

COMMENTARY

DOUBLE PUNISHMENT? PREVENTIVE DETENTION SCHEMES UNDER AUSTRALIAN LEGISLATION AND THEIR CONSISTENCY WITH INTERNATIONAL LAW: THE FARDON COMMUNICATION

PATRICK KEYZER* AND SAM BLAY†

[This commentary critically analyses legislation enacted by the Queensland Parliament that reincarcerates sex offenders who have already completed their terms of imprisonment. Despite the fact that the constitutional validity of this new style of 'preventive detention' was upheld by the High Court of Australia, important questions remain regarding the international legal validity of the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld). In particular, a recently commenced UN Communication by prisoner Robert Fardon argues that the Queensland Act inflicts double punishment contrary to art 14(7) of the International Covenant on Civil and Political Rights. This commentary considers the issues raised by this communication.]

CONTENTS

- I Introduction
- II Preventive Detention Legislation in Australia
 - A The History of the Debate
 - B Preventive Detention in Practice
 - 1 Victorian Case Study: Garry David
 - 2 New South Wales Case Study: Gregory Kable
 - 3 Queensland Example: The DPSOA
- III The *DPSOA* in Operation: The *Fardon* Case
 - A The Offences
 - B The Subsequent Proceedings
 - C Does the *DPSOA* Inflict Double Punishment?
 - 1 The High Court's Response
 - 2 Is Preventive Detention in a Prison Necessarily Punitive?
- IV Assessment at International Law
 - A The 'No Double Punishment' Rule under International Law
 - B The First Optional Protocol: The Avenue for Redress
 - C The Comparative Strengths of Fardon's Complaint
 - 1 The Precedent of the New Zealand Communication
 - 2 Admissibility of Preventive Detention Complaints
 - 3 The Merits
- V Conclusion

* BA (Hons), LLB (Hons), LLM (Sydney); Barrister of the Supreme Courts of New South Wales, Northern Territory, Queensland and Vanuatu; Associate Professor, Faculty of Law, University of Technology, Sydney. I would like to thank Aleksandr Azarov, Ksenia Belova, Cynthia Dearin, Nathan Jones, Diana Kuitkowski, Joanne Lennan, Kathryn MacDougall and Heidi Wolfenden for research assistance. I would also like to acknowledge the funding support I have received from the Criminology Research Council for research relating to some of the questions considered in this article, and also the support and ongoing efforts of Susan Bothmann of the Prisoners' Legal Service (Queensland) on the Fardon Communication and related matters.

† LLB (Hons) (Ghana); LLM (ANU); PhD (Tasmania); Professor, Faculty of Law, University of Technology, Sydney.

I INTRODUCTION

In 2004, the High Court of Australia dismissed an appeal by Robert Fardon, a prisoner at the Wolston Correctional Centre in suburban Brisbane, by upholding the validity of Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* ('*DPSOA*').¹ Subsequently, Fardon instructed the Prisoners' Legal Service of Queensland to initiate a communication ('the Fardon communication') to the United Nations Human Rights Committee ('HRC'),² contending that the *DPSOA* is inconsistent with the double jeopardy provision contained in art 14(7) of the *International Covenant on Civil and Political Rights*.³

It is not unusual to incarcerate offenders for terms longer than those which may otherwise be imposed, as a 'preventive' measure designed to protect the community. Such forms of imprisonment are generally referred to as 'preventive detention' schemes.⁴ However, the *DPSOA* is unique because it authorises the reincarceration of a sex offender who has served his or her term of imprisonment, but is judged by a court to represent a risk to the community if released. The key legal question that arises is whether re-imprisonment constitutes a 'second' imprisonment and, accordingly, double punishment for the initial offence.

This commentary argues that the *DPSOA* breaches the *ICCPR* provision on double jeopardy. It advances the view that the Fardon communication, which is currently before the HRC, is a critical test case of art 14(7). First, the commentary explores the historical debate surrounding preventive detention in Australia. Against this backdrop, the commentary considers three examples of preventive detention adopted by Australian states. In particular, the commentary will examine the *DPSOA*, revealing the unique nature of the legislation. The operation of the *DPSOA* in practice will be considered through an assessment of the High Court's approach in *Fardon*. Further, the commentary analyses the jurisprudence of the HRC and the central problems and issues concerning preventive detention. Here, it will be demonstrated that although imprisonment can be lawfully ordered for ostensibly 'non-punitive' purposes under the *DPSOA*, such imprisonment is plainly punitive and in breach of the *ICCPR*. It is argued that the HRC is likely to share this view when it considers the Fardon communication.

¹ *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 ('*Fardon*'). At the time of writing, Lyons J of the Supreme Court of Queensland had recently ordered that Fardon be released on a supervision order. This event is not likely to affect the status of Fardon's communication to the Human Rights Committee.

² Interview with Susan Bothmann, Coordinator, Prisoners' Legal Service (Telephone interview, 12 October 2006).

³ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

⁴ See, eg, Stephen Smallbone and Janet Ransley, 'Legal and Psychological Controversies in the Preventive Incapacitation of Sexual Offenders' (2005) 28 *University of New South Wales Law Journal* 299; Rozanna Zalewski, 'Preventive Detention: Justified or Justice Denied?' (1992) 66 *Law Institute Journal* 1008. On preventive detention regimes outside Australia, see Jess Vames, 'Preventive Detention versus Civil Commitment: Alternative Policies for Public Protection in New Zealand and California' (2005) 12 *Psychiatry, Psychology and Law* 357.

II PREVENTIVE DETENTION LEGISLATION IN AUSTRALIA

A *The History of the Debate*

The debate regarding preventive detention in Australia is not new. Historically, such detention has found few, if any, supporters beyond party politics. Almost a decade ago, a briefing paper to the New South Wales Parliament entitled *Dangerous Offenders Legislation* addressed the fundamental aspects of preventive detention.⁵ Its authors noted that while there exists a small number of ‘career’ violent offenders who do present a continuing risk,

[t]here are relatively few offenders who are ‘dangerous’ in the sense that they pose a continuing real danger of serious harm to members of the public. Most serious crimes against the person are committed by people who have not previously offended, and most offenders convicted of violent offences do not repeat their crimes.⁶

As Walker notes, while dangerous offender legislation commonly contains lists of crimes that arguably qualify for sentencing with a predictive component, there have been very few attempts to articulate in any coherent manner the principles upon which these selections are based.⁷

Preventive detention sits uncomfortably with the notions that the punishment must be proportionate to the crime and that the liberty of the individual is sacrosanct.⁸ Imprisonment for what a person *is likely to do* is, by its very essence, predictive of what may or *may not* occur in the future.⁹ Since there exists the possibility that a predicted offence may never occur, which renders any consideration of the proportionality of the response meaningless, preventive detention is always an extraordinary step to take. Furthermore, since the logic of preventive detention is that a detainee has the potential to offend if released, the concept permits indefinite detention so long as the detainer is able to ‘prove’ that the detainee has the potential to meet the detainer’s predictions of what the detainee will do. But what constitutes acceptable, cogent evidence of ‘dangerousness’?¹⁰ By its very nature, preventive detention allows for imprisonment of ‘criminal types’, rather than imprisonment for criminal conduct.¹¹

Moreover, since preventive detention permits the continuation of incarceration after an offender has served his or her prescribed sentence, it has

⁵ Honor Figgis and Rachel Simpson, ‘Dangerous Offenders Legislation: An Overview’ (Briefing Paper No 14/97, Parliament of New South Wales, Australia, 1997), available at <<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/7B7EEA210A63B31CCA256ECF0008CB87>> at 1 October 2006.

⁶ *Ibid.*

⁷ Nigel Walker (ed), *Dangerous People* (1996) 10.

⁸ See, eg, *The Magna Carta*, signed in 1215, arts 20, 21.

⁹ See Bernadette McSherry, ‘Indefinite and Preventive Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94–8. See also *R v Moffatt* [1998] 2 VR 229, challenging, inter alia, the *Sentencing Act 1991* (Vic) s 18.

¹⁰ For a telling critique of the ‘science’ of contemporary approaches to risk prediction in this context see Terence Campbell, ‘Sex Offenders and Actuarial Risk Assessments: Ethical Considerations’ (2003) 21 *Behavioural Sciences and the Law* 269.

¹¹ Bernadette McSherry, ‘Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 *UNSW Law Journal* 354, 364.

the consequence of punishing an offender twice for the same offence. Of course, this issue turns on whether preventive detention is punitive in character, which is considered later in this commentary.¹²

Irrespective of the merits or flaws of preventive detention, it remains a politically attractive tool for any government in search of avenues in the criminal justice system within which to deal with *perceptions* of continuing criminal behaviour. Preventive detention law is an ostensible demonstration to the electorate that the government is taking serious measures to protect the community against crime.

B Preventive Detention in Practice

The effective management of repeat offenders has been a persistent challenge for criminal justice systems in all Australian jurisdictions.¹³ Prior to the most recent wave of 'preventive detention' reforms,¹⁴ indefinite sentencing regimes were adopted. Under these regimes, courts were allowed to consider the offender's behaviour during incarceration and responses to rehabilitation efforts as part of determining his or her suitability for release.¹⁵ However, these reforms do not appear to have satisfied a number of prominent and vocal advocates of preventive detention,¹⁶ who have captured the attention of a number of state governments.¹⁷ As a result, the political desire to appear to have responded to periodic media reports of paedophilia and other types of serious sexual crime has hastened the pace of legislative experimentation.¹⁸ If an offender can be incarcerated indefinitely after a trial, then why not reincarcerate the offender

¹² See below Part III(C)(2).

¹³ See C R Williams, 'Coping with the Highly Dangerous: Issues of Principle Raised by Preventive Detention' in Sally-Anne Gerull and William Lucas (eds), *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform: Proceedings of a Conference Held 29–31 October 1991* (1993) 11.

¹⁴ The most recent Australian examples of preventive detention schemes have arisen in the context of terrorism: see *Terrorism (Police Powers) Act 2002* (NSW) s 26D; *Terrorism (Preventative Detention) Act 2005* (SA) s 6; *Terrorism (Community Protection) Act 2003* (Vic) s 13E. These regimes generally go a step further than the *DPSOA*, authorising detention to prevent a terrorist act, even when the detainee has not been charged with an offence.

¹⁵ See, eg, McSherry, 'Indefinite and Preventive Detention Legislation', above n 9; *R v Moffatt* [1998] 2 VR 229. See also *Felman v Law Institute of Victoria* (1997) 142 FLR 362.

¹⁶ Perhaps the most prominent advocate of the expansion of reincarceration schemes is Hetty Johnson, who, in a radio interview, said: 'What's happening here is we're just pussyfooting around. If what we're trying to do is to protect the community, protect innocent children, then let's do it. *And if that means turning the law on its head, then let's do that too*': ABC Radio National, *The Law Report*, 9 November 2004, available at <<http://www.abc.net.au/rn/lawreport/stories/2004/1236821.htm#>> at 1 October 2006 (emphasis added).

¹⁷ The increasingly extreme rhetoric from both sides of state politics regarding sexual and violent criminals is outlined in George Zdenkowski, 'Punishment Policy and Politics' in Martin Laffin and Martin Painter (eds), *Reform and Reversal: Lessons from the Coalition Government in New South Wales 1988–1995* (1995) 220.

¹⁸ This is evidenced by the quick succession of sexual offender legislation introduced across Australian jurisdictions: see, eg, *Community Protection Act 1994* (NSW) and *Community Protection Act 1990* (Vic). Other jurisdictions subsequently considered options for the sentencing of serious offenders: see, eg, David Biles, Consultant Criminologist and Professorial Associate, Charles Sturt University, *Sentence and Release Options for High-Risk Sexual Offenders* (2005) <<http://www.jcs.act.gov.au/eLibrary/OtherReports/Biles%20Report.pdf>> at 1 October 2006.

after the completion of the sentence where there is a *perception* that the offender has the potential to reoffend?

1 *Victorian Case Study: Garry David*

The earliest attempt to introduce this particular type of preventive detention was made in Victoria with the introduction of the *Community Protection Act 1990* (Vic).¹⁹ The Victorian Act was passed specifically to detain Garry David after his term of imprisonment had expired.²⁰ David, who had been convicted of two counts of attempted murder in 1980, had a long history of threatening behaviour.²¹ As his sentence approached its end in 1990, there was palpable community concern that he might reoffend.²² The Act empowered the Supreme Court to order David's preventive detention in a psychiatric in-patient service, prison or other institution for up to six months if the Court was satisfied that, on the balance of probabilities, he was a serious risk to the safety of any member of the public and was likely to commit any act of personal violence upon another person.²³ Upon subsequent application by the Attorney-General, detention orders were made. In 1993, David died in custody.

2 *New South Wales Case Study: Gregory Kable*

In 1994, the New South Wales Government believed that it faced a problem similar to that encountered in Victoria. Gregory Kable had been convicted and sentenced to prison for the manslaughter of his wife. While serving his sentence, Kable had written threatening letters which prompted serious concern that upon his release he would present a danger to those to whom he had made threats.²⁴ The NSW Parliament enacted the *Community Protection Act 1994* (NSW). Unlike the Victorian legislation, the NSW Act was intended to apply generally. However, after parliamentary debate over the Bill, its application was confined specifically to Kable. The NSW Act provided for Kable to be detained following the expiry of his scheduled sentence for up to six months, by order of the NSW Supreme Court on the application of the Director of Public Prosecutions.²⁵ The Court had to be satisfied on reasonable grounds that Kable was more likely than not to commit a 'serious act of violence' and that it was appropriate for the protection of a particular person or persons or the community generally that he

¹⁹ See David Wood, 'A One Man Dangerous Offenders Statute — The *Community Protection Act 1990* (Vic)' (1989) 17 *Melbourne University Law Review* 497, 497; C R Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 *Monash University Law Review* 161, 175; Paul Ames Fairall, 'Violent Offenders and Community Protection in Victoria — The Garry David Experience' (1993) 17 *Criminal Law Journal* 40, 42.

²⁰ *Community Protection Act 1990* (Vic) s 1.

²¹ *Attorney-General v David* [1992] 2 VR 46, 49–53.

²² See, eg, Paul Wilson, 'Why This Man Must Not Be Freed', *The Herald Sun* (Melbourne, Australia), 18 April 1990, 10.

²³ *Community Protection Act 1990* (Vic) s 8.

²⁴ See Elizabeth Jurman, 'Special Law May Keep Killer in Jail', *The Sydney Morning Herald* (Sydney, Australia), 25 October 1994, 3.

²⁵ *Community Protection Act 1994* (NSW) s 5.

be held in custody.²⁶ As a result of the legislation, which was plainly designed to ensure his continued incarceration, Kable was ordered to return to prison.²⁷

In 1996, the High Court declared that the NSW Act was constitutionally invalid.²⁸ The Court found that the Act imposed functions on the Supreme Court that were incompatible with the exercise of federal judicial power.²⁹ As a result, preventive detention legislation appeared to be destined for the history books — that is, until the Queensland Parliament enacted the *DPSOA*.

3 *Queensland Example: The DPSOA*

According to the Explanatory Memorandum, the *DPSOA* was enacted in response to

growing community concern about the release of convicted sex offenders, not only because of the abhorrent nature of these offences, but because of the lack of evidence that some offenders have been rehabilitated, after refusing to participate in sexual offender treatment programs.³⁰

Section 3 of the *DPSOA* articulates the objectives of the legislation:

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

The *DPSOA* entered into force on 6 June 2003, three days after it was introduced into the unicameral Queensland Parliament. The *DPSOA* authorises the Supreme Court of Queensland to order post-sentence imprisonment of persons serving sentences for serious sexual offences where the Attorney-General has made an application pursuant to ss 5 and 8.³¹ The Court must be satisfied that there are

²⁶ *Community Protection Act 1994* (NSW) s 5(2).

²⁷ See Anabel Dean, 'Kable Too Dangerous to Release, Judge Rules', *The Sydney Morning Herald* (Sydney, Australia), 31 December 1994, 6.

²⁸ *Kable v DPP (NSW)* (1996) 189 CLR 51.

²⁹ See also Peter Hanks, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (7th ed, 2004) 427–36; Patrick Keyzer, 'Liberty Is Dead: To What End the Separation of Judicial Power of the Commonwealth?' (Paper presented at the National Conference of the Australian Association of Constitutional Law, Sydney, Australia, 27 November 2004); Fiona Wheeler, 'The Kable Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15; Dan Meagher, 'The Status of the Kable Principle in Australian Constitutional Law' (2005) 16 *Public Law Review* 182, 186–7; Anthony Gray, 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Detention Laws' (2005) 10 *Deakin Law Review* 177, 179–83.

³⁰ Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld) 1.

³¹ Section 5 of the *DPSOA* provides that the application be made during the last six months of the prisoner's period of imprisonment (s 5(2)(c)). A 'prisoner' is defined as 'a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section' (s 5(6)). Section 8 provides that the Court may order that the prisoner undergo examinations 'by 2 psychiatrists named by the court who are to prepare independent reports' (s 8(2)(a)); or, if the court is satisfied the application may not be finally decided until after the prisoner's release day, order 'that the prisoner be detained in custody for the period stated in the order' (s 8(2)(b)).

reasonable grounds for believing that there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody.³² A serious sexual offence is defined in the *DPSOA* as ‘an offence of a sexual nature against children or involving violence whether committed in Queensland or outside Queensland’.³³

Importantly, a person subject to a continuing detention order made pursuant to s 13 remains a prisoner despite the expiry of the original sentence.³⁴ Such an order constitutes a warrant committing the prisoner into custody for the purposes of the *Corrective Services Act 2000* (Qld) (‘*CSA*’).³⁵ Furthermore, a person who is the subject of an order made pursuant to s 13 of the *DPSOA* is not eligible for post-prison community-based release programs under the *CSA*.³⁶

III THE *DPSOA* IN OPERATION: THE *FARDON* CASE

A *The Offences*

Fardon’s criminal history dates from 12 February 1965 when he was 16 years old, and comprises mostly minor property and other non-violent offences.³⁷ However, Fardon has also been convicted of three serious sexual offences. In 1967, 18 year old Fardon was convicted of attempted carnal knowledge of a girl under 10 years of age.³⁸ He was placed on a bond.³⁹ In 1979, he was convicted of indecent dealing with a female under 14 years, rape and unlawful wounding.⁴⁰ He was sentenced to serve 12 months, 13 years and six months respectively for these offences.⁴¹ Less than three weeks after his release from prison, Fardon was convicted of rape, sodomy and assault occasioning actual bodily harm in relation to an adult woman.⁴² The sentence commenced on 30 June 1989 and expired on 29 June 2003.⁴³

³² Section 13 provides that if a prisoner is considered to be a serious danger to the community, the court may impose a continuing detention order pursuant to which the prisoner may be detained in custody for an indefinite term for control, care or treatment (s 13(5)(a)). A prisoner is a serious danger to the community if there is an unacceptable risk that they will commit a serious sexual offence if released from custody or released without a supervision order being made (s 13(2)(a), (b)). In determining whether a prisoner is a serious danger to the community, the court must consider: the prisoner’s criminal history, medical, psychological and psychiatric assessments relating to the prisoner, the prisoner’s propensity to commit serious sexual offences in the future and the prisoner’s participation in rehabilitation programs (s 13(4)). In deciding whether to make an order, the paramount consideration is given to the need to ensure adequate protection of the community (s 13(6)). The Attorney-General has the onus of proving that there is a high probability that, if released, the prisoner would be a serious danger to the community (s 13(7)).

³³ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) sch 1.

³⁴ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 14(1)(a).

³⁵ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 50.

³⁶ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 51.

³⁷ *Attorney-General (Qld) v Fardon* [2003] QSC 331 (Unreported, Atkinson J, 2 October 2003) [36].

³⁸ *Ibid* [35].

³⁹ *Ibid*.

⁴⁰ *Ibid* [37].

⁴¹ *Ibid*.

⁴² *Ibid* [38].

⁴³ *Ibid*.

B *The Subsequent Proceedings*

On 17 June 2003, shortly before Fardon's release from prison, Queensland Attorney-General Rod Welford filed an originating application under s 5 of the *DPSOA* for an order that Fardon be detained in custody for an indefinite period. After a series of detention orders, Fardon was reimprisoned under the 'annual review' provisions of the *DPSOA* in May 2005.⁴⁴

Meanwhile, constitutional challenges to the validity of the *DPSOA* progressed through the courts. On 9 July 2003, Muir J held that s 8 of the *DPSOA* was constitutionally valid.⁴⁵ On 23 September 2003, the Queensland Court of Appeal then held that ss 8 and 13 were constitutionally valid.⁴⁶ Finally, on 1 October 2004, the High Court of Australia dismissed Fardon's constitutional challenge.⁴⁷

C *Does the DPSOA Inflict Double Punishment?*

In his submission to the High Court, Fardon argued that the *DPSOA* imposes double punishment because it allows a judge of the Supreme Court of Queensland to order the imprisonment of someone convicted and sentenced for a criminal offence, who has satisfied the penalty imposed at sentence, without proof of further criminal guilt.⁴⁸ The double punishment effect of the *DPSOA* is reinforced when one bears in mind that a Court making an order under the *DPSOA* is *required* to have regard to the prior offences of a person in determining whether he should continue to be a prisoner in circumstances where no new crime has been committed.⁴⁹ Fardon contended that s 13(4)(c) and (d) reinforce the conclusion that the *DPSOA* punishes a person for his or her prior offences. Fardon's continued imprisonment is punishment because, by virtue of the operation of ss 8 and 13, he is a prisoner. Fardon argued that he is subject to substantially the same imprisonment regime as if he were convicted of a criminal offence.

1 *The High Court's Response*

All of the principal threads of Fardon's submission were dismissed by the majority.⁵⁰ Despite the potential implications of preventive detention for double jeopardy, only Gummow and Kirby JJ addressed the issue. Gummow J noted:

It is accepted that the common law value expressed by the term 'double jeopardy' applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continuing detention

⁴⁴ For a detailed analysis of the progression of the case, see Patrick Keyzer, Stephen Southwood and Cathy Pereira, '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.

⁴⁵ *Attorney-General (Qld) v Fardon* [2003] QSC 200 (Unreported, Muir J, 9 July 2003).

⁴⁶ *Attorney-General (Qld) v Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003).

⁴⁷ *Fardon* (2004) 210 ALR 50.

⁴⁸ *Attorney-General (Qld) v Fardon* [2003] QCA 416 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 23 September 2003) [80] (McMurdo P).

⁴⁹ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(3)(g).

⁵⁰ *Fardon* (2004) 210 ALR 50 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ, Kirby J dissenting).

order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted.⁵¹

Central to his Honour's observation is the assertion that double jeopardy is not relevant to the *DPSOA* because preventive detention does not amount to being punished twice nor constitute an increase in the punishment originally imposed on the offender. In reaching this conclusion, his Honour referred to the reasoning of the House of Lords in *R (Giles) v Parole Board*,⁵² in which their Lordships drew a distinction between deprivation of liberty for an indeterminate term imposed by a court order and that imposed by an administrative decision. In *Giles*, it was held that a sentence imposed by an English court for a longer period than would be commensurate with the severity of the proven offences did not attract the operation of art 5(4) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.⁵³ Article 5(4) provides that 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

Kirby J approached the double punishment question from a different perspective. In contrast to Gummow J, Kirby J found that preventive detention amounted to both an increase in punishment and a new punishment for the original offence.⁵⁴ Furthermore, his Honour argued that 'the influence of [the *ICCPR*] upon Australian law is large, immediate and bound to increase, particularly in statutory construction'.⁵⁵ By implication, Kirby J argued that the values of the *ICCPR* must inform the construction of statutes. Accordingly, he noted that

the [*DPSOA*] ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed 'guess'.⁵⁶

Ultimately, his Honour concluded that '[r]etrospective application of new criminal offences and of additional punishment is offensive to the fundamental tenets of our law. It is also contrary to the obligations assumed by Australia under the *ICCPR*'.⁵⁷ The international aspects of his Honour's decision will be considered below.

2 *Is Preventive Detention in a Prison Necessarily Punitive?*

The analysis of preventive detention in *Fardon* demonstrates that the issue turns on whether preventive detention can be properly characterised as

⁵¹ *Fardon* (2004) 210 ALR 50, 72 (citations omitted).

⁵² [2004] 1 AC 1, 25–34 (Lord Hope of Craighead), 38–45 (Lord Hutton) (Lord Bingham of Cornhill, Lord Steyn and Lord Scott of Foscote agreeing at 20, 21 and 45 respectively) ('*Giles*').

⁵³ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention*'); *Giles* [2004] 1 AC 1, 8.

⁵⁴ *Fardon* (2004) 210 ALR 50, 100 (Kirby J).

⁵⁵ *Ibid* (citation omitted).

⁵⁶ *Ibid* 82 (citation omitted).

⁵⁷ *Fardon* (2004) 210 ALR 50, 101 (Kirby J).

'punitive'. As this commentary has argued, the form of preventive detention conceived by the *DPSOA* is punitive in character. This view finds substantial support in international human rights standards and various decisions of foreign courts and tribunals.⁵⁸

As Gummow J cited the House of Lords decision in *Giles* in support of his view that preventive detention is not punitive,⁵⁹ our analysis commences with an assessment of this decision. Giles pleaded guilty in the Crown Court at Nottingham to two offences committed on different occasions.⁶⁰ On 10 January 1997, he was sentenced to consecutive terms of four and three years' imprisonment.⁶¹ In sentencing, the judge observed that it was necessary to pass a custodial sentence which was longer than the sentence that would be commensurate with the seriousness of the offences, in order to protect the public — and one of Giles' victims in particular — from serious harm by him.⁶² As a result, Giles' sentence incorporated a preventive element. Giles appealed on the basis that the preventive element of his sentence constituted 'arbitrary detention' because 'he did not have the right, after he had served the punitive part of his sentence, to apply to a court to decide whether it was still necessary to detain him in order to protect the public'.⁶³

In his appeal, Giles contended that the preventive aspect of his detention violated art 5(4) of the *European Convention*. His counsel submitted that

[t]o prevent arbitrary detention the court can only authorise detention in the preventative phase as long as the offender continues to pose a danger. The lawfulness of detention falls to be re-determined in accordance with article 5(4) by reference to the question of ongoing dangerousness as soon as the punitive phase ceases to govern detention, and by reason of the changeable quality of dangerousness, at reasonable intervals thereafter.⁶⁴

It is significant that in *Giles*, there was no application made *after* the appellant had served his sentence. Rather, the case was decided after Giles had been released on licence. Nevertheless, the Court decided to hear the appeal because it raised 'an important point of principle',⁶⁵ namely, whether the imposition at the time of conviction of a sentence longer than is 'commensurate with the seriousness' of a person's crime is consistent with art 5(4). In examining the issue, Lord Hope cited the view of the European Commission for Human Rights that '[s]uch an "increased" sentence is ... no more than the usual exercise by the sentencing court of its ordinary sentencing powers, even if the 'increase' has a statutory basis'.⁶⁶ His Lordship thus concluded, as did the rest of the Court, that

⁵⁸ See, eg, *Witham v Holloway* (1995) 183 CLR 525, where Brennan, Deane, Toohey and Gaudron JJ stated that: 'Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines ... constitute punishment': at 534.

⁵⁹ *Fardon* (2004) 210 ALR 50, 70.

⁶⁰ *Giles* [2004] 1 AC 1, 6.

⁶¹ *Ibid.*

⁶² *Ibid* 1.

⁶³ *Ibid* 36.

⁶⁴ *Ibid* 37.

⁶⁵ *Ibid* 19 (Lord Bingham of Cornhill).

⁶⁶ *Mansell v United Kingdom*, Application No 32072/96 (Unreported, European Court of Human Rights, 2 July 1997), as cited in *Giles* [2004] 1 AC 1, 31 (Lord Hope of Craighead).

the longer than ‘commensurate’ sentence that was imposed on the appellant was not a violation of art 5(4). This view is supported by the jurisprudence of the Strasbourg Court in *Winterwerp v The Netherlands*⁶⁷ and in *De Wilde, Ooms and Versyp v Belgium (No 1)*.⁶⁸ However, this jurisprudence focuses on the initial conviction and not the subsequent issue of further detention without trial. This point is well made in *Iribarne Pérez v France*,⁶⁹ where the Court stated:

The review required by [art 5(4)] is incorporated in the decision depriving a person of his liberty when that decision is made by a court at the close of judicial proceedings; this is so, for example, where a sentence of imprisonment is pronounced after ‘conviction by a competent court’ within the meaning of [art 5(1)(a) of the *European Convention*]. Only the ‘initial decision’ is contemplated, not ‘an ensuing period of detention in which new issues affecting the lawfulness of the detention might subsequently arise’.⁷⁰

In considering judicial comment on the punitive nature of preventative detention under the *European Convention*, it is crucial to note that the issues raised in *Fardon* are fundamentally different from those in cases such as *Giles*. In *Fardon*, the issue was whether the application for and the imposition of a preventive sentence *after* the appellant had served his original sentence constituted a breach of his human rights. In light of the distinction that can be drawn between the facts in *Giles* and *Fardon*, the *DPSOA*, by permitting the detention of a person without further trial after they have served the original sentence, may well offend similar international laws relating to detention. Accordingly, this commentary now considers whether the *DPSOA* breaches the *ICCPR*.

IV ASSESSMENT AT INTERNATIONAL LAW

In the *Fardon* appeal, the majority of the High Court focussed its analysis on the constitutional questions arising in the case. With the exception of Kirby J, the Court paid scant attention to the fundamental international law issues. Questions that concern the impact of international law on the creation of Australian legislation are of great importance. The validity of any statute at international law cannot be determined solely by reference to the domestic legal system. Rather, it must ultimately be assessed by reference to international norms and standards. Significantly, the High Court’s decision does not render the *DPSOA* valid under international law. Instead, this issue will ultimately be determined by the HRC.

A The ‘No Double Punishment’ Rule under International Law

It is a fundamental maxim of the law that a person may not be punished twice for the same crime: *nemo debet bis vexari pro eadem causa*.⁷¹ The rule against

⁶⁷ (1979) 33 Eur Court HR (ser A) 4; 2 EHRR 387.

⁶⁸ (1971) 12 Eur Court HR (ser A) 6; 1 EHRR 373.

⁶⁹ (1995) 325 Eur Court HR (ser A) 48; 22 EHRR 153.

⁷⁰ *Ibid* 63; 173–4.

⁷¹ See *Rogers v The Queen* (1994) 181 CLR 251, 273 (Deane and Gaudron JJ); *Pearce v The Queen* (1998) 194 CLR 610, 625 (Gummow J); *R v Carroll* (2002) 213 CLR 635.

double punishment is a feature of numerous municipal legal systems.⁷² It may be classified, in the language of art 38(1)(c) of the *Statute of the International Court of Justice*, as a general principle of law ‘recognized by civilised nations’.

Article 14(7) of the *ICCPR* provides that ‘[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’. States parties to the *ICCPR* are obliged to comply with this prohibition. Furthermore, art 9(1) of the *ICCPR* provides that

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

There are few examples of states parties to the *ICCPR* whose domestic legislation contradicts art 14(7). As such, Queensland’s *DPSOA*, and similar legislation enacted in other Australian states referred to above, represent a novel set of circumstances for the HRC to consider.⁷³ Where states have breached the rule, those breaches have normally arisen from legislation that purported to serve an ulterior administrative or other non-punitive detention purpose. In such instances, the victim or prisoner retains the right to redress within the limits of the municipal legal system. However, the difficulty with seeking this redress is that invariably, as in Fardon’s case, the legislation authorising the incarceration is deemed to be valid.

B *The First Optional Protocol: The Avenue for Redress*

The avenue by which Fardon may obtain the HRC’s assessment of the *DPSOA* lies in the *First Optional Protocol to the ICCPR*,⁷⁴ which enables an applicant to file a communication with the Committee, which oversees the *ICCPR*. Through this mechanism, Fardon can test the consistency of the *DPSOA* with the rule against double punishment in art 14(7). States parties to the *First Optional Protocol* recognise the competence of the HRC ‘to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant’.⁷⁵ Australia ratified the *First Optional Protocol* in September 1991.

Rule 90 of the *Rules of Procedure of the Human Rights Committee* provides strict guidelines for the admissibility of communications.⁷⁶ For a communication to be admissible, a Working Group of the Committee must be satisfied that, amongst other things, ‘the individual has exhausted all available domestic remedies’.⁷⁷ The ‘local remedies’ rule is particularly relevant to the Fardon communication because it regards all local remedies as having been exhausted

⁷² *Green v United States*, 355 US 184, 187–8 (1957) (United States); *R v Shubley* [1990] 1 SCR 3 (Canada); *Daniels v Thompson* [1998] 3 NZLR 22 (New Zealand).

⁷³ See above n 18.

⁷⁴ Opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) (*‘First Optional Protocol’*).

⁷⁵ *Ibid* art 1.

⁷⁶ HRC, *Rules of Procedure of the Human Rights Committee*, UN Doc CCPR/C/3/Rev.6 (24 April 2001) (*‘Rules of Procedure’*).

⁷⁷ *Ibid* r 90(f).

where the highest domestic judicial authority determines that the relevant legislation is legally valid, and there is an absence of any non-judicial intervention to provide a remedy. Therefore, the High Court's decision constitutes the prerequisite that enables Fardon to pursue relief before the HRC.

C *The Comparative Strengths of Fardon's Complaint*

1 *The Precedent of the New Zealand Communication*

In order to demonstrate the relative strength of Fardon's case, this commentary will now examine an analogous case involving preventive detention considered by the HRC in 2002. In that case, the complainants argued that their preventive detention sentences breached New Zealand's obligations under the *ICCPR*.⁷⁸ Mr Rameka, the first complainant, was found guilty of two charges of rape, one charge of aggravated burglary, one charge of assault with intent to commit rape, and one charge of indecent assault.⁷⁹ Pre-sentence and psychiatric reports noted his 'previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that there was a 20% likelihood of further commission of sexual offences'.⁸⁰ For the first count of rape, he was sentenced to preventive detention, which was to be served for 14 years concurrently with the second charge of rape. He was sentenced to two years' imprisonment for the burglary and to two years' imprisonment for the assault with intent to commit rape.⁸¹

Mr Harris, the second complainant, pleaded guilty to, and was found guilty of, 11 charges of sexual offences he had committed over a three month period against a minor.⁸² He had two prior convictions for unlawful sexual interference with minors.⁸³ The Solicitor-General appealed his sentence on the basis that preventive detention, or at least a longer finite sentence, should have been imposed.⁸⁴ In June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. In imposing the sentence, the Court had noted that 'no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence'.⁸⁵

Mr Tarawa, the third complainant, was found guilty of a variety of charges including rape, 'unlawful sexual connection', indecent assault, burglary, aggravated burglary, kidnapping, being an accessory after the fact, aggravated robbery, demanding with menaces, and unlawfully entering a building.⁸⁶ He had previous multiple offences involving breaking into homes and engaging in

⁷⁸ *Rameka et al v New Zealand*, HRC, Communication No 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003).

⁷⁹ *Ibid* [2.1].

⁸⁰ *Ibid*.

⁸¹ *Ibid* [2.2].

⁸² *Ibid* [2.4].

⁸³ *Ibid*.

⁸⁴ *Ibid* [2.5].

⁸⁵ *Ibid*.

⁸⁶ *Ibid* [2.6].

sexually-motivated violence, including two rapes.⁸⁷ Some of the offences were committed while Tarawa was on bail. He was sentenced to preventive detention in respect of the three sexual violation charges.⁸⁸ On appeal, the New Zealand Court of Appeal held that in light of Tarawa's criminal background, the preventive detention sentence was appropriately open to the sentencing judge.⁸⁹

In September 2001, the Judicial Committee of the Privy Council rejected all three applications for special leave to appeal.⁹⁰ The applicants subsequently applied to the HRC. Citing several authorities,⁹¹ they complained that

it was arbitrary to impose a discretionary sentence on the basis of evidence of future dangerousness, as such a conclusion cannot satisfy the statutory tests of 'substantial risk of re-offending' or 'expedient for the protection of the public' in the individual case. ... [O]n the facts none of them fit the statutory tests of being a 'substantial risk', [nor was] preventive detention ... 'expedient for protection of the public'.⁹²

2 Admissibility of Preventive Detention Complaints

Before considering the merits of Fardon's claim, the HRC must, in accordance with its *Rules of Procedure*, determine the admissibility of the communication.⁹³ In this regard, the New Zealand communication may provide some guidance. In response to the complaint brought by Rameka, Harris and Tarawa, New Zealand argued, *inter alia*, that the claims were not admissible because the authors were not 'victims' pursuant to the definition in the *First Optional Protocol*.⁹⁴ New Zealand argued that

[w]hile the authors are currently serving sentences ... they have not yet served the period that they would have had to serve had they been sentenced to a finite sentence. Rather, they are currently serving the ordinary deterrent part of their sentence, and the preventive aspect has yet to arise.⁹⁵

As in *Giles*, preventive detention was imposed in all three instances at the time of conviction by the courts. By its very nature, the preventive element of the detention becomes operative after the finite sentence has been served. Therefore, the logic of the New Zealand argument appeared to be that prisoners who have been sentenced to preventive detention cannot bring a claim to the Committee until they have started to serve the preventive part of their sentence. Not

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* [2.7].

⁹⁰ *Ibid.* [2.8].

⁹¹ *R v Leitch* [1998] 1 NZLR 420; Cathy Cobley, *Sex Offenders: Law, Policy and Practice* (2000) 196; Mark Brown and John Pratt, *Dangerous Offenders, Punishment and Social Order* (2000) 82, 93; *ICCPR*, above n 3, arts 7, 9(1), 9(4), 10(1), 10(3), 14(2); *Bill of Rights Act 1990* (NZ) ss 9, 23(5); *Bill of Rights 1689* (Imp).

⁹² *Rameka et al v New Zealand*, HRC, Communication No 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) [3.2].

⁹³ HRC, *Rules of Procedure of the Human Rights Committee*, above n 76, r 87.

⁹⁴ *First Optional Protocol*, above n 74, art 1.

⁹⁵ *Rameka et al v New Zealand*, HRC, Communication No 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) [4.8].

surprisingly, the Committee disagreed, noting that

[the applicants] having been sentenced to and begun to serve such sentences, will become effectively subject to the preventive detention regime after they have served ... their [finite] sentence. As such, it is essentially inevitable that they will be exposed, after sufficient passage of time, to the particular regime, and they will be unable to challenge the imposition of the sentence of preventive detention upon them at that time.⁹⁶

Therefore, even though the New Zealand complainants had not yet begun to serve the preventive component of their sentences, the HRC nevertheless found them to be ‘victims’ due to the inevitability of their preventive detention.

Fardon’s communication would seem to be stronger than that of the New Zealand complainants. This is because Fardon served and completed his finite sentence before the imposition of preventive detention. If the HRC was willing to admit the New Zealand complaint *before* the elapse of their finite terms of imprisonment,⁹⁷ then the Fardon complaint, which comes after the completion of his finite imprisonment, appears admissible, subject to the other requirements of r 90 of the *Rules of Procedure*.

3 *The Merits*

In a 1995 report, the HRC considered the consistency of New Zealand’s sentencing provisions with the *ICCPR*, recommending the revision of the ‘indeterminate sentence of preventive detention contained in [New Zealand’s] *Criminal Justice Amendment Act* in order to bring the Act into full consistency with articles 9 and 14 of the [*ICCPR*]’.⁹⁸ In spite of this earlier comment, the Committee’s majority decision in the New Zealand communication made no specific reference to the issue of double jeopardy. The focus of the majority decision was on the opportunity for periodic review of preventive detention. The majority opinion stated:

The Committee considers that the ... authors’ detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues.⁹⁹

The Committee concluded that two of the authors ‘have not demonstrated ... that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences’.¹⁰⁰ Since preventive detention had been imposed by the courts at the time of conviction in each of the three cases before the courts, the

⁹⁶ *Ibid* [6.2].

⁹⁷ *Ibid*.

⁹⁸ HRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations on New Zealand*, UN Doc CCPR/C/79/Add.47 (3 October 1995) [186], as noted in *Rameka et al v New Zealand*, HRC, Communication No 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) [3.5].

⁹⁹ *Rameka et al v New Zealand*, HRC, Communication No 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) [7.3].

¹⁰⁰ *Ibid*.

issues of double punishment and the consistency of preventive detention with art 14(7) understandably did not arise.

In the New Zealand cases, there was only one trial in each instance. In each case, the court considered the crimes of the accused person and passed the finite and preventive sentence within the context of the single trial for the crimes committed. This presents a fundamental difference that strengthens Fardon's case. The very essence of the Fardon complaint is that unlike the cases in New Zealand, the preventive detention was not imposed as part of, or in the context of, the same criminal trial process that imposed the initial finite sentence. The purported preventive detention outside and independent of the initial criminal trial and after the completion of the finite sentence, without a finding of any new grounds of guilt, constitutes double punishment for the initial offence.

In our view, the human rights issue presented to the HRC in the New Zealand communication was far milder than that arising from a preventive term of imprisonment imposed *after* the initial sentence has been served. As Kirby J noted in *Fardon*, the *DPSOA* 'involves a later judge being required, in effect, to impose new punishment beyond that fixed by an earlier judge, without any intervening offence, trial or conviction'.¹⁰¹

Thus, when the HRC considers the circumstances in Fardon's case, it may well conclude that the *DPSOA* is a breach of art 14(7). This view is well supported by the approach of the minority in the New Zealand communication. Although double jeopardy was not raised by the communication, the minority rightly addressed the issue:

it is the very principle of detention based solely on potential dangerousness that [we] challenge, *especially as detention of this kind often carries on from, and becomes a mere and, it would not be going too far to say, an 'easy' extension of a penalty of imprisonment.*

While often presented as precautionary, measures of the kind in question are in reality penalties, and this change of their original nature constitutes a means of circumventing the provisions of articles 14 and 15 of the [ICCPR].¹⁰²

The minority observations represent the only HRC sentiment on double punishment to date. As the opinion noted, the institution of preventive detention offers the potential for officials who wish to evade the constraints of art 14 to do so. The facts in *Fardon* reveal that the *DPSOA* made this potential a reality.

While the Explanatory Memorandum to the *DPSOA* presented the legislation in 'precautionary' terms, preventive detention under the *DPSOA* is punitive because it allows a judge to order the incarceration of a person who has already served their sentence for a criminal offence, without any further determination of guilt justifying the use of judicial power. This presents a breach of art 14(7).

More disturbingly, the power of imprisonment which is ordinarily reserved for judicial authority in accordance with traditional judicial processes is replaced by legislation purporting to authorise the exercise of the judicial power of

¹⁰¹ *Fardon* (2004) 210 ALR 50, 100.

¹⁰² *Rameka et al v New Zealand*, HRC, Communication No 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (15 December 2003) appendix (Individual Opinion of Mr Prafullachandra Natwarlal Bhagwati, Ms Christine Chanet, Mr Glèlè Ahanhanzo and Mr Hipólito Solari Yrigoye, dissenting in part) (emphasis added).

imprisonment under the guise of civil commitment proceedings. This effectively undermines the essence of the *ICCPR* provision that detention and deprivation of liberty of the individual must be ‘on such grounds and in accordance with such procedure as are established by law’.¹⁰³ The HRC has noted in an earlier Comment that where ‘so-called preventative detention is used ... it must not be arbitrary, and must be based on grounds and procedures established by law’.¹⁰⁴

In appropriate circumstances, preventive detention may be imposed by a court as part of criminal proceedings. A person convicted of a crime can be sentenced for an indeterminate period for a spectrum of reasons, including the risk that that person will reoffend. But in such situations, preventive detention is an integral element of judicial power that is fastened to the judicial process of sentencing. The *DPSOA* is unique because it allows detention not as part of the judicial sentencing process, but on an *ex post facto* basis when the judicial sentence has been delivered. In effect, the *DPSOA* allows imprisonment of the accused after they have served their sentence. Even more significantly, this is done without following the processes ordinarily required for a criminal trial. In the process, the *DPSOA* breaches not only art 14(7) of the *ICCPR*, but also the procedural requirements under art 9(1).

V CONCLUSION

Traditionally, a convicted felon lost all civil and proprietary rights at common law. As a consequence of his crime, the prisoner ‘not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State’.¹⁰⁵ This status led a warden of Kingston Penitentiary in the United States to declare that ‘so long as a convict is confined here I regard him as dead to all transactions of the outer world’.¹⁰⁶ Such were the views on the status of prisoners in the 19th century. We have come a long way since then. The modern view has been articulated by Justice Brennan of the US Supreme Court: a prisoner is entitled ‘to treatment as a “person” for purposes of due process of law ... A prisoner remains a member of the human family ... His punishment is not irrevocable’.¹⁰⁷ Contemporary international human rights standards reinforce this view.

This commentary has argued that the continued incarceration under the *DPSOA* of a prisoner who has already served the initial sentence is a breach of the *ICCPR* provisions governing double punishment and due process. The High Court’s decision rejecting the punitive character of the *DPSOA*’s preventive detention scheme is one more unfortunate addition to the list of decisions that affirm the validity of Australian legislation and appear inconsistent with the

¹⁰³ *ICCPR*, above n 3, art 9(1).

¹⁰⁴ HRC, ‘General Comment No 8: Article 9 (Right to Liberty and Security of Persons)’ in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.7 (12 May 2004) 130, 131.

¹⁰⁵ *Ruffin v Commonwealth*, 62 Va 790, 796 (1871).

¹⁰⁶ Cited in William Arnold Calder, *The Federal Penitentiary in Canada, 1867–1899: A Social and Institutional History* (PhD Dissertation, University of Toronto, 1975) ch 8, 3.

¹⁰⁷ *Furman v Georgia*, 408 US 238, 290 (1972).

ICCPR.¹⁰⁸ Nevertheless, the *First Optional Protocol* appears to provide an avenue for redress for Fardon.

There is no doubt that the issues before the HRC will primarily turn on whether preventive detention is found to be punitive in nature. In our opinion, whereas preventive detention has generally been imposed by states as an integral part of the judicial process at the time of sentencing, detention under the *DPSOA* scheme — imposed after the completion of and independent to the initial sentence — is punitive. Although the High Court may have affirmed the legal validity of the *DPSOA* in Australia, its decision in *Fardon* is unlikely to remain the last word.

¹⁰⁸ See the discussion of *A v Australia*, HRC, Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) in Sam Blay and Ryszard Piotrowicz, 'The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law' (2000) 21 *Australian Yearbook of International Law* 1.