

**Balancing Rights:
Arguments for indefinite detention of dangerous sex offenders**

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*Presented at the Sentencing Conference (February 2008)
National Judicial College of Australia/ ANU College of Law*

Abstract

Indefinite sentencing legislation has been introduced in response to growing community concerns about the unsupervised release of convicted sex offenders who were considered a continued risk. The legislation enables the Courts to order post-sentence preventative detention or supervision of prisoners serving sentences for serious sexual offences who pose a significant danger to the community upon release from prison.

It is argued that these forms of legislation are a perilous result of community moral panic and politics of fear, however, the problem of dangerousness and unacceptable risk can not be ignored. While the science of assessing this risk remains questionable, it is imperative that our legislation addresses the, at times, conflicting rights of the community and those of individual offenders. The community has a right to expect protection from those most likely to commit sexual offences.

In 2003 Queensland was the first State to introduce indefinite sentencing legislation (the *Dangerous Prisoners (Sex Offenders) Act 2003*) to allow for sex offenders, assessed as dangerous, to be held indefinitely, post-sentence, until such time as the offender is considered of low risk. Bravehearts Inc, a national organisation focussed on addressing child sexual assault in Australian communities, was instrumental in ensuring that the proposed legislation was adopted.

Although the introduction of this type of legislation has withstood a High Court challenge asserting that it breached the Australian Constitution, debate continues. Legal arguments that indefinite sentencing breaches the general principle of sentence proportionality, amounts to cruel and unusual punishment and violates human rights by punishing offenders for crimes not committed, must be balanced against the rights to safety of the community.

This paper will explore the ethical and practical implications of the introduction of indefinite sentencing legislation in Australia from the perspective of a victims' advocacy and support group; this will include consideration of the principles of justice and the rights of the community

Introduction

It is not unusual to incarcerate offenders for terms longer than those which may otherwise be imposed as a 'preventive' measure designed to protect the community. Such forms of imprisonment are generally referred to as 'preventive detention' schemes.

Courts across Australia have always had the capacity, at the time of sentencing, to provide an indefinite term for prisoners if it is considered appropriate (for example, under Section 163 of Queensland's *Penalties and Sentences Act 1992*, Section 23 of South Australia's *Criminal Law (Sentencing) Act 1988* and Section 18 of Victoria's *Sentencing Act 1991*). The difficulty in ordering indeterminate sentence at time of sentencing is that there is little basis to judge risk. Courts cannot take into account whether or not the offender completed any rehabilitation programs and there is limited assessment of offenders. The pre-sentence assessment of risk provides little indication on whether or not the offender is likely to re-offend in a number of years time after he or she has completed their sentence.

In 2003, Queensland introduced the *Dangerous Prisoners (Sexual Offenders) Act 2003* (June) allowing the State's Attorney General to apply to the Supreme Court for a continuing detention order to be imposed upon a prisoner. The Queensland law is unique because it authorises the continued incarceration of a sex offender who has served his or her term of imprisonment, but is judged by a court to represent a risk to the community if released. In addition, such sentence is imposed, not as part of the sentencing process, but as an administrative procedure at the end of a person's sentence.

The main premise of such legislation is that there is a number of offenders who remain a significant risk to the community at the completion of their sentence. Since its introduction in Queensland in 2003, other Australian States have followed with similar legislation as a way of managing dangerous offenders. In 2006 both Western Australia (*Dangerous Sexual Offenders Act 2006*) and New South Wales (*Crimes (Serious Sex Offenders) Act 2006*) introduced versions of the Queensland Act and in 2007 South Australia followed suit (*Criminal Law (Sentencing) (Dangerous Offenders) Amendment Bill 2007*).

The Impetus for Indefinite Sentencing in Queensland: Leonard John Fraser

Bravehearts began strenuously lobbying for provisions to continually detain sex offenders who remained an unacceptable risk after a previously convicted sex offender abducted and murdered a nine-year old child.

In 2001 Leonard John Fraser was convicted of the 1999 abduction and murder of nine year old Keyra Steinhardt. Fraser had a lengthy criminal history spanning more than 30 years across New South Wales and Queensland, with convictions for a series of brutal rapes and attempted rapes before he abducted and murdered Keyra in 1999. Fraser was also found guilty of the murders of Beverley Leggo (37) and Sylvia Benedetti (19) and the manslaughter of Julie Turner (39) between 1998 and 1999.

Fraser's extensive and violent criminal history could be considered an indication of his habitually violent tendencies and prompted debate in regard to the criminal justice processes that allow for the release of prisoners where there is an indication that the offender is a high risk of re-offending.

In recognition that there are offenders, such as Fraser, who either cannot or will not control their predatory behaviours and urges, Bravehearts advocated for legislation which would focus on protecting children and others who could potentially be victims of known dangerous sex offenders who are judged not to have been rehabilitated and were seen as likely to reoffend. It is

our belief that we have a responsibility to protect our children and communities from those offenders who pose a serious and genuine risk. The protection of children from offenders known to be a risk must be our first priority.

In 2003 the Queensland government announced it would introduce new laws to block the release from prison of sex offenders who are assessed as posing a continuing serious danger to the community. The *Dangerous Prisoners (Sexual Offenders) Act 2003* was described by the then Queensland Premier as “a ‘community protection test’... governing the release from prison of violent sex offenders and paedophiles”.

The legislation allows for an application to the Supreme Court by the Attorney-General in cases where there is a belief that a convicted sex offender poses a risk of reoffending. The Court assesses the risk and has the power to either impose a continuing detention order or an order requiring strict supervision upon release. In making its decision, the Court takes into consideration the offender’s criminal history, evidence indicating the level of risk and other relevant evidence. Where a continuing detention order is imposed, a system of periodic review (annual) is established.

Queensland Legislation Tested: Robert John Fardon

In June 2003, three weeks after it was enforced, Robert John Fardon became the first sex offender to be subject to an application by the Queensland Attorney-General under the new legislation.

Fardon had an extensive criminal history extending back to 1965. While some of his offences included petty property and non-violent crimes, in 1967 he was placed on a bond for attempted carnal knowledge of a girl under 10 and in 1980 he was sentenced to imprisonment for indecent dealing with a girl under 14, rape and unlawful dealing. Fardon served 8 years of his sentence before being released on parole on 14th September 1988.

Twenty days after his release, on the 3rd October 1988, Fardon committed further offences of rape, sodomy and assault occasioning bodily harm of an adult female. On the 30th June 1989 he was sentenced to 14 years imprisonment on the first two counts and 3 years imprisonment on the third count, to be served concurrently.

A psychiatrist who had contact with Fardon from 1998, stated prior to his sentence completion date in 2003 that:

“Given the nature of Mr Fardon’s personality structure, including its intrinsic system of values, and the fact of his very prolonged institutional life, it is my opinion that a **substantial risk** (our emphasis) exists that Mr Fardon will commit further offences, including offences of a sexual nature upon or in relation to a child under the age of 16 years...”

He went on further to state that Fardon’s assurances that he would not re-offend could not be trusted. Fardon had refused or failed to participate in programs while incarcerated and had been expelled from the Sexual Offender’s Treatment Program after completing only a third of the program.

The two psychiatrists assessing Fardon for the indefinite sentencing Appeal, found that he was at risk of re-offending; one noting that:

“... re-offending is catastrophic for victims, families and the community. While the protection of the community is best served by the rehabilitation of offenders, that is not always possible. The difficulty remains that the protection of the community must be weighed against the imprisonment of a person who has completed his or her sentence and so is effectively to be punished by detention for a crime he or she has not committed and may never commit.”

After the dismissal of two challenges to the legislation (Justice Muir ruled that the legislation was constitutionally valid on 9 July 2003 and on 23 September 2003 the Queensland Court of Appeal found that s8 and s13 of the *Act* were constitutionally valid) the Queensland Attorney General's application for an indefinite detention order was granted on 6 November 2003.

Fardon lodged an Appeal through the High Court challenging the constitutional grounds of the legislation. The basis of Fardon's appeal was that the legislation was unconstitutional as it amounted to double punishment.

On the 2nd October 2004 the High Court of Australia upheld that the continued detention of offenders under the Queensland legislation was constitutional, with six out of the seven High Court judges ruling that the legislation was valid.

Key Debates Around Indefinite Sentencing Legislation

One of the greatest challenges facing our criminal justice system is the at times conflicting goals of ensuring community safety and protection and the rights of individual offenders. When sentencing an offender Courts are asked to determine an appropriate sentence that balances justice, punishment, deterrence and rehabilitation.

In the matter of Fardon, the High Court found that the continued detention of prisoners past the conclusion of their sentence term under *Dangerous Prisoners (Sexual Offenders) Act 2003*, was constitutionally valid as it (a) served a protective purpose, (b) applied rules of evidence and (c) upheld legal safeguards such as the right to review and appeal.

However, the debates around the lawfulness of indefinite sentencing continue. Opponents to the legislation argue that it breaches basic tenants of Australian law and violates the rights of offenders. Debates around indefinite sentencing legislation can be split into four major issues: (1) Impact on the criminal justice system and due process, (2) Violation of human rights, (3) Challenge of predicting risk and (4) Balancing community protection.

(1) Impact on the Criminal Justice System and Due Process

Although the High Court determined that the Queensland legislation was constitutionally valid and did not violate the legal rights to a fair and just system, those opposing indefinite sentencing legislation argue that basic tenants of our justice system are in fact corrupted by such legislation.

It is argued that the principle of due process is compromised as the legislation allows for the continued detention of a person who has already served their sentence without any further crime being committed and without any additional determination of guilt. Specific concerns that

continued detention may be ordered without following the processes ordinarily required for a criminal trial and sentencing (such as requirements of evidentiary proof beyond reasonable doubt, rules of evidence and true judicial discretion) are legitimate and must be addressed.

One of the arguments against this form of legislation is that the threshold of evidential proof falls short of the standard of 'beyond reasonable doubt'. As such it does not reflect the ordinary rules of evidence and in fact requires a Judge to make a decision that is considered 'non-judicial' in nature.

To ensure a fair system and protection against the arbitrary imposition of indefinite sentence, the legislation in Queensland sets a high threshold of probability, requiring the court to be satisfied to a "high degree of probability" that an offender presents as a "serious danger to the community". It is important that the rules of evidence are enforced and that the proof that an offender is likely to reoffend upon release is based on acceptable and cogent evidence and to a high degree of probability. The continued detention of offenders should only occur where there is appropriate expert opinion of risk in line with suitable and accepted criteria. It is crucial that agencies managing high-risk sex offenders are given the appropriate resources to provide courts with all the information they require to ensure a fair and just process in assessing applications for continued detention.

Some opponents argue that indefinite sentencing legislation removes judicial discretion. In an effort to eliminate this concern, Queensland legislation allows for either the continued detention of a prisoner or release on an extended supervision order. While the Attorney-General's representatives petition the court for one or the other, the ultimate decision lies with the Judge.

It may be argued that despite the provisions in the legislation, true judicial discretion is limited as it would be difficult for a Judge to release a prisoner where reports suggest that the prisoner would be a danger if released. However, such decisions, similar to any others made by a Judge, must be made based on the evidence and information before the Court. If the evidence and the recommendations of the reports provided suggest that an offender is of unacceptable risk and should be further detained, the Judge's responsibility is to make a determination based on that information.

Indefinite sentencing legislation must be transparent with the appropriate checks and balances in place to ensure that all offenders are afforded a just process. In addition to ensuring an offender's access to review and appeal, strong procedural guidelines and safe-guards must be built into any legislation that allows for the indefinite detention of sex offenders.

(2) Violation Human Rights

Indefinite sentencing legislation may be considered to infringe upon the human rights of offenders and has been labelled as cruel and unusual punishment. The major issues affecting the basic rights of offenders include: the violation of the principle of proportionality, the question of double punishment, offenders' rights to finality of sentence and opportunities for rehabilitation.

One of the basic principles of sentencing is that an offender should receive a sentence that is proportional to the crime committed and the amount of harm done. The sentencing Judge is charged with determining an appropriate sentence for the offender based on the information

before them at the time of sentencing. The principle of proportionality may be considered to have been violated through continued detention. It is suggested that a person should only be sentenced for the offence they have committed and been found guilty of, not offences that they may commit in the future.

This issue is one that as a community we are grappling with at a larger scale, particularly around terrorism, with debates around the use of preventative detention of suspected terrorists. The use of preventative detention in the area of terrorism differs to the type of legislation we are advocating for. Detention of suspected terrorist is a challenge to our system as it does not require the commission of an offence – for example see the *Terrorism (Preventative Detention) Act 2005*, Qld – whereas indefinite sentencing provides for the ‘continued’ detention of someone who has committed an offence and who is assessed as at an unacceptable risk of reoffending.

Taking victim and community safety into consideration, the principle of proportionality must remain a key component of our legal system. However, it must also be subject to ‘reasonable’ and ‘justifiable’ exceptions. Where an offender’s criminal history and behaviour is such that a clear, unacceptable level of risk is able to be established, an exception to the notion of proportionality must be considered justified in the interests of community safety.

Another fundamental maxim of our legal system is that a person will not be punished twice for the same crime. Many argue that the continued detention of an offender under indefinite sentencing serves as double punishment as the individual has already been convicted and satisfied the sentence imposed by the court.

In response to this concern, it is important to emphasise that indefinite sentencing legislation is a preventative form of detention. The purpose of legislations, such as the *Dangerous Prisoners (Sexual Offenders) Act 2003*, is not punishment for an offence, but the prevention of future offending and the protection of the community. The purpose of this type of legislation must not be to punish the offender, but must be focussed on assuring, as far as possible, the protection of the community.

In the High Court appeal regarding Fardon’s case, the majority Justices found that this legislation was not punitive in nature and that there are situations where individuals are detained for reasons other than punishment and that it depended on whether incarceration could be considered as reasonably necessary to achieve a non-punitive objective.

It may be considered that continued imprisonment of an offender after completion of a sentence might be seen as punishment for the failure to rehabilitate. It is important that all jurisdictions provide offenders with the opportunity to participate in *effective* rehabilitation programs. It is our position that sex offenders should be required to participate in rehabilitation while in custody and be provided with maximum support upon release to protect against reoffending. The majority of victims are not as concerned with offenders being incarcerated as they are with offenders receiving treatment to help reduce the likelihood that others would be harmed.

It has been argued that a prisoner should have a legitimate expectation to be released upon the conclusion of their sentence; that is that offender’s have a right to ‘finality of sentence’. However, it can be said that offenders sentenced for sexual offences are aware of this legislation and the potential for them to be continually detained under it.

It is important to ask whether the community should have a legitimate right to be protected from an individual who has committed a sexual offence, has made little or no attempt to rehabilitate and who is assessed by experts within the field to be an unacceptable risk of reoffending?

There is a need to ensure that the competing rights and interests of the broader community and that of the offender are balanced appropriately and that continuing detention is used to protect children and the community as a priority. Paramount is that the individual rights of the offender should not prevent us as a society from questioning the ethics and rationale of releasing people who we know are at an unacceptable risk of reoffending.

Underlying the arguments around the violation of an offender's basic human rights is the argument that there is a shift from the legal system's focus on ensuring that the "punishment fits the crime" to a focus on a "punishment fitting the offender".

(3) Challenge of Predicting Risk

One of the fundamental questions in respect to risk of sex offenders reoffending is: what do we know about the recidivism rate of this category of offenders? Given the difficulty in detecting and measuring re-offending, claims that child sex offenders pose a high risk of recidivism are difficult to prove.

Difficulties in accurately assessing recidivism rates results in the many discrepancies in rates of re-offending among sex offenders reported by research:

- Smallbone and Wortley (2000) found previous convictions for sexual offences amongst incarcerated child sex offenders of:
 - 10.8% for intra-familial offenders
 - 30.5% for extra-familial offenders
 - 41.1% for "mixed-type" offenders
- Greenberg, Da Silva and Loh (2002) reported an overall recidivism rate of 15.5% for sex offenders
- Hanson (2002) found rates of:
 - 8% for intra-familial child sex offenders
 - 20% for extra-familial child sex offenders
 - 17% for rapists
- Hood, Shute, Feilzer and Wilcox (2002) found recidivism rates of:
 - 0% for intra-familial child sex offenders
 - 26.3% for extra-familial child sex offenders
 - 9.5% for non-stranger rapists
 - 5.3% for stranger rapists
- Lievore (2004) found a variance between 2% and 16% in Australian studies on sex offender recidivism.

Recidivism can only be measured in terms of known offences and what we do know is that only a small percentage of sex offenders are ever charged and convicted. However, it is clear that community fears of child sex offenders are real. Just as real is the incredible amount of damage and harm that is caused by child sex offenders on those they prey upon. As a result, legislative responses need to ensure that the community is safe from those offenders that we do know about and who present as a continued risk.

The question then turns to the validity of assessing risk. Risk assessment is extremely difficult and it is argued that preventative legislation such as indefinite sentencing deprives individuals of their liberty on the basis of what amounts to an “educated guess” and may in fact lead to the detention of people who are in fact not likely to reoffend.

Accurate risk assessment is crucial in making decisions about a sex offender’s level of risk to the public. However, there is no fool-proof method of assessing offending risk. No single instrument or data source in and of itself should be used to make critical decisions that impact on the safety and protection of the community:

- **Clinical risk assessment** involves a judgment by a forensic psychologist or psychiatrist concerning the risk a specific offender poses. This type of assessment involves interviews and/or observation of the offender. The assessment usually involves developed tools or checklists. All known information about the offender's personality and behaviour and the details of the crime itself are considered. The risk factors used in clinical assessment are different for each person assessed and can change over time; including various aspects of a person’s mental health, personality, behaviour, personal history and social skills. These individual characteristics, taken as a whole, give clinicians a picture of the person in question, and a decision about the potential harm they may pose is then made. However, studies indicate that clinicians often come to different conclusions after assessing the same individual. Such findings question the notion of clinical ‘expertise’ in dangerousness prediction, suggesting that the assessment process is arbitrary, and that the fate of an offender is dependant on who conducts the assessment.
- **Actuarial risk assessment tools** focus primarily on static (unchangeable) factors that influence recidivism. Several studies have found that the static risk factor with the strongest influence on general recidivism (all types of criminal offences) is prior contact with the criminal justice or mental health systems. When an offender is assessed using an actuarial tool, their particular characteristics are inventoried and level of risk is determined by the extent to which the individual possesses various risk factors associated with recidivism. The information considered in the assessment process typically includes the offender's education level, employment status, known or suspected mental disabilities, in addition to the individual's criminal history. While these tools generally provide better results than unstructured clinical judgments, the predictive accuracy of these tools is far from perfect.
- **Physiological assessments** can provide an independent and objective means for collecting useful assessment information that is not reliant on an offender’s statement. Although there have been questions about its reliability and validity, including the potential for some individuals to use countermeasures to control some the physiological responses that are measured, physiological tools are becoming increasingly a valuable in the assessment, treatment and supervision of offenders.

Both actuarial risk assessment tools (such as the SONAR [Sex Offender Needs Assessment Rating] and RRASOR [Rapid Risk Assessment for Sexual Offence Recidivism]) and clinical judgement are commonly used in the Australian context. Combining a range of methods provides the most comprehensive analysis of offender’s risk and results in a broad assessment spanning a range of factors from personal traits to environmental contexts.

Assessment of risk is a highly inaccurate science. It has been suggested that psychiatrists “get it wrong almost as often as they get it right”. Accurate risk assessment is crucial in making decisions about a sex offender’s level of risk to the public. However, there is no fool-proof method of assessing offending risk. No single instrument or data source in and of itself should be used to make critical decisions that impact on the safety and protection of the community. The reliability of assessing individual risk is strengthened when a combination of clinical and actuarial measures are used; looking at a combination of static factors based on historical evidence, stable factors based on long-term characteristics and acute factors based on immediate and recent behaviours.

As a community we need to find ways in which to manage sex offenders and respond to those that are clearly a serious risk. In order to keep our communities, and in particular our children, safe and protected from harm, we need to find effective measures to protect our children against those offenders who demonstrate that they are a risk.

Clearly there are some offenders who pose such a danger to the community that they must be kept in prison until their risk of reoffending is minimised. While Courts currently take into account a range of factors at the sentencing stage, including that of community protection, it is unreasonable to expect a sentencing Judge to be able to make assumptions on when an individual, who has committed a sexual offence, will be of ‘acceptable’ risk to release. If we argue that it is difficult for professionals and clinical experts to assess risk, then how can we expect Judges to make this determination with the limited information available at sentencing? Indefinite sentencing legislation allows for offenders to be monitored in terms of their progress while in custody, their responsiveness to treatment and for a full assessment of their level of risk.

In addition, safeguards should be in place to prevent, as far as possible, the potential for predictive error and its impacts. Any indefinite sentencing legislation must include provisions for offenders’ rights to review and appeal.

(4) Balancing Community Protection

Proponents for indefinite legislation are extremely vocal about the community protection goal of these laws. It is suggested by opponents of this type of legislation that there may in fact be more effective means for protecting the community that are less intrusive on the rights of offenders. While indefinite prison sentences can be justified in terms of the criminal justice goal of incapacitation to ensure community protection from a known risk, it is argued that current measures including extended supervision orders and multi-agency support are more viable opportunities for providing for the protection of the community.

Certainly, balancing the rights of individual offenders and community protection is difficult and community protection must also encompass prevention and intervention programs and structures that support offenders to not reoffend upon release.

There is no question that offenders, as individuals, have rights, but the rights of the community to safety and protection from those we know pose an unacceptable risk is surely greater. Philosophical debates around individual versus community rights are across many aspects of our daily life, from the smokers right to smoke in public through to the rights of those detained under mental health orders to sex offenders who pose an ongoing risk to community members. At some

point we, as a community, need to put the best interests of our vulnerable members, our children before the rights of those who have harmed them.

Some argue that continual detention of offenders assessed as an unacceptable risk would result in great financial cost to the prison system. However, in 2007 the Queensland Minister for Corrective Services, in response to a question from the Opposition, stated that under the *Dangerous Prisoners (Sexual Offenders) Act* it costs more to supervise dangerous sex offenders in the community than it does to keep them in prison. In addition, if cost is considered a factor, a cost-benefit must also take into consideration the costs of reoffending.

We would argue that cost should not be a factor. We need to focus on what will best serve community safety.

Despite arguments that indefinitely detaining offenders gives a false sense of security and community protection, this type of legislation provides the community with a real sense of safety and of a system that is focussed on protecting and respecting the community. As it stands there is an increasing feeling that the criminal justice system is out of touch with community expectations and focuses on the offender, ignoring the rights of victims. As a community we need to get serious about responding to sexual offenders and ensuring that where there is a known risk, we protect our communities from these.

The fundamental truth is that we will never be able to protect all children from sexual assault despite our collective best efforts. However, we can bring about huge improvements to the current situation by dealing with the realities of the issue and beginning to put the best interests of children and victims first. Indefinite sentencing legislation is not a response for all offenders. The response should be targeted at those who pose a serious risk to children and the community more broadly. As such, targeting resources towards high risk offenders is surely a useful allocation of the limited correctional resources.

Summary

Clearly there are some offenders who pose such a danger to the community that they must be kept in prison until their risk of reoffending is minimised. It is unreasonable to expect a Judge at the sentencing stage to assess when such individuals will be safe for release. Indefinite sentencing legislation allows for offenders to be monitored in terms of their progress while in custody, their responsiveness to treatment and for a full assessment of their level of risk.

Underpinning all of the arguments against indefinite sentencing is the argument that such legislation violates the individual rights of offenders. There is no question that every human being has fundamental rights, however perhaps we need to question whether as a society we consider individual rights above the rights and liberties of the community as a whole? Are our human rights charters necessarily absolute or are they subject to reasonable limitations.

The Woods Royal Commission represented the most exhaustive and comprehensive study incorporating the very latest research available from around the globe on this subject. It concluded that all sex offenders constitute a real risk to children and **that this risk is lifelong**. We need to find appropriate ways to reduce this risk and ensure community safety.

Community members are entitled to be protected. If this protection is attainable through the legislation of indefinite sentencing laws, then surely the use of continued detention is justifiable.