with certainty. Criminological research showing that no method of prediction achieved more than a 50 per cent success rate in predicting 'dangerousness' spawned a sophisticated debate in the 1980s about the ethical problems of preventive detention. More recent research confirms the extreme difficulty of predicting the risk posed by individual offenders with any certainty."

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[2] *Van Alphen v The Netherlands* UN Doc CCPR/C/39/D/305/1988, 15 August 1990, para 5.8; also M Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, Kehl 1993, p 172.

[3] *Fardon v Attorney-General for the State of Queensland* (2004) 78 ALJR 1519 at paras [124]-[125].

[4] Lucia Zedner, "Securing Liberty in the Face of Terror: Reflections from Criminal Justice" (2005) 32(4) *Journal of Law and Society* 507, 512.

Among the studies referred to by Zedner is one by Hood et al, in which the reconviction rates of serious sex offenders in the UK were studied, four and six years after a release from a determinate prison sentence. The study concluded, *inter alia*, that:[5]

- The proportion of offenders reconvicted of another sexual offence during the follow-up periods was relatively low: less than 10% even among those who could be followed up for six years. However, those who were reconvicted committed very serious crimes . . . The proportions reconvicted varied according to the type of victim . . .
- All those subsequently convicted of a further sexual offence within the four-year follow-up period (and all but one followed-up for six years) had been identified as 'dangerous' or 'high risk' by at least one member of the Parole Board panel.
- However, nine out of them of those thought to pose a 'high risk" were not reconvicted of a sexual offence within four years of their release (three quarters of those followed up for six tears). They were 'false positives'. Particularly prominent amongst them were:
  (a) Offenders against children within their own family
  (b) Those who denied their offence: only one 'high-risk' 'denier' was reconvicted of a sexual crime.

There is a multitude of other research on recidivism in relation to serious sexual offenders, and the Bar Association does not purport to be able to provide a comprehensive survey of this material and its relationship to offenders in the Australian context. However, the Bar Association wishes to make two points in relation to the research:

(a) There is considerable literature to support the conclusion that the prediction of the probability of reoffending is extremely difficult and highly unreliable, in particular in relation to individual cases.

(b) The Government put no material before the Parliament when it introduced the Bill to demonstrate that it was possible to make highly reliable assessments of probable recidivism in individual cases . . . given the unseemly haste with which this Bill was rushed through the Parliament, there was no opportunity for the Parliament to solicit input from experts in the field. It is difficult therefore to conclude that there has been a proper assessment of the proportionality of the measures on the basis of the available evidence, something which is necessary if the Government wishes to justify this as a reasonable restriction on rights.

Moreover, proceedings under the Act are civil proceedings (s 21), without the safeguards of the law relating to criminal proceedings, including the rules of evidence relating to criminal proceedings, such as the exclusion of prejudicial evidence and the standard of proof in criminal proceedings (ss 137 and 141 of the *Evidence Act*).

Of particular concern is the absence of any procedural fairness safeguards in relation to applications for interim detention orders. Section 16 provides in relation to interim detention orders:

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[5] Home Office, *Findings 164*, R Hood, S Shute, M Feilzer and A Wilcox, "Reconviction rates of serious sex offenders and assessments of their risk": http://www.bfms.org.uk/Text_Assets/HO_Findings_164.pdf .

> "(1) If, in proceedings on an application for a continuing detention order, it appears to the Supreme Court:
> (a) that the offender's current custody will expire before the proceedings are determined, and
> (b) that the matters alleged in the supporting documentation would, if proved, justify the making of a continuing detention order or extended supervision order,
> the Supreme Court may make an order for the interim detention of the offender."

As McClellan CJ at CL recently observed in *Attorney-General for the State of New South Wales v Gallagher* [2006] NSWSC 340 at [44]-[46]:

> "There are significant differences between the Queensland legislation and the Act which are material to an application for an interim order under the New South Wales legislation. The Queensland legislation requires the Court to be satisfied that there are "reasonable grounds for believing the prisoner is a serious danger to the community in the absence of [substantive] orders" (Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 8(1)) and the Court is to receive evidence from both the Attorney-General (s 5) and the defendant (s 6) in relation to the matter. In that statutory context, procedural fairness would require the defendant to have adequate opportunity to test the Attorney-General's evidence and also tender any evidence which he or she thought relevant.
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> The scheme of the New South Wales legislation is quite different. As I have already indicated, the matter must be determined by reference to the material tendered by the Attorney-General and a decision made upon the assumption that the matters in the supporting documentation are proved. Accordingly, at the interim detention order stage there is little or no opportunity for the defendant to bring evidence or test the evidence of the Attorney-General. The argument is confined to whether or not the material tendered by the Attorney-General supports the making of an order.
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> In these circumstances the requirements necessary to afford a defendant procedural fairness are significantly confined with respect to an interim application ..."

The Bar Association is concerned that the procedure for obtaining interim orders involves contraventions of the guarantees of a fair trial in article 14(2) of the ICCPR[6], in particular the right of a person:

> "(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ..
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> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

Finally, there is no procedure in the nature of judicial review which can be invoked by persons the subject of a continuing detention order seeking its revocation, beyond the limited right of appeal provided in s 22. This is contrary to article 9(4) of the ICCPR, which provides:

> "4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

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[6] Not to mention Chapter III of the Constitution: see *Criminal Proceeds Confiscation Act 2002 (Qld), Re* [2003] QCA 249.

Similarly, article 14(5) of the ICCPR recognises the right of everyone convicted of a crime to have his or her conviction and sentence reviewed by a higher tribunal according to law.

Recently, the United Nations Human Rights Committee considered the compatibility of orders of preventive detention under section 75 of the *Criminal Justice Act* 1985 (New Zealand) with the provisions of the ICCPR: Communication No 1090/2002: New Zealand (15/12/2003) UN Doc CCPR/C/79/D/1090/2002 In the case of one complainant, Mr Harris, the Committee found at [7.2] that, while detention for a period of two and a half years based on the State party's law was not arbitrary, his inability for that period to challenge the existence, at that time, of the substantive justification of his continued detention for preventive reasons was in violation of his right under article 9, para 4, of the Covenant to approach a "court" for a determination of the 'lawfulness' of his detention over that period.

Four members of the Committee, Bhagwati, Chanet, Glèlè Ahanhanzo, and Yrigoyen dissented from the finding at [7.2] that Mr Harris' detention was based on the State party's law and was not arbitrary. The dissenting members observed:

> "[T]he Committee proceeds by assertion and not by demonstration.
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> "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?
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> "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.
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> "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.
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> "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.
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> "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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> "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.
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> "Such a situation is a source of legal uncertainty and a great temptation to judges who may wish to evade the constraints of articles 14 and 15 of the Covenant."

Also dissenting in part, Committee member Mr Kalin commented:

> "The Committee concludes, in paragraph 7.2 of its Views, that Mr. Harris will serve two and a half years of detention, for preventive purposes, before he can approach the Parole Board after a total of ten years of detention and that the denial of access to a 'court' during this period amounts to a violation of his right under article 9, paragraph 4, of the Covenant. This finding

> is based on the assumption that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less" than seven and a half years with respect of his offences. While the Court of Appeal did, indeed, observe that the case would warrant a finite sentence of "not less" than seven and a half years, it did not impose such a finite sentence, but rather substituted a sentence of preventive detention from the outset. Finite sentences are to be proportionate to the seriousness of the crime and the degree of guilt, and they serve multiple purposes, including punishment, rehabilitation and prevention. In contrast, as is clearly spelled out in section 75 of the State party's *Criminal Justice Act* 1985, preventive detention does not contain any punitive element, but serves the single purpose of protecting the public against an individual in regard to whom the court is satisfied 'that there is a substantial risk that [he] will commit a specified offence upon release'. Although preventive detention is always triggered by the commission of a serious crime, it is not imposed for what the person concerned did in the past, but rather for what he is, i.e. for being a dangerous person who might commit crimes in the future. While preventive detention for the purpose of protecting the public against dangerous criminals is not prohibited as such under the Covenant and its imposition sometimes cannot be avoided, it must be subject to the strictest procedural safeguards, as provided for in article 9 of the Covenant, including the possibility for periodic review, by a court, of the continuing lawfulness of such detention. Such reviews are necessary as any human person has the potential to change and improve, i.e. to become less dangerous over time (e.g. as a consequence of inner growth or of a successful therapy, or as a result of an ailment reducing his physical abilities to commit a specific category of crimes). In the present circumstances, Mr. Harris did not receive any finite sentence aimed at sanctioning past conduct, but was detained for the sole reason of protection of the public. Therefore, I conclude that his right to 'take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful' (article 9, paragraph 4) was not only violated during the last two and a half years of the first ten years of preventive detention, but also during that whole initial period. For the same reasons, I would find that the detention over the same initial period of 10 years prior to review by the Parole Board would also be in violation of article 9, paragraph 4, with respect to Mr. Rameka."

Article 14 of the ICCPR also provides for the right of access to court in the determination of one's rights and obligations in a suit of law. The UN Human Rights Committee has commented in concluding observations on India (UN Doc CCPR/C/79/Add.81 at [24]:

> "The Committee is . . . of the view that preventive detention is a restriction of liberty imposed as a response to the conduct of the individual concerned, that the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant, and that proceedings to decide the continuation of detention must, therefore, comply with that provision . . . The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with article 14, paragraph 1, of the Covenant."

The limited right of appeal in s 22 falls well short of effective judicial oversight of preventive detention orders that provides adequate safeguards against violations of the human rights of the person affected.

Similarly, the Bar Association considers that the regime in relation to supervision orders in s 11 confers an unacceptably confined power to direct any "*conditions as the Supreme Court considers appropriate*". Such an unfettered power permits manifest arbitrariness and does not properly permit of appellate review.