"The Law and Intellectual Disability - Intellectual Disability and Community Protection"

Department of Community Services

Western Divisional Office, Orange

28 October 1994.

DEPARTMENT OF COMMUNITY SERVICES

WESTERN DIVISIONAL OFFICE

CONFERENCE ORANGE

THE LAW AND INTELLECTUAL DISABILITY

Orange, 28 October 1994

INTELLECTUAL DISABILITY AND COMMUNITY PROTECTION

The Hon Justice M D Kirby AC CMG

After referring to:

- *In Re B (A Minor)* [1981] 1 WLR 1421 (CA);
- S C Hayes and R Hayes, *Mental Retardation: Law, Policy and Administration;* S C Hayes & R Hayes *Simply Criminal*; and Redfern Legal Centre *Legal Rights and Intellectual Disability: A Short Guide*;
- *R v Brian Chivers* (1991) 54 A Crim R 272 (QCCA);
- *R v Edward Champion* (1992) 64 A Crim R 244 (NSWCCA);
- J Bright: "Intellectual Disability and the Criminal Justice System: New Developments, *Last Inst J* (Vic), Oct 1989, 933;
- *Veen v The Queen* (1979) 143 CLR 458.

In this context it is appropriate for me to express my concern about the preventive detention legislation introduced into the New South Wales Parliament.[1] The Bill was introduced on 27 October 1994.

Recent reports have shown the very high level of intellectually disabled persons amongst the prisoners in Australian gaols. One such report, a paper by the New South Wales Law Reform Commission, showed that one in four people appearing in Local Courts in this State suffer from some measure of intellectual disability. The Community Protection Bill, presently before Parliament, therefore has to be considered in the context of the likelihood that it would fall heavily upon people with various kinds of intellectual impairment or disability.

If enacted by the New South Wales Parliament, the Community Protection Bill will empower a Judge of the Supreme Court to make a preventive detention order against a person. Such an order may be made on the application of the Attorney-General if the Judge considers:

- that the person is "more likely than not" to commit a serious act of violence; and
- that it is "appropriate" for the protection of a particular person or persons or the community generally that the person be held in custody.[2]

If enacted, the law will provide that the order have effect for between six and twenty-four months as specified. The order may be made whether or not the person subject to it is already in legal custody.

The Bill would also empower a Supreme Court judge to issue a warrant for the arrest of a person against whom proceedings on an application for a preventive detention order are pending. The Judge must be satisfied that there are reasonable grounds on which a preventive detention order may be made. The Judge is also given power to restrain certain publicity about such proceedings.

---

1. See Community Protection Bill 1994 (NSW).
2. See clause 5.

The most remarkable feature of the Bill is that it empowers such radical steps to be taken simply upon proof by the civil standard, ie on the balance of probability, not on the criminal standard (ie beyond reasonable doubt) which is virtually invariably required in our system of law to deprive a person of his or her liberty.[3] Thus, a single Judge may, on an application of this kind, without any criminal conviction or offence being proved, perhaps under order of non-publication and on the civil onus of proof, deprive a person of liberty for up to two years. This is a truly remarkable empowerment of the Judges. But it is a deprivation of civil liberties which gives cause for anxious reflection.

I want to make it clear that if the Community Protection Bill is passed by Parliament, subject to any arguments of constitutional invalidity, it will be the duty of the Judges, including myself, to give effect to the law. No Judge can put himself or herself above a valid Act of Parliament.

However, it is appropriate that I should express anxiety about the Bill now whilst it is before Parliament I know that similar anxiety is shared by a number of senior Judges who have spoken to me about it. It is a complete departure from the longstanding principle of the common law. That is that our criminal justice system does not punish people for what they *might do* in the future but for what they have been proved beyond reasonable doubt *already to have done*. The High Court of Australia in the case of *Veen* in 1979[4] has clearly held that this is the law of Australia. Any attempt to circumscribe that law must be viewed with extreme caution.

Preventive detention has been a feature of oppressive regimes such as the apartheid regime in South Africa. It is a feature of terrorism legislation in some countries. In others it is a relic of colonial rule, embraced and used with enthusiasm by the successor regimes. In short, it has been followed in many oppressive States. It has not, until now, been part of the law of New South Wales.

---

3 See clause 15.

4 See (1979) 143 CLR 458.

I most earnestly hope that Parliament will send this Bill to the appropriate Parliamentary Committee or to the Law Reform Commission for further consideration. There, it could be studied and opinions gathered from experts and the community generally. It would be a tragedy if, especially in an election mode, the Parliament allowed this measure to pass without full community consultation about such a radical departure from our long established rule of law principles. Its burden could fall heavily upon intellectually disturbed or disabled persons. That this is the purpose is made clear by clause 12 of the Bill. This empowers the Supreme Court to direct the Commissioner of Corrective Services to make psychiatric treatment available to a person detained.

I am sure that those who have introduced the Bill are well meaning. They are seeking to respond to anxieties in the community which are often whipped up by media reports of particular cases. But twenty-four months loss of liberty on the basis of a Judge's prediction of dangerousness itself seems dangerous. Better by far to found our laws upon ancient principles respectful of liberty and sound data than on alien notions which may arguably breach Australia's obligations under the *International Covenant on Civil and Political Rights*.[5]

When judges are appointed they are issued with a desk, a modest library and trappings of office. Alas, they are not issued with a crystal ball by which they can predict whether a particular person is more likely than not to commit a serious act of violence in the future. Sentencing law already provides for additional punishment if a person's record of past convictions shows that he or she has a record of violence. Bail law protects the community against people facing trial who have bad criminal records. Mental health legislation already provides means, with safeguards, for the detention of people suffering from severe mental illness which threatens the community or themselves. This is the correct way to deal with potentially violent people. Neither Judges nor medical practitioners nor prison officers have the gift of prophesy. Before

---

[5] See esp Art 7, Art 8.2, Art 9.1, Art 14.2 and Art 14.7.

this law is enacted, I hope that it will have the most thorough public consideration and debate.

Community groups, including those involved in the protection of intellectually disabled persons should pay particular regard to the Bill. They should make their views about it known to Parliament and to the community.

It is worth recalling the words of Lord Lane, former Lord Chief Justice of England, speaking in the House of Lords in April 1989:

> *"[L]oss of freedom seldom happens overnight, as the experiences of the noble and learned Lord, Lord Elwyn-Jones, in Europe immediately after the war taught him. Oppression does not stand on the doorstep with a toothbrush moustache and a swastika arm band. It creeps up insidiously, it creeps up step by step and all of a sudden the unfortunate citizen realises that [liberty] has gone."*[6]

---

6 See Sir Francas Purchas, What is happening to judicial independence?" (1994) 144 New LJ 1306 citing *Hansard* (HL) 7 April 1994, col 1331.