

## THE PREVENTIVE DETENTION OF SEX OFFENDERS: LAW AND PRACTICE

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### I INTRODUCTION

In Australia, as in many other countries, there have long existed various legislative schemes governing ‘dangerous’ offenders, persons considered to be incapable of controlling their sexual instincts and ‘habitual’ criminals.<sup>1</sup> These legislative schemes have been cyclical, falling in and out of favour in response to community concerns and governmental ‘law and order’ policies.<sup>2</sup>

As well as indefinite detention laws for high risk offenders in general, Queensland and South Australia have specific schemes for the indefinite detention of sex offenders. In addition, over the past decade, post-sentence preventive detention and supervision schemes for sex offenders have been enacted in four Australian states as well as in the Northern Territory.

Hundreds of police and corrections officers, social workers, lawyers, psychologists and psychiatrists now work within the preventive detention and

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1 For further consideration and analysis, see Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press, 2009) ch 1; Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014). For an analysis of the regimes operating in Germany, New Zealand, the United Kingdom and the United States, see Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013).

2 See generally John Pratt, *Governing the Dangerous: Dangerousness, Law and Social Change* (Federation Press, 1997); McSherry, *Managing Fear*, above n 1; Mark Finnane and Susan Donkin, ‘Fighting Terror with Law? Some Other Genealogies of Pre-emption’ (2013) 2(1) *International Journal for Crime and Justice* 3.

community supervision systems that have developed to manage these prisoners and supervisees. As the Queensland regime enters its 11<sup>th</sup> year of operation, there is considerable interest in how these regimes actually operate in practice, and what each jurisdiction can learn from the experience of others.

This article examines both the law and practice of preventive detention of those considered to be at high risk of reoffending in Australia. It draws on the results of empirical research on the views of those involved in implementing post-sentence preventive detention regimes for sex offenders. The first half of the article provides an overview of current Australian laws on indefinite and preventive detention, outlining three regimes: indefinite detention for 'dangerous offenders', special indefinite detention for sex offenders, and post-sentence preventive detention and supervision. It also examines the constitutionality of, and judicial responses to, these schemes.

The second half of the article focuses on the practice of post-sentence preventive detention of sex offenders, presenting the views of professionals who work in the area on what they think are the strengths and weaknesses of these schemes. These views reflect 86 in-depth interviews with police officers, corrective services officials, social workers, lawyers, psychologists and psychiatrists experienced in the operation of the schemes in Queensland, Western Australia and New South Wales. The interviews were conducted as part of an Australian Research Council Discovery Project (DP0877171) entitled *Preventive Detention of High Risk Offenders: The Search for Effective and Legitimate Parameters*. The objective of the interviews was to determine how post-sentence prevention and supervision sex offender schemes are working in practice in the states of Queensland, Western Australia and New South Wales. In particular, this article analyses interviewees' perspectives concerning treatment, resources, accommodation, monitoring of offenders, and breaches of supervision orders.

It is argued that while the legal parameters of preventive detention schemes may be settled, members of the judiciary have cautioned that they must be used sparingly and there is evident judicial reluctance to impose indefinite sentences. Most importantly, the views expressed by those implementing post-sentence preventive detention and supervision schemes reveal that there are serious concerns about their operation.

## II THE LEGAL FRAMEWORK

### A Indefinite Detention Orders at the Time of Sentencing

Indefinite detention laws have existed in various forms in Australia for over a century. Such laws allow the judge to take into account the risk the offender poses to the community when determining the offender's sentence. A court can order an offender to serve an indefinite sentence on its own initiative, or after an application from the prosecution. The appropriateness of an indefinite sentence can be reviewed at various stages.

The power to pass an indefinite sentence on offenders who are assessed as posing a danger to society exists in the Northern Territory, Queensland,

Tasmania, Victoria and Western Australia.<sup>3</sup> Some of the provisions specifically refer to violent offenders and sex offenders, while others are broader in their scope.

Under section 65(2) of the *Sentencing Act 1995* (NT), the Northern Territory Supreme Court 'may sentence an offender convicted of a violent offence or violent offences to an indefinite term of imprisonment'. Similarly, in Tasmania, a judge may declare an offender to be a 'dangerous criminal', and thus subject to indefinite detention, 'if the offender has been convicted of a crime involving violence or an element of violence', and if the offender has at least one previous conviction for such a crime.<sup>4</sup>

In Queensland, a court may impose an indefinite sentence on offenders considered to be 'a serious danger to the community', provided the offence is of sufficient severity.<sup>5</sup> In Western Australia, the Supreme Court or District Court may order an indefinite sentence in circumstances where the court sentences an offender for a serious (indictable) offence to a term of imprisonment, does not suspend that imprisonment and does not make an order for parole eligibility.<sup>6</sup> Under section 18A of the *Sentencing Act 1991* (Vic), an adult offender who is convicted of a 'serious offence' may be sentenced to an indefinite term of imprisonment.

Similarities exist between jurisdictions as to the criteria to be applied. For example, in Queensland, in order to impose an indefinite sentence the court must be satisfied that the offender is 'a serious danger to the community' because of the offender's 'antecedents, character, age, health or mental condition', the 'severity of the offence' and 'any special circumstances'.<sup>7</sup> 'In determining whether the offender is a serious danger to the community', the court must also 'have regard to whether the nature of the offence is exceptional', as well as other factors including, importantly, 'the risk of serious physical harm to members of the community if an indefinite sentence were not imposed'.<sup>8</sup> A similar list of factors appears in the Northern Territory legislation.<sup>9</sup>

In Tasmania, before a declaration can be made that the offender is a dangerous offender, the judge must be of the opinion that 'the declaration is warranted for the protection of the public', having regard to the 'nature and circumstances' of the offences, the offender's 'antecedents or character', 'any

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3 *Sentencing Act 1995* (NT) s 65; *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act 1991* (Vic) s 18A; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1995* (WA) s 98.

4 *Sentencing Act 1997* (Tas) s 19(1).

5 *Penalties and Sentences Act 1992* (Qld) s 163, sch 2.

6 *Sentencing Act 1995* (WA) s 98(1).

7 *Penalties and Sentences Act 1992* (Qld) s 163(3)(b).

8 *Penalties and Sentences Act 1992* (Qld) s 163(4).

9 *Sentencing Act 1995* (NT) s 65(9).

medical or other opinion' and 'any other matter that the judge considers relevant'.<sup>10</sup>

In Victoria, the judge must be 'satisfied, to a high degree of probability' that 'the offender is a serious danger to the community' because of:

- (a) his or her character, past history, age, health or mental condition; and
- (b) the nature and gravity of the serious offence; and
- (c) any special circumstances.<sup>11</sup>

In Western Australia, the court must be 'satisfied on the balance of probabilities that when the offender would otherwise be released from custody ... he or she would be a danger to society, or a part of it' due to one or more of the following factors:

- (a) the exceptional seriousness of the offence;
- (b) the risk that the offender will commit other indictable offences;
- (c) the character of the offender and in particular –
  - (i) any psychological, psychiatric or medical condition affecting the offender;
  - (ii) the number and seriousness of other offences of which the offender has been convicted;
- (d) any other exceptional circumstances.<sup>12</sup>

As noted in Part III below, these provisions are rarely used.

## **B Special Indefinite Detention Schemes for Sex Offenders<sup>13</sup>**

Queensland and South Australia have special indefinite detention schemes for sex offenders which enable the relevant Attorney-General to apply for an order for continuing detention during the term of imprisonment. These schemes thus operate in a similar way to post-sentence continuing detention schemes, which are discussed in Part II(C) below.

In Queensland, the special provisions operate alongside the power to order an indefinite sentence under the *Penalties and Sentences Act 1992* (Qld). A person convicted of 'an offence of a sexual nature,' committed against a child under the age of 16, may be detained indefinitely upon sentencing if there is evidence from two medical practitioners, one of whom must be a psychiatrist, that the offender is 'incapable of exercising proper control over the offender's sexual instincts', and the judge makes a declaration to this effect.<sup>14</sup> Additionally, where the Attorney-General is supplied with such evidence in relation to 'any person who is

10 *Sentencing Act 1997* (Tas) s 19(2).

11 *Sentencing Act 1991* (Vic) s 18B(1).

12 *Sentencing Act 1995* (WA) s 98(2).

13 Part II(B) draws on Bernadette McSherry, Patrick Keyzer and Arie Freiberg, *Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development* (Report to the Criminology Research Council, December 2006).

14 *Criminal Law Amendment Act 1945* (Qld) ss 18(1)–(3).

serving a sentence of imprisonment' for a sexual offence (whether committed against a minor or not), and where the inability to control the sexual instinct is capable of being treated, and detention would be desirable for 'the purposes of such treatment', the Attorney-General can apply to the Supreme Court of Queensland for a declaration that the offender be detained until the Governor in Council decides the offender can be released.<sup>15</sup> This latter scheme does not apply to those who are capable of controlling their instincts, but choose not to, nor does it apply to those whose 'sexual instinct' is considered untreatable.<sup>16</sup> In 2003, Queensland's then Attorney-General and Minister for Justice described this scheme as 'archaic and out of touch with community standards'.<sup>17</sup>

In 2005, the South Australian legislature extended a similar scheme so that it now applies in that State not only to those who are incapable of controlling their sexual instincts, but also to those who are *unwilling* to control such instincts.<sup>18</sup> This law permits the Attorney-General to apply to the Supreme Court of South Australia for an offender already serving a sentence to be detained indefinitely once that sentence has expired.<sup>19</sup> However, in practice, applications tend to be made after conviction and prior to sentencing to enable the Supreme Court to deal with the question of sentence at the same time as it addresses the question of preventive detention.

### C Post-Sentence Preventive Detention and Supervision of Sex Offenders and the Standard of Proof Required

In 2003, Queensland introduced a new scheme for post-sentence detention in prison and continuing supervision of sex offenders.<sup>20</sup> Western Australia, New South Wales, Victoria and the Northern Territory followed.<sup>21</sup> The New South Wales legislation has been amended by the *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW) such that it now relates to 'high risk sex offenders and high risk violent offenders', but the main features of the scheme remain the same.<sup>22</sup>

In general, post-sentence preventive detention schemes enable an application to be made to a specified court, prior to the offender completing a finite sentence, for an order for continuing detention in prison or for continuing supervision in

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15 *Criminal Law Amendment Act 1945* (Qld) ss 18(4)–(5) (emphasis added).

16 Explanatory Memorandum, *Dangerous Prisoners (Sexual Offenders) Bill 2003* (Qld) 2.

17 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General and Minister for Justice).

18 Section 23 of the *Criminal Law (Sentencing) Act 1988* (SA) was cast in similar terms to the Queensland provision, but this was amended by the *Statutes Amendment (Sentencing of Sex Offenders Act) 2005* (SA).

19 *Criminal Law (Sentencing) Act 1988* (SA) ss 23(2a), (4).

20 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

21 *Dangerous Sexual Offenders Act 2006* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Serious Sex Offenders Act 2013* (NT).

22 *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW) sch 1, ss 1, 3.



the community. The court must consider risk assessment testimony from psychiatrists (and/or psychologists) concerning whether or not the offender poses an unacceptable risk of reoffending. Supervision orders may contain a number of conditions including that the offender must report to and receive visits by certain specified individuals, must obey any curfews relating to leaving his or her residence at certain times, or must not commit an offence or move to a new address without prior written consent.<sup>23</sup> The *Dangerous Prisoners (Sexual Offenders) Amendment Act 2007* (Qld) and the *Dangerous Sexual Offenders Amendment Act 2012* (WA) introduced provisions enabling the electronic monitoring of sex offenders.<sup>24</sup>

An important and troubling feature of these preventive detention determinations is that the standard of proof that applies is not the criminal standard of beyond a reasonable doubt, despite the result in many instances being continuing detention in prison. Section 7(2) of the Western Australian Act, for example, requires the Director of Public Prosecutions to adduce ‘acceptable and cogent evidence’ and satisfy the court ‘to a high degree of probability’ that there is an unacceptable risk that ‘if the person concerned were not subject to a continuing detention order or a supervision order, the person would commit a serious sexual offence’.<sup>25</sup> In determining risk, the legislation mandates the court to consider reports from two psychiatrists<sup>26</sup> who have assessed the offender as well as ‘any other medical, psychiatric, psychological, or other assessment’.<sup>27</sup> Hence the focus is on opinion evidence rather than the evidence of witnesses. This means that traditional evidentiary issues in criminal trials such as problems of hearsay can be bypassed.

The Queensland, New South Wales and Northern Territory laws similarly require ‘a high degree of probability’ that the offender is a serious danger to the community based on an unacceptable risk of reoffending.<sup>28</sup> What a ‘high degree of probability’ actually means has been the subject of some judicial interpretation. In *Director of Public Prosecutions (WA) v D*,<sup>29</sup> Hasluck J described this as ‘more than a finding on the balance of probabilities, but

23 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 16; *Dangerous Sexual Offenders Act 2006* (WA) s 18; *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 11; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 16–17; *Serious Sex Offenders Act 2013* (NT) ss 18–19.

24 *Dangerous Prisoners (Sexual Offenders) Amendment Act 2007* (Qld) s 3A, inserting *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 16A; *Dangerous Sexual Offenders Amendment Act 2012* (WA) s 6, inserting *Dangerous Sexual Offenders Act 2006* (WA) ss 19A, 19C.

25 *Dangerous Sexual Offenders Act 2006* (WA) s 7(1).

26 *Dangerous Sexual Offenders Act 2006* (WA) ss 14(2)(a), 37.

27 *Dangerous Sexual Offenders Act 2006* (WA) s 7(3)(b).

28 *Crimes (Serious Sex Offenders) Act 2006* (NSW) ss 9(2), 17(2)–(3); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 13(1)–(3)(b), 30(1)–(2)(b); *Dangerous Sexual Offenders Act 2006* (WA) s 7(1)–(2)(b); *Serious Sex Offenders Act 2013* (NT) ss 6, 7(1).

29 [2010] WASC 49 [13].

less than a finding of proof beyond reasonable doubt'.<sup>30</sup> This interpretation had previously been accepted by Steytler P and Buss JA in *Director of Public Prosecutions (WA) v GTR*.<sup>31</sup> Similarly, the New South Wales Court of Appeal in *Cornwall v Attorney-General (NSW)* stated:

The expression 'a high degree of probability' indicates something 'beyond more probably than not'; so that the existence of the risk, that is the likelihood of the offender committing a further serious sex offence, does have to be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt.<sup>32</sup>

However, the New South Wales legislation has since been amended. Schedule 1 of the *Crimes (Serious Sex Offenders) Amendment Act 2010* (NSW) inserted a new section 17(3A) into the Act. This section states:

The Supreme Court is not required to determine that the risk of a person committing a serious sex offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious sex offence.

This sets a lower standard of proof than required previously by the courts. Similarly, the Victorian Parliament, after a series of cases restricting the standard of proof,<sup>33</sup> passed the *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) which introduced subsection (2B) into the then section 11 of the *Serious Sex Offenders Monitoring Act 2005* (Vic). The new subsection states:

For the avoidance of doubt, subsection (1) [setting out the standard of proof] permits a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.

Later in 2009, the Victorian scheme of extended supervision orders for sex offenders was replaced by a scheme of both post-sentence detention and supervision. Sections 35(4) and 36(2) of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) now state that 'an offender poses an unacceptable risk of committing a relevant offence *even if the likelihood that the offender will commit a relevant offence is less than a likelihood of more likely than not*' (emphasis added). While there is no set standard of proof other than requiring the Supreme Court to be 'satisfied' there is an 'unacceptable risk' of reoffending,<sup>34</sup> it is clear that the Victorian government intended that evidence of risk be easily proved.<sup>35</sup>

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30 Ibid.

31 (2008) 38 WAR 307, 317–18 [34].

32 [2007] NSWCA 374 [21].

33 For a full analysis of these cases, see McSherry, *Managing Fear*, above n 1, 160–1.

34 See, eg, *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 35(1).

35 As to the need for expert evidence on risk to be 'cogent', see Ian R Coyle, 'The Cogency of Risk Assessments' (2011) 18 *Psychiatry, Psychology and Law* 270, 271, 279–80.

### III THE CONSTITUTIONALITY OF AND JUDICIAL RESPONSES TO PREVENTIVE DETENTION SCHEMES

Preventive detention schemes have been accepted as constitutional in Australia, but judges have cautioned that they should be used sparingly and with great care.

In *R v Moffatt*,<sup>36</sup> the Victorian Court of Appeal confirmed the legality of the Victorian indefinite sentence provisions, noting that the ability to pass such a sentence was tied to a finding of guilt for an offence, and that a person was deprived of liberty because of what that person had done rather than because of what he or she *might* do.<sup>37</sup> However, Hayne JA also emphasised that the power to order indefinite imprisonment should be exercised sparingly.<sup>38</sup>

The High Court has recently upheld the constitutionality of indefinite detention under section 18 of the *Criminal Law Amendment Act 1945* (Qld).<sup>39</sup> The Queensland Prisoners' Legal Service brought a 'special case' to the High Court on behalf of two prisoners, Edward Pollentine and Errol George Radan, both of whom had been detained for 30 years. It was argued that section 18 was repugnant to, or incompatible with, the institutional integrity of the District Court, thereby infringing Chapter III of the *Constitution*, which sets out the powers of the judicature. While the High Court upheld the validity of section 18, the majority reaffirmed that 'great care must be exercised in seeking and considering the making of an order for indefinite imprisonment'.<sup>40</sup>

While indefinite detention provisions have thus been held to involve a valid exercise of sentencing powers, the High Court has signalled that a cautious approach should be taken to the evidence upon which orders for indefinite detention are based.<sup>41</sup> In *McGarry v The Queen*,<sup>42</sup> the High Court discussed the difficulties in determining whether an offender was 'a danger to society, or a part of it',<sup>43</sup> concluding that more was needed than a risk – even a significant risk – that an offender will reoffend before indefinite detention can be ordered.<sup>44</sup> Judicial statements about the need to be cautious regarding evidence of risk contrast with the legislative amendments outlined above in New South Wales and

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36 [1998] 2 VR 229.

37 Ibid 251 (Hayne JA).

38 Ibid 255. See also Bernadette McSherry, 'High Risk Offenders: Continued Detention and Supervision Options' (Issues Paper, Sentencing Advisory Council, August 2006) 33.

39 *Pollentine v Bleijie* (2014) 311 ALR 332.

40 Ibid 337 [22] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

41 See, eg, *Thompson v The Queen* (1999) 165 ALR 219, 220 [2] (Gaudron and Hayne JJ).

42 (2001) 207 CLR 121.

43 *Sentencing Act 1995* (WA) s 98(2).

44 *McGarry v The Queen* (2001) 207 CLR 121, 129 [21] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). For a discussion of this case, see Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94, 97–9. See also McSherry, Keyzer and Freiberg, above n 13, 22.



Victoria authorising courts to detain offenders in prison by reference to evidence that only reaches a low threshold of proof.

It appears that judges are reluctant to use indefinite detention powers. For example, in Victoria between 1993 and 2006, only four prisoners had ‘received orders for indefinite detention, one of which was amended to a fixed sentence on appeal, leaving three offenders still serving indefinite sentences’.<sup>45</sup> A study of the use of serious offender provisions in Victoria by Elizabeth Richardson and Arie Freiberg, which examined 553 relevant cases from the County and Supreme Courts for the period 1994–2002, found that disproportionately long sentences were imposed in only 11 cases.<sup>46</sup> Six of these cases were overturned on appeal, three of them specifically because of the disproportionality of the sentence.<sup>47</sup>

In relation to post-sentence preventive detention, the early signs were that such a scheme was unconstitutional. In *Kable v Director of Public Prosecutions (NSW)*,<sup>48</sup> a majority of the High Court struck down New South Wales legislation that empowered the Supreme Court of New South Wales to order the preventive detention of Gregory Wayne Kable, who had been convicted of the manslaughter of his estranged wife and who had allegedly made threats against her family. In that case, one of the majority, Gummow J, observed:

whilst imprisonment pursuant to Supreme Court order is punitive in nature, it [was] not [made] consequent upon any adjudgment by the Court of criminal guilt. Plainly ... such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction ... [N]ot only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree.<sup>49</sup>

The majority of the High Court in *Kable* struck down the New South Wales legislation on the basis that it had imposed functions that were incompatible with the exercise of federal judicial power by the Supreme Court of New South Wales, a court capable of exercising judicial power of the Commonwealth.<sup>50</sup>

However, in hearing a subsequent challenge to Queensland’s sex offender legislation in *Fardon v Attorney-General (Qld)*,<sup>51</sup> the majority of the High Court distinguished *Kable* partly on the basis that the legislation in that matter was aimed at one person, whereas the Queensland scheme refers to a class of prisoners, namely serious sex offenders.<sup>52</sup> The majority also dismissed an argument that the legislation was unconstitutional because it inflicted double

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45 McSherry, ‘High Risk Offenders’, above n 38, 15.

46 Elizabeth Richardson and Arie Freiberg, ‘Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria’ (2004) 4 *Criminology and Criminal Justice* 81, 91.

47 Ibid.

48 (1996) 189 CLR 51 (*Kable*).

49 Ibid 132.

50 Ibid 107 (Gaudron J), 109 (McHugh J), 134 (Gummow J).

51 (2004) 223 CLR 575 (*Fardon*).

52 Ibid 602 [44] (McHugh J), 591 [16] (Gleeson CJ).

punishment, holding that detention in prison is not correctly characterised as punishment if it is ordered for non-punitive purposes.<sup>53</sup> Justices Callinan and Heydon stated that ‘the [Act] ... is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective rather than a punitive enactment’.<sup>54</sup>

The majority of the High Court also held that there were sufficient safeguards in place to ensure the Supreme Court was exercising its judicial discretion in making preventive detention and supervision orders.<sup>55</sup>

Chief Justice Gleeson was careful to point out that the High Court had no jurisdiction to consider policy issues concerning the legislation:

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.<sup>56</sup>

The decision of the majority of High Court Justices to focus on a ‘relatively narrow [constitutional] point’,<sup>57</sup> rather than canvass wider policy issues, contrasts with Justice Kirby’s dissenting judgment which was notable in considering the human rights implications of post-sentence preventive detention. Justice Kirby’s position has been comprehensively discussed elsewhere.<sup>58</sup>

It is notable also that the majority approach contrasts with recent jurisprudence by the European Court of Human Rights and Germany’s Federal Constitutional Court.<sup>59</sup> For example, in *Haidn v Germany*,<sup>60</sup> the European Court of Human Rights held that the applicant’s post-sentence preventive detention breached his right to liberty under article 5 of the *European Convention on*

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53 Ibid 592 [20] (Gleeson CJ), 597 [34] (McHugh J), 610 [74] (Gummow J), 654 [216]–[217] (Callinan and Heydon JJ). For a summary of the appellant’s arguments advanced in this case, see Patrick Keyzer, Cathy Pereira and Stephen Southwood, ‘Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues’ (2004) 11 *Psychiatry, Psychology and Law* 244. For an analysis of the High Court judgment, see McSherry, ‘High Risk Offenders’ above n 38; Patrick Keyzer, ‘Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?’ (2008) 30 *Sydney Law Review* 101.

54 *Fardon* (2004) 223 CLR 575, 654 [217].

55 Ibid 595–6 [34] (McHugh J), 655 [219] (Callinan and Heydon JJ).

56 Ibid 586–7 [3]. See also Bernadette McSherry, ‘Sex Drugs and “Evil” Souls: The Growing Reliance on Preventive Detention Regimes’ (2006) 32 *Monash University Law Review* 237, 243; McSherry, Keyzer and Freiberg, above n 13, 41.

57 *Fardon* (2004) 223 CLR 575, 583 [3] (Gleeson CJ).

58 McSherry, *Managing Fear*, above n 1.

59 The following analysis of the jurisprudence of the European Court of Human Rights and Germany’s Federal Constitutional Court draws on McSherry, *Managing Fear*, above n 1, 183–4.

60 (European Court of Human Rights, Chamber, Application No 6587/04, 13 January 2011).

*Human Rights*.<sup>61</sup> The Court focused on the fact that the detention in prison had been ordered retrospectively and thus was not foreseeable. The Court stated that ‘in order to be “lawful”, the detention must conform to the substantive and procedural rules of national law, which must, moreover, be of a certain quality and, in particular, must be foreseeable in its application, in order to avoid all risk of arbitrariness’.<sup>62</sup>

Following this case and a series of other rulings by the European Court of Human Rights,<sup>63</sup> Germany’s Federal Constitutional Court, the Bundesverfassungsgericht (‘BVerfG’) reconsidered Germany’s system of preventive detention in 2011.<sup>64</sup> Four applicants relied on the European Court of Human Rights decisions, arguing that the provisions of the German Constitution (‘Basic Law’)<sup>65</sup> should be interpreted in the light of this jurisprudence. They argued that the orders for preventive detention contravened the fundamental right to liberty protected under article 2(2) in conjunction with article 104(1) of the Basic Law.<sup>66</sup>

The BVerfG ‘allowed all four complaints’ and concluded that the orders had breached the applicants’ right to liberty.<sup>67</sup> The Court clarified that the Basic Law should be interpreted in a manner compatible with international law. The *European Convention on Human Rights* and the judgments of the European Court of Human Rights were viewed as providing interpretative guidance in relation to the Basic Law.<sup>68</sup>

The BVerfG declared the preventive detention provisions were unconstitutional, but that they could remain until the entry into force of new legislation to be enacted prior to 31 May 2013. The BVerfG did not declare *all* forms of preventive detention unconstitutional, but held that preventive detention

61 Ibid [88], [90], [95], [97]. See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

62 *Haidn v Germany* (European Court of Human Rights, Chamber, Application No 6587/04, 13 January 2011) [96].

63 *M v Germany* (European Court of Human Rights, Chamber, Application No 19359/04, 17 December 2009); *Kallweit v Germany* (European Court of Human Rights, Chamber, Application No 17792/07, 13 January 2011); *Schummer v Germany [No 1]* (European Court of Human Rights, Chamber, Application Nos 27360/04 and 42225/07, 13 January 2011).

64 Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2365/09, 4 May 2011 [BVerfG trans; *English Translation of the Judgment of the Second Senate of 4 March 2011* (2011) <[http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504\\_2bvr236509en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html)>].

65 *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany].

66 Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2365/09, 4 May 2011 [BVerfG trans; *English Translation of the Judgment of the Second Senate of 4 March 2011* (2011) A.III].

67 Christopher Michaelsen, “From Strasbourg with Love”: Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights’ (2012) 12 *Human Rights Law Review* 148, 163, citing BVerfG [German Constitutional Court], 2 BvR 2365/09, 4 May 2011 [86]–[94].

68 Michaelsen, above n 67, 163, citing BVerfG [German Constitutional Court], 2 BvR 2365/09, 4 May 2011 [89]–[91].

could only be justified if it is subject to a strict review of proportionality and if strict requirements are satisfied.<sup>69</sup> As Hans-Jörg Albrecht points out, these decisions mean that preventive detention ‘can be tolerated only under the condition that preventive detention is implemented in a way differing significantly from the implementation of prison sentences’.<sup>70</sup> The BVerfG stressed that the underlying rationale for preventive detention is the minimisation of danger through a therapeutic regime aimed at reducing the deprivation of liberty to that which is absolutely necessary.<sup>71</sup> The Court, therefore, called upon the legislature to develop a ‘liberty-oriented overall concept of preventive detention aimed at therapy’.<sup>72</sup>

The BVerfG thus took a very different approach to post-sentence preventive detention to the majority of High Court Justices in *Fardon*. While post-sentence preventive detention schemes are constitutional in Australia, judges have tended to shy away from using preventive detention in prison in lieu of community supervision schemes. In *Attorney-General (Qld) v Francis*<sup>73</sup> the Queensland Court of Appeal stated:

If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the [Queensland] Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.<sup>74</sup>

Despite the constitutionality of post-sentence preventive detention schemes in Australia, they continue to raise serious concerns about human rights. There is continuing debate about the human rights implications of legislation that authorises post-sentence reimprisonment, particularly in light of the decision by the United Nations Human Rights Committee that the Queensland and New South Wales schemes breach the prohibition on arbitrary detention under article

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69 Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2365/09, 4 May 2011 [BVerfG trans; *English Translation of the Judgment of the Second Senate of 4 March 2011* (2011) C.1.2(a)].

70 Hans-Jörg Albrecht, ‘The Incapacitation of the Dangerous Offender: Criminal Policy and Legislation in the Federal Republic of Germany’ in Marijke Malsch and Marius Duker (eds), *Incapacitation: Trends and New Perspectives* (Ashgate Publishing, 2012) 39, 52.

71 Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2365/09, 4 May 2011 [BVerfG trans; *English Translation of the Judgment of the Second Senate of 4 March 2011* (2011) C.1.2.dd.3].

72 Michaelsen, above n 67, 163.

73 [2007] 1 Qd R 396.

74 Ibid 405 [39] (The Court).

9 of the *International Covenant on Civil and Political Rights*.<sup>75</sup> On 6 September 2011, the Australian government filed a five-page document rejecting the Human Rights Committee's view that there were less restrictive means available to achieve the purposes of the New South Wales and Queensland legislation other than detention in prison.<sup>76</sup> Darren O'Donovan and Patrick Keyzer have described these communications and the Australian government's response as providing

a stark example of what may be termed normative dissension between an international body and a nation state, illustrating the dynamics of 'decoupling', where a state effectively separates its international legal commitments from practical implementation. ... [E]ven rich, developed, liberal democracies can pursue a policy of deliberate and persistent non-compliance. Ultimately, access to international justice in this context is meaningless if the parties to international human rights instruments fail to comply.<sup>77</sup>

Notwithstanding criticisms of the Australian government's response to its international human rights obligations in this area, it appears unlikely that there will be any shift in approach. However, it may be noted that Atkinson J of the Queensland Supreme Court stated in a footnote to her judgment in *Attorney-General (Qld) v Waghorn*<sup>78</sup> that the decision of the United Nations Human Rights Committee in *Fardon v Australia* 'serves to emphasise the respect for human rights that ought be applied by this court when giving effect to the

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75 Human Rights Committee, *Views: Communication No 1629/2007*, 98<sup>th</sup> sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) ('*Fardon v Australia*') 8; Human Rights Committee, *Views: Communication No 1635/2007*, 98<sup>th</sup> sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010) ('*Tillman v Australia*'). On this point see, eg, McSherry, *Managing Fear*, above n 1, ch 7; Patrick Keyzer, 'Preventive Detention: Asking the Fundamental Questions' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 1, 5; Bernadette McSherry 'Post-sentence Incapacitation of Sex Offenders and the Ethics of Risk Assessment' in Marijke Malsch and Marius Duker (eds), *Incapacitation: Trends and New Perspectives* (Ashgate, 2012) 77; Ian Freckelton and Patrick Keyzer, 'Indefinite Detention of Sex Offenders and Human Rights: The Intervention of the Human Rights Committee of the United Nations' (2010) 17 *Psychiatry, Psychology and Law* 345; Patrick Keyzer, 'The United Nations Human Rights Committee's Views about the Legitimate Parameters of the Preventive Detention of Serious Sex Offenders' (2010) 34 *Criminal Law Journal* 283; Patrick Keyzer, 'The International Human Rights Parameters for the Preventive Detention of Serious Sex Offenders' in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 25. See *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

76 Australian Government, *Response of the Australian Government to the Views of the Committee in Communication No. 1635/2007 Tillman v Australia and Communication No. 1629/2007 Fardon v Australia* (Communication to the Human Rights Committee, September 2011), 3–4 <[www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/FardonvAustralia-AustralianGovernmentResponse.pdf](http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/FardonvAustralia-AustralianGovernmentResponse.pdf)>. See also Bernadette McSherry, 'Throwing Away the Key: The Ethics of Risk Assessment for Preventive Detention Schemes' (2014) 21 *Psychiatry, Psychology and Law* 779, 784–5.

77 Darren O'Donovan and Patrick Keyzer, "'Visions of a Distant Millennium'? The Effectiveness of the UN Human Rights Petition System' in Patrick Keyzer, Vesselin Popovski and Charles Sampford (eds), *Access to International Justice* (Routledge, 2015) 148, 148.

78 [2010] QSC 183.



[Queensland legislation]’.<sup>79</sup> She reiterated this point in *Attorney-General (Qld) v Beattie*.<sup>80</sup>

It should also be noted that supervision orders can also involve substantial breaches of human rights, particularly in Queensland and Victoria where supervision ‘in the community’ may take place within a special unit housed within the grounds of a prison.<sup>81</sup> These human rights issues have been canvassed elsewhere.<sup>82</sup>

Ultimately, as Mark Finnane and Susan Donkin have pointed out, ‘the judiciary has been reluctant to impose detention in anticipation of future misconduct but has also been reluctant to interfere with such detention when mandated by statute’.<sup>83</sup>

#### IV PRACTICAL PERSPECTIVES CONCERNING POST-SENTENCE PREVENTIVE DETENTION AND SUPERVISION SCHEMES<sup>84</sup>

While the law relating to preventive detention schemes appears to be settled, there has been relatively little research carried out as to what professionals involved in the day-to-day operation of these schemes think about them. A qualitative study was therefore devised to ascertain what professionals think are the strengths and weaknesses of post-sentence sex offender preventive detention schemes operating in three states.

Eighty-six semi-structured interviews were conducted in Queensland, Western Australia and New South Wales over a two-and-a-half year period with psychiatrists, psychologists, social workers, former corrective services officials, lawyers and police officers who have firsthand experience with the operation of the schemes in these jurisdictions. Because the project was focused on those who work with the schemes, victims or representatives of victim groups were not included in the interviews.

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79 Ibid 2 n 1.

80 [2010] QSC 217, 2.

81 See, eg, Patrick Keyzer and Ian Coyle, ‘Reintegrating Sex Offenders into the Community: Queensland’s Proposed Reforms’ (2009) 34 *Alternative Law Journal* 27, 28; McSherry, ‘Throwing Away the Key’, above n 76, 783–4. For perspectives on the operation of preventive detention schemes, see Patrick Keyzer and Bernadette McSherry, ‘The Preventive Detention of “Dangerous” Sex Offenders in Australia: Perspectives at the Coalface’ (2013) 2 *International Journal of Criminology and Sociology* 296.

82 Freckelton and Keyzer, above n 75; McSherry and Keyzer, *Sex Offenders and Preventive Detention*, above n 1.

83 Finnane and Donkin, above n 2, 12.

84 The beginning of Part IV draws on Keyzer and McSherry, ‘Perspectives at the Coalface’, above n 81, which also analyses interviews conducted as part of the Australian Research Council Discovery Project *Preventive Detention of High Risk Offenders: The Search for Effective and Legitimate Parameters*.

Interviewees were randomly selected from a review of the case reports published by the Australasian Legal Information Institute. Snowball sampling, that is, the recruitment of future participants from the acquaintances of existing participants, was then used to ensure coverage of key professional groups and stakeholders (prosecution and defence) along with geographical spread across and within the three State jurisdictions of Queensland, Western Australia and New South Wales.

Table 1 sets out the number of participants interviewed by role and jurisdiction.

Table 1: Interview Participants

Position Title	Queensland	New South Wales	Western Australia
Psychologists	6	6	8
Lawyers	9	11	12
Police and Corrections	2	3	6
Social Workers	2	2	4
Criminologists	2	1	3
Psychiatrists	2	4	3
<b>Total</b>	<b>23</b>	<b>27</b>	<b>36</b>

The interviews were conducted on the basis that the identity of the participants would not be revealed in any publications without the prior consent of the participant concerned. The interviews were conducted on a one-to-one basis between the interviewer and participant. All interviews were tape recorded and transcribed by a transcription service. The interviewees were asked to comment on four very general questions:

- What are some of the practical issues that have arisen in implementing the preventive detention and supervision scheme?
- What have been the expectations (hopes and fears) in relation to the preventive detention and supervision scheme and have they been borne out?
- What are some of the issues relating to assessing the risk of future harm to the community?
- Are there any other specific issues relating to preventive detention and supervision schemes you think should be addressed by the project?

Interviews lasted for approximately an hour to 90 minutes. The justification for asking such general questions, and leaving so much time to answer them, was that it would allow the interviewees latitude to identify issues that were important to them and scope to develop points they wanted to make.

The transcripts were analysed using the software package NVivo 9, using classic content analysis, supplemented by keyword-in-context analysis.<sup>85</sup> Categories or themes were not predetermined, but were allowed to emerge from the interviews in accordance with a 'grounded theory' approach.<sup>86</sup> This approach enables themes to be analysed in the absence of an initial hypothesis, providing a 'bottom-up' variant of content analysis.

In our previous article reviewing the data, responses from interviewees relating to the effectiveness of preventive detention regimes, attitudes to risk assessment as well as the role of the media in providing information about sex offenders were analysed.<sup>87</sup> The remainder of this Part analyses five of the most commonly occurring themes relating to practical issues that emerged from the NVivo analysis. Each will be analysed in turn.

## A Perspectives on Treatment Issues

When analysing perspectives on treatment issues, three sub-themes emerged: first, the need for specialised treatment programmes; secondly, offender participation and the effectiveness of treatment programmes; and thirdly, the need for treatment of lifestyle issues in order to build an effective treatment plan.

### 1 The Need for Specialist Treatment Options

Psychologists, psychiatrists and lawyers alike complained that specialist treatment options are not being made available in prisons.

Not only should treatment programmes be tailored to the age of victims, they should also take account of the different risk levels, personality types and mental states of the offenders. Lawyers and psychologists from each of the three jurisdictions emphasised that high risk offenders placed in preventive detention regimes require programmes that are attenuated to their level of risk. As one Queensland psychologist observed, this is particularly so in relation to the 'most dangerous individuals who are most likely to be repeat offenders'. A New South Wales psychologist indicated that appropriate treatment programmes are not available for offenders 'who are high on the psychopathy side of things [and] are fabulous manipulators and deceivers'. In addition, another New South Wales psychologist observed that there 'are not enough programmes generalised for

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85 Nancy L Leech and Anthony J Onwuegbuzie, 'Beyond Constant Comparison Qualitative Data Analysis: Using NVivo' (2011) 26 *School Psychology Quarterly* 70, 75–7.

86 Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research* (Sage, 3<sup>rd</sup> ed, 2008).

87 Keyzer and McSherry, 'Perspectives at the Coalface', above n 81.

people who wouldn't necessarily be a risk to the community when they are released'.

One New South Wales psychologist critiqued the failure of present treatment programmes to develop a 'link' between 'cognitive behavioural change with decent understanding of dynamic theory'. The interviewee appears here to be referring to Kurt Lewin's 'dynamic' theory of personality which explores behaviour in terms of individual goals shaped by the individual's societal context.<sup>88</sup> This interviewee stated that, at present, there is 'no attachment theory being used in treatment, and that is the key to good treatment'. Stemming from the psychologist John Bowlby's work on relationships between infants and their mothers, attachment theory examines how individuals respond to conflict within relationships.<sup>89</sup> Psychologists from several jurisdictions observed that prison treatment programmes often do not have a 'childhood issues component'. Yet, as one forensic psychologist observed, 'acknowledging that offending stems from childhood issues is a cornerstone of successful treatment' and 'it often leads to transformation and understanding by the offender of why they did what they did, or where the impulse to offend is coming from'.

Specialist treatment in the form of anti-libidinal medication was considered by one Queensland forensic psychologist to be 'one of the major tools we have'. However, this psychologist went on to state that anti-libidinal medication tends not to be 'used regularly or in a standard way, so most of the time it comes down to general practitioners who prescribe [this medication] and [they] don't have the expertise in the area'. Three psychologists recommended that a systematic investigation of the practicalities and the ethics surrounding the use of anti-libidinal medication needed to take place.

## **2 Offender Participation and the Effectiveness of Treatment Programmes**

While preventive detention regimes presume that offenders will participate in sex offender treatment programmes in order to be released from detention or supervision, one interviewee from Western Australia argued that participation should be explicitly compelled: 'If you don't do it, you don't get out'. A New South Wales forensic psychologist said that it was important to take advantage of the 'captive audience' created by the regime. However, the interviewee who favoured compulsion acknowledged that 'whether it works on them is another thing, but at least it might bring issues to them that they haven't looked at or dealt with'. A lawyer from New South Wales disagreed, saying that 'behaviour needs to change but it can't be forced on them ... they need to decide for themselves'. This reflects Michael King's observation about forensic treatment programmes in general, that '[t]hose who choose to participate in treatment or

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88 Kurt Lewin, *A Dynamic Theory of Personality: Selected Papers* (McGraw-Hill, 1935).

89 John Bowlby, *Attachment and Loss* (Basic Books, 1969) vol 1.

other activities have an internal commitment that is generally lacking in those with only external sources of motivation'.<sup>90</sup>

A range of interviewees from each jurisdiction disagreed with post-sentence compulsory treatment of sex offenders in prison because of the human rights issues associated with detaining people after their sentence is complete.

One corrections officer from Western Australia asserted that sex offender treatment programmes have a positive impact, saying that they are 'as good as you're going to get'. While one New South Wales psychologist acknowledged that 'there must be ways to improve monitoring outside of detention', this interviewee argued that the continued development of custody-based treatment is important.

Notwithstanding the strong support for offender participation in sex offender treatment programmes, there were mixed opinions about the *effectiveness* of such programmes. 'No one will admit', one forensic psychologist from Queensland opined, 'that the courses do very little to reduce the real risk'. A New South Wales psychologist agreed, stating that the conditions of treatment imposed by corrective services departments 'are not related to any therapeutic goal or outcome'.

A Queensland forensic psychologist argued that treatment in custody makes 'no or low' statistical difference to recidivism rates. The same interviewee pointed to the 'varied nature and incredible complexities of human nature and criminalised behaviour'. Accordingly, 'one size doesn't fit all with serious sex offenders'. Rather, according to a lawyer from New South Wales, it is 'a complicated dynamic that leads to offending'. These views reflect T Kenworthy and colleagues' research which found 'very little evidence that psychological treatments in custody reduces the risk of sexual recidivism'.<sup>91</sup>

While differing opinions were expressed about the effectiveness of sex offender treatment programmes, there was a degree of consensus that there is not enough research on the topic. A forensic psychologist from New South Wales observed that none of the sex offender treatment programmes have been formally, independently assessed, so 'there is very little to measure and no control [group] to base it on'. As a result 'there are no measurement tools being used [and] there are no outcome studies'. Despite these criticisms, custody-based treatment programmes have become unofficial prerequisites for discharge from prison according to lawyers in each of the three states. Programmes are 'rarely available outside prison', a Queensland lawyer observed, so lawyers advise their clients that completion of a sex offender treatment programme significantly

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90 Michael S King, 'Problem Solving under the *Dangerous Sexual Offenders Act 2006* (Western Australia)' (2007) 14(1) *eLaw Journal* 32, 39.

91 T Kenworthy et al, 'Psychological Interventions for Those Who Have Sexually Offended or Are at Risk of Offending' (2007) 3 *Cochrane Database of Systematic Reviews*, cited in Robert Hayes et al, 'Justifications and Rationalizations for the Civil Commitment of Sex Offenders' (2009) 16 *Psychiatry, Psychology and Law* 141, 143.



enhances their prospects of release, whether it works or not. One New South Wales lawyer observed that offenders who decline to participate run the risk that they will remain in prison indefinitely.

A final concern raised regarding sex offender treatment programmes was that of safety. One Queensland lawyer highlighted the fact that a 'separate code of conduct and set of laws operates in the prison', where offenders have been 'brutally assaulted because of vicious rumours in the prison' that they were child-sex offenders. 'Within the prison hierarchy,' one Queensland lawyer observed, 'sex offenders are way down there'. This lawyer explained that sometimes during group sessions, a rapist would not even sit with a paedophile. 'Some of them are in for murder,' the interviewee stated, 'and somehow that seems to be better than [just] sex offending'.

Placing people who offend against adults in the same programme as people who offend against children is 'one of the major failings of the in-prison treatment programme', a New South Wales psychologist observed. The problem, according to this interviewee, is that if you want honesty within a treatment programme – which is the only way that it can properly work – the offenders within that programme must admit to their crimes. However, 'that's not going to happen' in mixed offender groups. The reason for this is that 'adult-sex offenders hate child-sex offenders' and the likely result is adult-sex offenders 'go out into the prison population and reveal what's been said in the group'. For these reasons, it was argued by a psychologist from New South Wales that sex offender treatment programmes need to become flexible and individuated. This view reflects research that indicates prison treatment programmes have been largely ineffective in reducing recidivism because they have not been 'specific to the individual offender's needs'.<sup>92</sup> It is 'going to take a long time to re-educate people', explained one Western Australian psychologist, 'to believe that [sex-offending against children] isn't something that takes up the whole personality, it's only a part of the personality'.

### 3 'Whole of Lifestyle' Management

Two psychologists from New South Wales argued that treatment needs to involve the 'management of the whole lifestyle' for sex offenders and not be confined to just medical and psychological intervention. Treatment needs to assist offenders in developing community ties, acquiring community support and developing healthy adult relationships.

One New South Wales social worker commented that counselling needs to be provided to released offenders, particularly those who are classified as 'fixated'

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92 Hayes et al, above n 91, 143. It may be, however, that the purported efficacy of individual over group based treatment is founded in clinical opinion rather than empirical evidence: see generally Jayson Ware, Ruth E Mann and Helen C Wakeling, 'Group Versus Individual Treatment: What is the Best Modality for Treating Sexual Offenders?' (2009) 2(1) *Sexual Abuse in Australia and New Zealand* 2, 10.

offenders so that ‘they’re constantly in touch with someone who can pick up if anything’s changed in their lives’. Another New South Wales psychologist stated that parole officers and social workers are more likely to reduce recidivism if they work with offenders ‘from a more personal perspective’ and talk to them about their work, relationships and life generally. Support in times of stress is essential in reducing recidivism, according to lawyers and social workers in both New South Wales and Queensland.

Employment was seen to be an essential component of any sex offender treatment plan. One Queensland social worker argued that before an offender leaves prison, the ‘first priority should be to get them into a stable job’. A forensic psychologist from Queensland observed that employment is important because it provides offenders with meaningful goals and curbs boredom. In addition, a lawyer from Queensland observed that employment helps ensure that former prisoners are ‘not dependent on the public purse’.

#### **4 Commentary**

The views outlined raise serious concerns regarding the lack of adequate treatment options for sex offenders who are subject to preventive detention and supervision. Most significantly, doubts were raised by interviewees about the effectiveness of treatment in reducing recidivism, the effects and human rights implications of coercive treatment and the safety of sex offender participants in group therapy.

Participants were forthcoming about practical measures for improving the system. They highlighted the fundamental need to tailor treatment and medication to individual requirements and characteristics, and emphasised the importance of ‘whole of lifestyle’ concerns, such as community connections, post-imprisonment relationships and employment opportunities. There is an evident imperative, as recognised by the majority of participants, for further research to assess the quality of the treatment being provided and its effectiveness.

### **B Perspectives on Resources**

The analysis of the theme ‘resources’ indicated that interviewees responded to three sub-themes: the need for increased funding for the sector; the perception that resources are being misdirected on punitive responses rather than being directed toward therapeutic objectives; and that there is insufficient investment in community-based treatment and monitoring.

#### **1 The Need for Increased Funding**

The issue of funding figured prominently in the interviews. It was acknowledged by a Western Australian corrections officer that ‘you can’t devote half the gross national product and look after a handful of offenders’, and you could not ‘have someone looking after an offender 24 hours a day, 7 days a week, following him around’, as ‘that’s not realistic’. However it was argued by

a New South Wales lawyer that ‘no funding is available for even *realistic* control measures’, leaving both the community and the offender at risk.

## 2 *Misdirected Resources*

Four interviewees, three from Queensland and one from New South Wales, expressed the opinion that the resources that have been invested in the management of high risk offenders have been misdirected. One New South Wales psychologist stated that ‘we are placing resources into managing a small group of sex offenders ... when resources could be better expended on measures that could target the majority of sex offenders, most of whom are not charged and who go untreated’. It was argued by a Queensland psychologist that the regimes are ‘wasting huge amounts of resources in a way that isn’t really going to have any impact on recidivism’. It was also argued by a lawyer from New South Wales that resources should be allocated to therapeutic services, in particular to ‘the key mental health professionals’ responsible for treatment.

## 3 *Investment in Community-Based Treatment and Monitoring*

Interviewees in each of the three jurisdictions argued that there is a lack of resources for the appropriate monitoring of sex offenders. One psychologist from New South Wales said that there had been situations where s/he had made recommendations to a court regarding the post-release conditions of an offender, but corrective services ‘just can’t follow through because there’s just not the resources there to monitor these people’.

Another psychologist from New South Wales preferred to see resources channelled into community-based monitoring and risk management programmes as opposed to preventive detention because preventive detention ‘deprives people of their liberty based on actuarial instruments that are dubious ... and unreliable in terms of predicting behaviour of an individual’.<sup>93</sup>

A different psychologist from New South Wales was unconvinced that ‘there were sufficient resources put into supervision [or] that anyone necessarily needs to be preventatively detained’. According to this psychologist, if society is interested in reducing risk, supervision and community treatment should be funded. This reflects recent research into the importance of resourcing post-release services for prisoners to reduce recidivism.<sup>94</sup> Community-based

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93 On the issue of problems with using risk assessment tools in relation to predicting sex offending, see generally Danny H Sullivan, Paul E Mullen and Michele T Pathé, ‘Legislation in Victoria on Sexual Offenders: Issues for Health Professionals’ (2005) 183 *Medical Journal of Australia* 318, 319; Coyle, above n 35; McSherry, ‘Throwing Away the Key’, above n 76.

94 See generally Gwenda M Willis, ‘Back to Basics: Empirical Support for the Importance of Release Planning in Reducing Sex Offender Recidivism’ (2010) 2(2) *Sexual Abuse in Australia and New Zealand* 54; Maria Borzycki and Eileen Baldry, ‘Promoting Integration: The Provision of Prisoner Post-release Services’ (Trends & Issues in Crime and Criminal Justice No 262, Australian Institute of Criminology, September 2003).

supervision and monitoring, this psychologist argued, ‘maximises people’s rights to a presumption of innocence about crimes they haven’t yet committed’.

A New South Wales social worker noted that ‘there aren’t enough treatment services in the community for offenders’. ‘The community doesn’t want to spend money on treatment’, a New South Wales lawyer observed, as ‘they don’t really have any empathy for sex offenders, which is understandable’. But ultimately, it was noted by a Western Australian psychologist, ‘legislative efforts that keep them in custody longer, which ultimately costs more money, probably increases their risk, and doesn’t reduce [the number of] victims’. Community treatment options were regarded by one lawyer from Western Australia to be especially vital in cases where ‘the offender has been in jail for some decades and really can’t be expected to cope in a world that has changed so much’.

#### 4 Commentary

Many interviewees were concerned about resources being allocated to the preventive detention of sex offenders at the expense of what many interviewees viewed as the more effective option of community-based monitoring and treatment. There was a perception that resources were skewed towards detaining a small group of sex offenders when there were better alternatives available.

In addition, post-sentence preventive detention and supervision schemes focus attention and resources on *convicted* offenders. There is growing evidence which indicates that the majority of sex offenders are not reported to police or charged, let alone convicted.<sup>95</sup> This implies that a strong case can be made for the investment of public resources into preventive measures to curb the amount of sex offences that go undetected, uninvestigated and unprosecuted as well as providing adequate treatment options for those offenders who are within the criminal justice system.

### C Perspectives on Accommodation

Concerns about accommodation options figured prominently. One psychologist from New South Wales observed that ‘there needs to be greater consideration as to how these people live, how they’re accommodated, how you can ... protect society but at the same time, not [place] intolerable burden on those people’.

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95 See, eg, Cindy Tarczon and Antonia Quadara, ‘The Nature and Extent of Sexual Assault and Abuse in Australia’ (Resource Sheet, Australian Centre for the Study of Sexual Assault, December 2012) 1–2, 5; Donna Chung, Patrick O’Leary and Tammy Hand, ‘Sexual Violence Offenders: Prevention and Intervention Approaches’ (Issues Publication No 5, Australian Centre for the Study of Sexual Assault, June 2006) 10–16; Terance Miethe, Jodi Olson and Ojmarrh Mitchell, ‘Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types’ (2006) 43(3) *Journal of Research in Crime and Delinquency* 204, 211, 224.

Lawyers from both New South Wales and Queensland supported ‘staged rehabilitation’ which enables progressive release from custody. Improving accommodation options, commented a lawyer from Queensland, ‘is going to reduce the risk of [sex offenders] reoffending’ and ‘make their transition into the community a smoother one’.

Lawyers and social workers from Queensland and New South Wales identified support networks in the community as an important avenue for securing accommodation, which is an essential requirement for post-prison risk management. One Queensland social worker pointed out that the onus is placed on the offender to come up with a release plan. This is not mandated in the legislation, but is necessary in practice if a prisoner wants to persuade the court that he or she would be low risk if released. One Queensland social worker pointed out that because offenders have ‘been isolated for so long ... it is artificial to suggest they could nominate social supports’. Quite often, ‘no one has visited them in jail and that is used against them’. Offenders themselves, as opposed to another more appropriate authority, must identify accommodation and social contacts in their release plan and outline any of their ‘triggers’ for possible reoffending. Sometimes, according to this interviewee, offenders cannot formulate these plans because they lack the intellectual capacity to do so.

Concerns were expressed about the process by which accommodation arrangements are developed. Across the interviews, there was much confusion as to who is specifically responsible for finding appropriate housing for released offenders. One lawyer from Queensland noted that judicial approaches vary widely: some judges assume that the prisoner is responsible for post-release services, while other judges place more pressure on Queensland Corrective Services to help. It was noted by the same interviewee that where a prisoner was active in or had active assistance generating accommodation options, the Department of Corrective Services rarely agreed to it.

Since there is no clear body responsible for organising accommodation and other post-release services for prisoners, the task often falls to legal aid solicitors. While government legal aid departments employ social workers, the reintegration of sexual offenders into the community is not the responsibility of this organisation. One Queensland lawyer observed that, in one case, ‘there was nothing in place so we had to find our client accommodation, counselling, income, a local GP, everything’. The client and solicitor ‘kept hitting a brick wall’. It appears that in Queensland, at least, each case is dealt with in an ad hoc way, and no systems are in place to ensure efficient placements. One Queensland lawyer said that in some cases people are reimprisoned not because they lack an adequate supervision plan, but rather because there are no resources to establish that plan.

One social worker from New South Wales referred to a situation where accommodation and supervision for a particular offender had been approved by Corrective Services NSW, but the Attorney-General made a submission that the Government would not fund the arrangement, raising the spectre of political interference. This interviewee was ‘shocked’ by this, stating that the Minister’s intervention was ‘disturbing’, ‘wrong’ and should not have happened because



‘the courts are for the individual, and the policy is the government and they should keep the two quite separate’.

One psychologist in Western Australia offered a solution to the various bureaucratic, communications and responsibility problems, highlighting a ‘multidisciplinary approach’ employed in certain shires of England. Under this model, offenders convicted of a certain class of sexual offence were, upon their release, automatically placed on an order under the control of HM Prison Services. The order incorporated a programme governed by the local shire that included education, housing, police, corrective services, job assistance and psychiatric healthcare all under the one banner. The funding for such programmes was determined by the reports provided to the government by the shires. According to this psychologist, a multidisciplinary model was a ‘better approach’ as it ‘provided a greater response to people’s needs’ following their release.<sup>96</sup>

A Western Australian psychologist pointed out that locating suitable accommodation is particularly difficult for offenders who live in rural environments and for Indigenous offenders. This interviewee observed that there are often ‘no facilities in the communities where they come from’ to deal with their specific mental health needs. A Western Australian corrections officer stated that there needs to be sufficient resources made available to the Department of Corrective Services so that ‘a boutique centre, probably somewhere out in the bush’ could be established. However a Queensland psychologist rejected the suggestion that rehabilitation facilities should be geographically isolated, noting that ‘a person who has committed a serious offence in a small town can’t go back there because the complainant and family are there’.

There is a ‘great problem’, one Queensland psychologist explained, ‘with risk and the Indigenous population’, because many of the communities from which Indigenous offenders originate are ‘incredibly violent and dysfunctional’ and have ‘incredible problems with alcohol’. It is difficult ‘to send someone who is convicted of a serious offence back to an entirely dysfunctional community where there will be very little supervision of them and they will be subject to temptation and influences of people whom are likeminded’. However, a New South Wales psychologist said that while Indigenous offenders needed to be

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96 It appears that this interviewee was referring to multi-agency public protection arrangements which are used in England, Wales and Scotland. In Northern Ireland similar arrangements are known as ‘PPANI’ (public protection arrangements in Northern Ireland). The Scottish and Northern Ireland arrangements are discussed in Lindsay Thomson, ‘The Role of Forensic Mental Health Services in Managing Mental Health Services: Functioning or Failing?’ in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 165, 168 ff. The arrangements in England and Wales are discussed in Caroline Logan, ‘Managing High-Risk Personality Disordered Offenders’ in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy Prediction and Practice* (Routledge, 2011) 233.

reunited with their families if possible, this can ‘create a sense of social isolation that isn’t conducive to preventing reoffending’. One Western Australian psychologist indicated that, for these reasons, an Indigenous offender he or she had dealt with had requested to remain in prison rather than being released into society.

Two interviewees argued that isolating offenders from the community creates an environment conducive to depression. The isolation ‘forces them apart from the mainstream community’, stated one New South Wales social worker, and ‘it breaks down relationships [and] it drives them out of any semblance of normal community living’. This segregation increases dynamic risk factors by removing the offender from positive support systems. One New South Wales psychologist argued that ‘offenders are more stressed in those facilities than they would be if they were living in the community’. Isolation and supervision restrictions also make it almost impossible for the offender to maintain employment or engage in any social activity with non-offenders.

One housing option that has emerged in Queensland (and also in Victoria, although Victorians were not interviewed in this research) is accommodation ‘in the community’ that is adjacent to and inside the prison perimeter fence. In Queensland, a number of buildings adjacent to the Wacol Prison Reserve (and only 20 metres from the prison) in outer-suburban Brisbane are used to house a number of sex offenders released on supervision orders. The buildings are surrounded by a 10-metre high barbed wire fence and the outside is patrolled by a dog squad officer.<sup>97</sup> Providing ‘accommodation’ within the prison precinct was argued by one Queensland lawyer to be inconsistent with the objectives of Queensland’s ‘High Intensity’ and ‘Moderate Intensity’ sexual offending programmes, which dictate that sex offenders are not to meet with other sex offenders.<sup>98</sup>

The members of staff employed by the in-house facilities ‘have similar attitudes to the staff in prison, so it feels like they’re still in prison’, remarked a social worker from New South Wales. The same interviewee argued that staff in such facilities should be ‘qualified or trained people who do not bring a judgmental attitude to the facility, because that is what puts [offenders] under stress and at more risk’.<sup>99</sup>

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97 See McSherry, ‘Throwing Away the Key’, above n 76, 784.

98 Queensland Corrective Services, *Intervention Programs* (Information Booklet) 6 <[http://www.correctiveservices.qld.gov.au/About\\_Us/Booklets/Intervention%20Programs%20PRINT.pdf](http://www.correctiveservices.qld.gov.au/About_Us/Booklets/Intervention%20Programs%20PRINT.pdf)>. For an overview of intervention programs, see Karen Helseltine, Rick Sarre and Andrew Day, ‘Prison-Based Correctional Rehabilitation: An Overview of Intensive Interventions for Moderate to High-Risk Offenders’ (Trends & Issues in Crime and Criminal Justice No 412, Australian Institute of Criminology, May 2011).

99 On the training of correctional staff in relation to their attitudes to sex offenders, see generally Jayson Ware et al, ‘Training Correctional Staff in the Management of Sex Offenders: Increasing Knowledge and Positive Attitudes’ (2012) 4(2) *Sexual Abuse in Australia and New Zealand* 23.

A New South Wales psychologist argued that by forcing released offenders to communicate and associate with each other, the in-house model may be 'encouraging networks of sex offenders'. This interviewee observed that putting sex offenders in close living quarters placed 'pressure emotionally, psychologically and psychically' on them, which in turn increased risk. Some offenders, a Queensland social worker observed, may want to stay in contact with each other for healthy reasons, such as to provide mutual support or to participate in legitimate sexual relationships, and 'the friendship that develops between sex offenders in the prison to support each other is critical to them'. However, other offenders may not want to associate with each other outside of prison in order to make a fresh start. One Queensland psychiatrist argued that the in-house model is a 'one size fits all' approach to sex offender release that may not be suitable for all offenders.

### **1 Commentary**

Problems regarding accommodation featured prominently among interviewees' responses. A significant problem identified is that offenders almost invariably lack the resources to fund their accommodation in the community and rely heavily on charities and social welfare organisations to make connections to the outside world to build their post-release lives.

The expansion of housing options, including by providing assistance in locating appropriate accommodation, especially in rural and indigenous communities, emerged as key to improving prospects of both release and rehabilitation.

### **D Perspectives on Monitoring of Offenders under Supervision Orders**

A range of policy options were discussed in the interviews, including GPS monitoring, reporting, exclusion zones, medical interventions, such as anti-libidinal treatments or anti-depressants known to have anti-libidinal effects, as well as psychological interventions such as intensive counselling or out-of-prison maintenance programmes. However, it was pointed out by a Queensland forensic psychologist that there has been no Australian research on these strategies to determine whether they work.

A New South Wales lawyer stated that it was necessary to delve 'back into the literature and research and promote things which do demonstrate a reduction in recidivism'. There is research, this interviewee stated, 'that demonstrates that some things actually do work in the long-term for reducing recidivism, and it's not just electronic monitoring'.

In addition, a Western Australian interviewee pointed out that there is a perception that sex offenders are being monitored more closely than they are: '[members of] the community believe that we can access their computers and do a lot of things that they see on TV [but] what we're actually doing is very, very basic and just on the surface'.

Three sub-themes emerged from the interviews regarding monitoring: questions about the effectiveness of the different types of monitoring; questions about who is being monitored and the cost of monitoring.

## 1 *The Effectiveness of Monitoring*

GPS monitoring, or as one New South Wales social worker dubbed it ‘distance administrative management’, was described as ‘problematic’. This interviewee observed that electronic monitoring ‘doesn’t encourage rehabilitation or normalisation’. This reflects research that indicates electronic monitoring is a poor alternative to case management and is ineffective in reducing crime.<sup>100</sup> On a practical level, ‘you can’t strap a piece of plastic to someone’s legs indefinitely’. The device ‘becomes very itchy, it’s very difficult to clean around it [and] it’s a constant reminder of the bad that these people have done in the past’. Often, a Queensland social worker observed, people wearing electronic anklets become frustrated by the device and simply tear it off, ‘particularly at night when they’re just trying to get some sleep and it itches’. For that reason it, was argued that bracelets should be used sparingly and really only for those who are considered ‘high-risk’.

One New South Wales psychologist argued that ‘there is nothing to support [the proposition] that [electronic monitoring devices] reduce recidivism, and yet they are being relied upon when we should be putting resources into other areas of monitoring like community support’. This interviewee argued that it would be more beneficial to develop a programme that assists released sex offenders to establish connections in the community than to use electronic monitoring. Such a programme would be a ‘kind of monitoring programme but is much more human’. Instead, effective management through probation and parole, where ‘the parole officers worked with the offender from a more personal perspective and talked to them about their work, how their life was going [and] their relationships’ would be more likely to reduce recidivism than electronic monitoring.

A Queensland psychologist summed up the concerns in this area by stating ‘there is very little you can do about opportunistic offending’.

## 2 *Who is Being Monitored?*

One New South Wales psychologist was concerned that monitoring programmes are being applied to too many people, consequently wasting invaluable time and money. Rather than applying intense monitoring programmes to the ‘top 5 per cent of very high risk offenders’, current monitoring programmes capture individuals that may not need intense monitoring, such as those who committed historical offences and are now elderly. This interviewee argued that there are existing monitoring organisations,

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100 Astrid Birgden, ‘*Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis*’ (2007) 14 *Psychiatry, Psychology and Law* 78, 87.

such as the Child Protection Watch Team in New South Wales, which could effectively monitor such offenders.

### **3 The Cost of Monitoring**

The New South Wales interviewee concerned with who was being monitored also noted that extended supervision orders ‘require a huge amount of work just to get them to a point of having an order made’. On top of such costs, ‘there is the supervision, follow up [and] the costs involved in GPS monitoring, which I think is possibly a little excessive in some cases’. This was a recurrent theme.

It was argued by a lawyer from Queensland that ‘intensive supervision ... is quite a labour intensive business so it’s expensive to monitor them’. Accordingly, intensive supervision must be limited to those individuals who actually require it. If such supervision is extended to all levels of offender, resources will become scarce. This could cause situations where, as one New South Wales lawyer noted, recommendations are made for an offender’s release plan, but there are simply not enough resources to actually carry out that plan.

### **4 Commentary**

The theme of the centrality of community reintegration in preventing recidivism emerged once again in relation to this issue, here in preference to electronic monitoring and its associated discomfort. This concern again coincided with the issue of skewed resources, with the view that selective and less widespread intensive supervision would be more cost-effective than is presently the case.

Another important issue raised was the lack of evidence as to whether GPS monitoring in fact reduces recidivism. There is an obvious need to evaluate outcomes in relation to such a resource-intensive form of monitoring, particularly given that research in this area is still developing.<sup>101</sup>

## **E Perspectives on Breaches of Supervision Orders**

Two key themes emerged with regard to sex offenders committing breaches while under supervision orders: the challenges faced by offenders in understanding their supervision orders; and the problems associated with the bodies responsible for managing offenders’ breaches.

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101 See, eg, Brian K Payne and Matthew DeMichele, ‘Sex Offender Policies: Considering Unanticipated Consequences of GPS Sex Offender Monitoring’ (2011) 16 *Aggression and Violent Behavior* 177; Mike Nellis, Kristel Beyens and Dan Kaminski (eds), *Electronically Monitored Punishment: International and Critical Perspectives* (Routledge, 2013).



## ***1 Offenders' Understanding of Supervision Orders***

'There is a real risk', stated one Queensland lawyer, 'of people simply not understanding the content of their supervision order, either through a lack of intelligence or a lack of English language skills'. Another Queensland interviewee, a lawyer, highlighted the 'practical difficulty in crafting orders in such a way as to make it clear what a person can and cannot do, and to that end, reduce the risk of minor breaches'. This interviewee noted that this is particularly difficult in the case of Indigenous offenders, 'whose level of English, which is often their second language, is not good'. Some of the supervision orders are between four and six pages long and 'they're written in language that even lawyers have great difficulty in understanding'. The standard order is 'vague and terribly drafted', ultimately resulting in an unintentional breach, 'resigned despondency' or even 'a desire to challenge' out of frustration.

A New South Wales psychologist pointed to cases where offenders have displayed 'self-defeating' behaviour, such as 'keeping a knife under [their] pillow in a secure hostel where they know they have to be searched'. Accordingly, it was argued by a lawyer from Queensland that 'there should be a heavy onus on Corrective Services to make sure that these people have to document and to understand what it is that they are required to do'.

## ***2 Bodies Responsible for Managing Breaches of Supervision Orders***

Three concerns were highlighted regarding the bodies responsible for managing breaches by sex offenders under supervision orders: skill and qualification shortages; negative and oppressive attitudes (sometimes resulting in authority figures precipitously accusing offenders of breaches, also referred to as 'breaching'); and lack of checks and balances.

One New South Wales psychologist argued that many of the individuals in charge of released offenders who breach orders have 'no clinical competence, no social competence, no training' and have 'their own pathological agendas'. A New South Wales social worker stated that the probation and parole officials who manage released sex offenders are 'not accountable'. 'It's damn serious', emphasised a New South Wales psychologist, 'because you've got depressed and suicidal clients that are being breached' for trivial matters, which can worsen their mental state.

Another related issue raised by social workers and lawyers from each jurisdiction was the lack of forensically qualified psychologists in the supervision apparatus, increasing the possibility that people would breach their orders and return to custody.

In three interviews from New South Wales and two from Queensland, it was argued that an oppressive culture has developed within the agencies that are responsible for monitoring supervision order breaches, in particular within the Department of Corrective Services in Queensland and the Community Compliance Group ('CCG') in New South Wales. The CCG, which one New South Wales social worker dubbed as 'the "heavy mob" from probation and parole', regard their role as 'compliance rather than rehabilitation'. The CCG, this interviewee opined, 'work in terms of risk avoidance by breaching people

and sending them back to jail' and this 'may have some counterproductive elements'. Another social worker from Queensland noted that, like the CCG, Corrective Services have 'some kind of agenda that is about clobbering [offenders]'.

A social worker from Queensland highlighted that a minor breach can trigger one of three responses from Corrective Services: inaction, a recommendation or order for counselling, or the institution of formal breach proceedings in the Supreme Court which inevitably results in detention. However, despite having three options, the third appears to be the most regularly employed 'out of fear for the political repercussion of not doing so' and a general oppressive attitude towards offenders, even for very minor breaches.

Breaching a person for getting on the wrong bus was offered as one example of community monitoring that was 'ludicrous'. 'Overall', a New South Wales social worker observed, 'if you set up a Department whose only job is to make people comply, then you've got to be breaching people'. Accordingly, 'if you don't breach people, someone's going to say "we don't need to fund you anymore" because you're not doing your job'. For this reason, this social worker observed, Corrective Services and the CCG would be likely to continue 'breaching people for very minimal breaches'.

A final issue raised in New South Wales with regard to the breach management bodies was the general lack of 'checks, balances or supervision' in place. It was argued by a lawyer from New South Wales that another tier of supervision is necessary to oversee the breach programme. This supervision, stated the interviewee, must come from an independent source that has 'no agenda with the Community Compliance Group or Corrective Services'.

### **3 Commentary**

The interviewees raised concerns about the perceived lack of competency and accountability of parole officers, coupled with a parole culture that favours re-detaining individuals pursuant to minor breaches.

There is a need for further exploration of the nature of the breaches that may lead to individuals being re-detained. To date, it does not appear that there is a systematic review process detailing whether breaches are minor or major, nor how regularly re-detention occurs. Re-detention for minor breaches is particularly concerning because of the possibility of disproportionate infringement on human rights.

## **V CONCLUSION**

Preventive detention schemes for certain groups of offenders have long been used. Indefinite detention laws have existed in various forms in Australia for over a century, yet there is some indication that judges are reluctant to use them. Post-sentence preventive detention and supervision schemes have been enacted in five Australian jurisdictions on the grounds of community protection. For those working with such schemes, however, there is an acknowledgement that a

number of practical issues need to be addressed to ensure a 'real' rather than perceived reduction in the risk of reoffending.

The concerns raised regarding current practice by participants in the study were numerous. They range, with regard to treatment, from questioning its effectiveness in preventing recidivism to concrete suggestions for improvement such as the development of specialist treatment options which identify individual needs. At the very least, different programmes for those who have been convicted of sexual assaults against adults and those who have been convicted of sexual assaults against children would be more effective than current 'one size fits all' treatment programmes.

There was also widespread acknowledgement amongst those working with post-sentence preventive detention schemes that resources need to be redeployed to encourage healthy living in the community, rather than in treatment centres that are disconnected from that community. In this regard, the need for adequate accommodation was highlighted. Wasted expenditure on overly draconian and insufficiently discriminating post-release monitoring was also a predominant issue. Concerns regarding post-imprisonment accommodation, supervision and a heavy-handed parole culture are critical in evaluating preventive detention regimes as a whole because these matters affect the possibility of release and the prospects of offender rehabilitation.

Overall, the analysis of the major themes in the interviews dealing with practical issues poses a new agenda for policy responses in this difficult area. The analysis also points to new research foci concerning what works best in relation to monitoring offenders under supervision orders and ensuring breaches are kept to a minimum. While post-sentence preventive detention and supervision schemes are constitutional, from an international human rights law perspective, they breach the right to liberty. Care must be taken to ensure that in practice such schemes actually do protect the community through evidence-based treatment and rehabilitation of offenders. The concerns raised by those who work with these schemes should therefore be heeded.