Chapter Eleven

Parliamentary Democracy, Criminal Law and Human Rights Bodies

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There are an increasing number of very important public policy issues in Australia subject to consideration and determination by quasi-judicial international bodies on the basis of how, in their view, a particular result of legislative action or administrative decision-making does or does not conform with a "human right", which may be elsewhere defined in an international human rights document.

This paper seeks to make several related points regarding the determinations by these international arbitral bodies. The first relates to the nature of the determinations, considered in light of prevailing standards that are relevant to the public policy areas under consideration.

The second point relates to the legal quality of the decisions, considered by way of a comparison between the determinations reached by international human rights bodies in question and decisions made by domestic Australian courts. Central to this part of the analysis will be an observation that there are emerging instances whereby the "non-binding" decisions made by international human rights bodies have reached entirely different conclusions to domestic courts, including the High Court of Australia, in circumstances where the factual and legal questions under determination are very similar or, indeed, precisely the same.

The third and final point relates to a possible consequence of a divergence of authority between domestic courts and human rights bodies considering very similar issues relating to specific legal questions dealing with human rights issues. With respect to this issue, it is a point sometimes made that the determinations of human rights bodies (both domestic and international) are non-binding; and that, as a consequence, these decisions are merely educative or advisory, such that a divergence in the conclusions that they reach, either from prevailing community opinion or Australian courts is not an issue which is not problematic. This argument proposes that divergent outcomes do not mean, in practice, that domestic legislators and administrators are subject to separate and different standards. This paper will consider whether and to what extent a divergence in legal standards on key issues relating to public policy and public administration may come to affect the practical operation of Australian governments (both State and Commonwealth) and their constitutional interaction.

Human rights decisions as public policy outcomes

There are two broad ways in which the quality of decision-making by human rights arbitral bodies might be assessed. Firstly, the legal quality of the decision-making of different bodies can be assessed where an Australian appellate court has reached conclusions on the same series of facts and is applying those facts to similar legal tests and principles. Cases are now starting to emerge that allow for such a comparison and some of those cases will be examined in this paper. To anticipate one of the conclusions of this analysis, there is cause to conclude that when considered alongside decisions of Australian domestic courts, international human rights bodies are making determinations which are wrong at law.

The second means of assessing the quality of decisions made by human rights bodies is inherently more subjective. In this regard, this analysis contends that determinations made by human rights

bodies involve considerations about appropriate public policy outcomes where different interests are being balanced against each other. And, further, that it is the case that the determinations of human rights bodies as to what is the appropriate balance between competing interests or values in a given public policy area is often inconsistent with determinations made on the same topic by courts who ultimately owe their decision-making authority to democratically-elected parliaments.

I have elsewhere set out the way in which the types of decisions being made pursuant to human rights documents or provisions are more in the nature of balancing exercises between competing rights in a select area of public policy than they are decisions which can be properly characterised as decisions protecting and preserving fundamental and consensually agreed rights against state action.[1]

It is not the purpose of this paper to restate those arguments. However, by way of summary, these arguments rest on the fundamental descriptive proposition of value pluralism; being a contention that values (or rights) exhibit one central feature. Notably, that they cannot be simultaneously obtained but, rather, that values (or rights) are in constant conflict with each other and that choices between different and thereby competing values is agonistic in the sense that choosing more of one value (or right) invariably means accepting less of another. In turn, the idea of value pluralism is fundamental to a descriptive view that decisions as between competing rights are fundamentally decisions reaching appropriate public policy outcomes and is also fundamental to the allied philosophical view that elected representatives are best placed to make determinations of public policy.

In short, if the descriptive concept of value pluralism is accepted, it can be seen as the reason why it is that what courts are most often called upon to do when determining questions arising under rights documents or human rights provisions is, fundamentally, to engage in setting public policy outcomes.

While not the only focus of this paper, it is useful to provide one example of this phenomenon as a means of placing the points made later in context.

Aurukun Shire Council v Chief Executive, Office of Liquor Gaming and Racing in the Department of Treasury (2010) 265 ALR 356 (*Aurukun*) is squarely a case dealing with determinations arising under statutory provisions which are commonly considered to establish and protect human rights. Indeed, it is instructive that the head note describing the case simply commences with the capitalised words, "HUMAN RIGHTS".

Aurukun dealt with an appeal by the Aurukun Shire Council (a shire with residency rights largely restricted to aboriginal residents). The issue which arose for consideration in *Aurukun* was whether amendments made in 2008 to the *Liquor Act* 1992 (Qld) (the Liquor Act) were inconsistent with s. 10 of the *Racial Discrimination Act* 1975 (Cth) (the RDA). The relevant amendments had the effect of ensuring that the general liquor licence held by each of the appellant shire councils was brought to an end on 1 July 2008. And, further, that the appellants, as well as all other local government authorities in Queensland, were barred from applying for or holding such a licence in the future.

The appellants were local government authorities constituted under the *Local Government Act* 1993 (Qld) for a local government area within Queensland. Prior to 1 July 2008 each of the appellants held a general liquor licence under the Liquor Act whereby it was authorised to sell alcohol from premises within its local government area.

It was then the case that the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act* 2008 (Qld) (the amending Act) amended s. 106 of the Liquor Act by the introduction of s. 106(4) which was is in the following terms: "(4) Also, a local government, corporatised corporation or relevant public sector entity may not apply for or hold a general licence".

The amending Act also introduced into the Liquor Act certain transitional provisions, where the effect of s. 278 of the Amending Act was to cause the general licences held by "a local government, corporatised corporation or relevant public sector entity, other than the Torres Strait Island Regional Council" to lapse at the beginning of 1 July 2008. The operation of s. 278 was, by virtue of ss. 278(2)

and 279, subject to the decision of the Chief Executive, to continue the licence in force until 31 December 2008 but no later.

In consequence of these legislative changes, a central argument raised by the appellants was that the amending Act was calculated to affect only "Indigenous councils". This term, the appellants argued, meant local authorities governing local government areas with mainly indigenous residents. The argument in essence was that the appellant local authorities were said to be the specific target of the amending Act because they were the only "local government, corporatised corporations or relevant public sector entities" in Queensland which actually held general licences under the Liquor Act prior to the amending Act.

His Honour Justice Keane noted that s. 10(1) of the RDA did establish rights to property including indigenous forms of property holdings but that, to the extent that the legislation sought to advance or protect a specified right, the right of the kind protected was not absolute and would be subject to other legislative provisions. And, further, that these other legislative provisions may well have the effect of cutting across the right established by the RDA and could do so if these provisions were themselves seeking to advance or protect other legitimate rights.

His Honour Justice Keane further observed that that the Queensland Legislature was entitled, if not obliged, to address the claims of women and children in Aurukun and Kowanyama communities pursuant to Article 5(b) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)[2]. Article 5(b) of CERD seeks to advance and protect a right, being, "[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution". A finding of fact made in *Aurukun* was that there existed an undisputed connection between alcohol consumption and what was described as the notorious domestic violence in Aurukun and Kowanyama. The conclusion was then drawn that domestic violence against women and children is an issue of fundamental concern in terms of human rights, involving, as it does, concerns as to human dignity and freedom from fear and that the amending Act was a legislative expression of the right referred to in Article 5(b) of CERD.

His Honour Justice Keane then went on to say:

> It may be said immediately that it is difficult to accept that the opportunity to buy alcohol from a licensed local government authority can rationally be placed on the same level of importance in any frame of reference with the right of women and children to live free of alcohol-fuelled violence. But even if one assumes that the appellants are able to point to a fundamental freedom or human right with an equal claim to protection with the fundamental human right of women and children to be protected against personal violence, the striking of the balance between these competing human rights is, as *Bropho v Western Australia* (2008) 169 FCR 59 shows, a matter for the legislature.[3]

The value pluralist conception of ethics proposes that, while some degree of commonality in human nature can provide support for the idea of a stable pool of objectively good ends or values (sometimes characterised as rights), reason cannot function as a perfect arbiter in conflicts among good ends or universally accepted values. Translated to the *Aurukun* circumstances, this idea holds that the right of freedom of choice embodied in the opportunity to buy alcohol from a licensed local government authority is a validly, agreed-upon value, just as is the right of women and children to live free of alcohol-fuelled violence. But, also, each of these rights is clearly in conflict in the relevant circumstances.

Justice Keane's observation that it is difficult to accept that the opportunity to buy alcohol from a licensed local government authority can rationally be placed on the same level of importance in any frame of reference with the right of women and children to live free of alcohol-fuelled violence

is an interesting one. Certainly, in the particular circumstances relevant to *Aurukun*, a difficulty in considering the right to buy alcohol as deserving precedence is readily understandable. It is not impossible, however, to envisage a circumstance where a freedom of choice represented by an opportunity to purchase alcohol might be considered of a higher order; much would depend on the particular facts and circumstances. If denial of a choice to purchase alcohol was systematic, thorough-going and indicative of other deficiencies in one particular group's freedom of choice to purchase goods and services, this might change the calculus between the two rights in question. The central point being made by Justice Keane is, nevertheless, perfectly correct and highly reflective of a value pluralist conception of decisions pursuant to rights documents.

This point aside, what Justice Keane recognises is that the amending Act represents an attempt by the legislature to strike a balance in a particular public policy problem which accords primacy to the reduction of alcohol-related violence to women and children in the community in question.[4] The situation was described in the following terms:

> Nothing in s. 10 of the RDA or, for that matter, in CERD or the UDHR or the ICCPR, is apt to deny the legislature of the State the power and responsibility to strike the balance of priority between human rights and freedoms where those rights are in competition with each other. That this should be so is hardly surprising given that, if the setting of the balance of priority between human rights where those rights are in conflict in any given situation was intended to be a matter for the exercise of judicial judgment, then the instruments or statutes which establish the content of human rights or provide for their enforcement might have been expected to provide a hierarchy of these rights. Absent some statement of priority in the instruments which establish the rights and freedoms protected by s. 10 of the RDA, a decision-maker forced to choose between right and right must make an intuitive value judgment between incommensurable values.[5]

This case well reflects the difficult practical operation of judicial decision-making in rights cases in the light of the theory of value pluralism.

The case illustrates that value pluralism finds its inevitable manifestation in the realm of rights documents in a way that means judicial decisions consequent upon such documents are rarely determinations about singular rights themselves but are rather determinations about public policy outcomes where one or more rights are in conflict. In this sense, it can be perceived that what is actually contained within rights documents is not much more than various lists and reformulations of those things that Isaiah Berlin, in his theory of value pluralism, considered might be identifiable agreed values.[6] If this is the case, and it can be accepted that what Berlin says about values is correct, then rights documents simply contain values in inevitable conflict and what invariably occurs in decisions arising from rights documents are simply determinations about what mix of values is to be preferred over another mix. Which is to say that, judicial decisions consequent on rights documents are most often simply public policy outcomes to which there may exist several equally justifiable positions or commensurate outcomes.

Indeed, in the *Aurukun* decision, Justice Keane uses the description of incommensurability. Incommensurability is the concept at the heart of Berlin's theory of value pluralism. It is the idea that there exist multiple commensurate outcomes to public policy decisions about values which lends power to the philosophical suggestion that judicial decision-making amongst commensurate outcomes is politically illegitimate for the reason that it subverts democratic values by privileging the views as to the appropriate public policy outcome of a small number of unelected decision-makers over those of elected representatives and that, in so doing, it disenfranchises ordinary citizens.

To restate this argument – it is certainly the case that views may rationally differ as to whether the balance between competing values has been well struck in any particular public policy problem. It is

precisely this point that makes rights documents so controversial because they exhibit the potential to elevate the view of the judiciary, or small parts of it, above the view of past, present and future democratically elected parliaments.

It should be noted that to argue that domestic courts which are arbitrating matters pursuant to human rights provisions are ultimately making determinations of public policy (and that they are ultimately not best placed to so) is not a criticism of Australian courts in the sense of any accusation that this a role which the judiciary has coveted. Many sensible judicial officers understand that advancing the role of the courts in public policy decision-making is to engage in inherently political (and controversial) decisions which would likely serve only to diminish the well deserved reputation of Australian domestic courts for independence, political impartiality and excellence. So it was that in *Aurukun* that there was a recognition by Justice Keane that a judicial decision in the matter in question would have had the effect of denying the legislature of the State the power and responsibility to strike the balance of priority between human rights and freedoms where those rights are in competition with each other.

Rather than there necessarily being a pull from the judiciary to make such decisions, it has been a cumulative push effect of a range of human rights type provisions. Whether the provisions are in domestic legislation or international rights documents, the provisions have resulted in elected parliaments at the State and federal level siphoning off difficult decisions to courts that should properly have been made by executive governments and legislatures. This phenomenon, of courts making decisions which are inherently determinations of public policy, would have been radically accelerated if the High Court were called upon to assess the validity of legislation based on the provisions of a statutory human rights document or, indeed, a constitutionally-entrenched Bill of Rights. Both of these possibilities have thankfully been rejected by the two mainstream Australian political parties at least for the foreseeable future. However, as this analysis will argue, when considering the public policy decision-making role of bodies arbitrating on human rights provisions, domestic Australian courts are only a small part of the story.

A central contention of this paper is that the determinations being made pursuant to provisions purporting to enshrine or advance a particular human right in legislation or some other document are increasingly being made not merely by domestic Australian courts but also by quasi-judicial bodies, both domestic and international. And, further, that these determinations are both out of step with accepted judicial precedent as well as public opinion as to what is the appropriately balanced public policy outcome.

Making any point which involves an assessment of a public policy outcome against prevailing community standards relevant to the public policy area in question is necessarily a subjective process. It is to be expected that some argument may arise as to the central features of what may be a general public view as to a particular public policy outcome. The very process of formally expressing that any particular outcome is widely held by a majority of the public is a reductive process attempting to put in short summary form the common elements of a wide range of individually held views.

Elected public policy-makers invariably claim insight into community sentiment. Those claims are often subject to overstatement and disagreement. Notwithstanding the difficulties associated with reaching a determination of general public sentiment, there is good reason to believe that key determinations being reached by human rights bodies significantly diverge from the public policy outcomes that are likely desired by the majority of electors if for no other reason than that the former decisions often override the legislative decisions of parliaments or administrative decisions of elected executive governments.

One recent decision of the Australian Human Rights Commission that can be argued to demonstrate such a divergence is *Mr KL v State of NSW (Department of Education) (KL)*[7].

The complainant in *KL* had been charged and convicted with a number of offences committed between 1983 and 1992. These charges included "the possession and use of amphetamines, illegal

use of a motor vehicle, break and enter offences, dishonesty offences and stealing".[8] Of particular importance was the fact that some of these offences were committed after a term of imprisonment in 1991. In total, KL served eight months imprisonment.[9] Upon completing a Bachelor of Music Education in 2003 and a Graduate Diploma in Education in 2006, KL then applied for a teaching position with the NSW Department of Education through its graduate recruiting program. After reviewing his application, including his previous criminal convictions, the Department refused KL a position. KL's application was later reviewed by an independent reviewer engaged by the Department who recommended that KL be granted limited casual teacher approval for a period of 12 months with the opportunity for his application to be reviewed after this period. The Department, having considered this recommendation, continued to uphold its original decision.

KL further complained to the Australian Human Rights Commission on the basis that his exclusion from teaching amounted to discrimination under the definition in s. 3 of the *Australian Human Rights Commission Act* 1986 (Cth). The definition of discrimination under s. 3 of the Act outlines that an exclusion which would otherwise amount to discrimination is not properly characterised as discrimination if it is based upon the inherent requirements of the job. The President of the Australian Human Rights Commission, the Hon Catherine Branson, concluded that, even though, "at first blush, it may appear difficult to see how a person with the criminal record held by Mr KL could meet [the inherent job] requirements",[10] the Department had failed to "demonstrate a sufficiently 'tight correlation' between the decision not to offer Mr KL employment and the inherent requirements of the job".[11] Her decision was based upon KL's current involvement with his community and the changes he had made to his life as well as the length of period since his last offence.[12]

President Branson was satisfied on all the circumstances that there were no additional steps that KL could have undertaken over the period of time to support "the evidence of his rehabilitation and his commitment to making a contribution to society and to the education system".[13] Along with this, President Branson recommended that the Department pay to KL $38 500 in compensation for hurt, humiliation and distress; loss of earnings; and loss of opportunity.[14]

This paper will return to this decision below. Here, however, it is useful simply to note that it can be readily contended that the outcome determined by the Department under instruction from the executive government was an administrative decision which would be preferred by an overwhelming majority of citizens. It is based on a strict ban on serious offenders (and, thereby, sacrificing their rights to teach) in favour of a further value producing a policy outcome which weighs the protection of children as paramount.

The legal quality of international human rights decisions

There is an issue further to the necessarily subjective analysis regarding whether the decisions of quasi-judicial human rights bodies reach conclusions that strike the same balance between competing values as would be produced by the democratic parliamentary process. This is the question of the legal quality of the decisions.

With an increasing number of decisions being made by quasi-judicial human rights bodies at the international level an opportunity is presented to compare the legal reasoning between these bodies and Australian domestic courts.

Before proceeding to examine the matters of *Fardon* and, later, *Tillman*,[15] it is necessary to consider briefly the international agreement that is the genesis of these two decisions.

The *International Covenant on Civil and Political Rights* (the ICCPR),[16] which is monitored by the United Nations Human Rights Committee (the UNHRC), was signed by Australia on 18 December 1972 and ratified on 13 August 1980. The ICCPR seeks to protect certain rights that have been deemed by signatories as necessary for enforcement. The ICCPR commits signatories to protecting the civil and political rights of its citizens in a manner consistent with the covenant. Relevant to this paper are articles 9 and 14:

> Article 9 recognises the right to liberty and security of protection, as well as protection for citizens from being subject to arbitrary arrest or detention.[17] Article 14 relates to the right of equality before courts and tribunals.[18]
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> Specifically, Article 14, paragraph 7 protects citizens from double punishment, notably from being 'tried or punished again for an offence for which he has already been finally convicted or acquitted.'

In Communication No. 1692/2007, the UNHRC considered the matter of Robert John Fardon. Mr Fardon's criminal history dated back to the age of 16 involving mostly minor property and other non-violent offences. His first sexual conviction was in 1967 when he was convicted of attempted carnal knowledge of a girl under the age of 10 years. In 1979 he was convicted of indecent dealing with a female under 14 years, rape and unlawful wounding. Within a month of his release from prison in 1988 he raped and sodomised a woman and was later sentenced to another 14 years imprisonment. The legislation at issue was the *Dangerous Prisoners (Sexual Offenders) Act* 2003 Qld (the DPSOA), which came into force on 6 June 2003. Before Fardon's anticipated release pursuant to the expiry of his final 14-year term of imprisonment, the Queensland Attorney-General filed an application under the DPSOA for an order that Fardon be detained for an indefinite period pursuant to s. 13 of the DPSOA.

On 27 June 2003 the Queensland Supreme Court ordered the interim detention of Fardon until 4 August 2003. This date was subsequently extended until 3 October 2003 and then again until further order.

Fardon's detention continued until the 8 November 2006 when the Supreme Court, after two preceding preliminary decisions, ordered his release subject to a conditional supervision order, which would end on 8 November 2016. Fardon was released pursuant to the conditional supervision order on 4 December 2006.

It should be noted that in July 2003 the Queensland Supreme Court held that the provisions in the DPSOA were constitutional.[19] This decision was upheld by the Court of Appeal in September 2003 and, later, by the High Court of Australia in *Fardon v Attorney-General (Queensland)* (*Fardon*) in October 2004 by a 6-1 majority (Kirby J dissenting).[20] Many of the bases upon which the validity of the decision in *Fardon* were considered by the High Court bear close resemblance to the issues considered in the UNHRC decision and allow for a direct comparison.

Fardon argued in his communication to the UNHRC that he has not been convicted of a crime since 29 June 2003 and that his continuing detention was a breach of his human rights. Specifically, that his detention under the DPSOA violated the ICCPR because his imprisonment was arbitrary and it punished him for an offence for which he had already been convicted and thus constituted double punishment without further determination of criminal guilt.[21]

As a part of his submissions to the UNHRC Fardon maintained that the DPSOA's objectives could have been achieved through detention in a rehabilitative or therapeutic facility and that the punitive character of his detention could not be rationally connected to the DPSOA's objective of facilitating rehabilitation. The state party (being Australia) argued that the detention of Fardon was lawful, reasonable and necessary in the circumstances. This was because he needed intensive counseling and rehabilitation that was not available in psychiatric facilities and, additionally, Fardon had refused to undertake any rehabilitation program during his initial sentence. While these arguments were accepted by a two-person minority of committee members, the UNHRC majority found in favour of Fardon and ruled that the relevant decision under the DPSOA breached the ICCPR.

The majority found that the central question arising for their determination was "whether, in their application to [Fardon], the provisions of the DPSOA under which the author continued to be detained after his 14 year term of imprisonment were arbitrary".[22] On this question, the majority

noted that each of their reasons, in itself, would have constituted a violation of the UNCCPR, article 9 and did not find it necessary to consider the matter separately under article 14, paragraph 7.[23]

In the summary of the reasons appearing at [7.4] of the decision, five key points may be made:

> The majority found that Fardon had "already served his 14 year term of imprisonment and yet he continued . . . to be subjected to imprisonment in pursuance of a law which characterises his continued incarceration under the same prison regime as detention". The majority contended "that this purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law".
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> The majority also contended that imprisonment is penal in character and therefore "can only be imposed on conviction for an offence in the same proceedings in which the offence is tried". The majority in effect concluded that while the order was made in respect of predicted future criminal conduct, because this prediction had its "very basis" in the offence which he had served already, there was a new sentence in fresh proceedings for the same offence which constituted a breach of Article 15, paragraph 1, of the ICCPR. And, further, that the new proceedings also fell within the prohibition of Article 15, paragraph 1, against retroactive application of punitive legislation due to the fact that the DPSOA was enacted shortly before Fardon's term was to be completed for the offence for which he was imprisoned for 14 years in 1989. The conclusion was that because the detention was incompatible with Article 15 it was "necessarily arbitrary within the meaning of Article 9, paragraph 1, of the Covenant".
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> The DPSOA procedure, which brought about the continuing detention, by being civil in character, did not meet the due process guarantees required under Article 14 of the Covenant for a fair trial in which a penal sentence is imposed.[24]
>
> The majority considered the fact the High Court of Australia had found that the detention order was not based on the author's criminal history and did not relate to the author's original offence but rather that it was preventative in character. Importantly (and to be referred to in detail below) the UNHRC noted that the prohibition against arbitrary arrest has limitations, particularly "where the procedures for doing so (detaining) are established by law". Critically, however, the majority considered that the "concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts". And, while the Court was required to take into account psychiatric expert advice as to Fardon's dangerousness, the Court also had to make a finding of fact on "the suspected future behavior of a past offender which may or may not materialise". Essentially, the majority in the UNHRC were considering "whether . . . the procedures for detaining a person deemed dangerous based on a domestic court's predictive assessment of future behavior were established by law" and found, in essence, that, being inherently problematic, they were not.
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> The majority also concluded that, related to point 4 above, for the State to have avoided the arbitrariness of the DPSOA they should have "demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures

for reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison".

In comparing the quality, in terms of legal correctness, of the UNCHR in *Fardon* to the High Court's consideration of the matter, it is obviously necessary to compare the reasoning and resultant determinations on like issues. On this point it is obviously the case that, ultimately, the UNHRC decision and the High Court decision in *Fardon* are offering judicial determinations of separate questions. The UNHRC decision related to whether the Queensland Supreme Court decision constituted a breach of the articles of the ICCPR detailed above, particularly whether the detention was arbitrary and thereby contrary to Article 9, paragraph 1.

By contrast, the High Court decision considered primarily a Chapter III constitutional question, notably, whether the Act *was* invalid in that it was contrary to the requirements of Chapter III of the Australian Constitution; the contention being that in involving the Supreme Court of Queensland in the process of deciding whether prisoners who have been convicted of serious sexual offences should be the subject of continuing detention orders, the Queensland Parliament conferred on the Supreme Court a function which is incompatible with the Court's position, under the Constitution, as a potential repository of federal jurisdiction. Restated, the point was that the conferred function was repugnant to the Court's institutional integrity. In essence, this was a question very similar to that identified in *Kable v Director of Public Prosecutions (NSW).*[25]

The Kable issue described above is distinct from the ultimate issue being decided by the UNHRC. However, in determining this ultimate issue the High Court had to make determinations on a range of sub-issues which were very similar to, if not precisely the same as, issues that the UNHRC was required to pronounce upon in order to make its own final determination. When the decision-making of the respective bodies is assessed on each of the three issues summarised below, the UNHRC reasoning is exposed as superficial, polemical and legally in error.

Predictive decision-making in criminal law

As noted above, the UNHRC majority at [7.2] and [7.3] considered the fact that the High Court of Australia had found that the detention order was not based exclusively on the author's criminal history and did not relate to the author's original offence but rather that it was preventative in character. The UNHRC also noted that the prohibition against arbitrary arrest has limitations "where the procedures for doing so (detaining) are established by law". Having properly recognised the clear limitations to rule against arbitrary detention in Article 9, it became necessary for the UNHRC to make a determination on the critical issue whether a preventative detention based on analysis that was predictive in character are "established by law".[26]

The UNHRC itself noted such procedures as legitimately including those employed for immigration control or the institutionalisation of persons suffering from a mental illness or other medical conditions which made them dangerous to themselves or the community. When the UNHRC chracterises the relevant question in terms of whether predictive procedures generally are "established by law," it was presumably meaning (as it later describes) that such procedures cannot be "lawful" if they themselves are arbitrary or "unreasonably or unnecessarily destructive of the right itself".[27] Based on this reasoning, the UNHRC had to make some determination as to the legitimacy of the predictive procedure at issue in the DPSOA, and its legitimacy, as well as making a determination about whether this was properly described as a civil or a criminal proceeding (this second issue is addressed below).

The best the UNHRC could do on this key question was to describe the procedure as *"problematic"*.[28]

The first problem with this depiction is that it is vague at least to the extent that it does not provide a conclusive answer to the question that required decision; notably, whether the process was "established by law" and was accepted as a lawful process. It is left to be presumed that "problematic" means unacceptable, improper or unlawful because of the proceeding description that the "concept

of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts".[29] And the further description that while the Court was required to take into account psychiatric expert advice as to Fardon's dangerousness, the Court also had to make a finding of fact on "the suspected future behavior of a past offender which may or may not materialize".[30]

Although vague, the UNHRC's position appears to be that a civil or criminal procedure that relies upon a predictive analysis of the likely nature of the subject's future criminal conduct based, in part, on their past history, but also on how this history and other matters such as the witness's mental condition are considered by expert witnesses as likely to affect the subject's future behavior is not a legitimate legal process. The conclusion by the UNHRC that the predictive process in *Fardon* is an illegitimate process not historically recognised at law and with no proper place in either the civil or criminal law is simply a wrong conclusion at law. Indeed, several of the judges of the High Court determined this issue specifically in their consideration of the *Kable* issue.

It is notable that Kirby J was the only judge that determined this issue in a substantively similar manner to the UNHRC. He held that:

> Imprisonment is not used as punishment in advance for crimes feared, anticipated or predicted in the future. To introduce such a notion of punishment, and to require courts to impose a prison sentence in respect of perceived future risks, is a new development. It is one fraught with dangers and "inconsistent with traditional judicial process".[31]

Indeed, Gleeson CJ considered the very same question but rather framed by Fardon's counsel as the point (going directly to the *Kable* issue) that the process was so devoid of content as to be meaningless and decided this question in the following terms:

> It was argued that the test, posed by s. 13(2), of "an unacceptable risk that the prisoner will commit a serious sexual offence" is devoid of practical content. On the contrary, the standard of "unacceptable risk" was referred to by this Court in *M v M* in the context of the magnitude of a risk that will justify a court in denying a parent access to a child.[32] The Court warned against "striving for a greater degree of definition than the subject is capable of yielding". The phrase is used in the *Bail Act 1980* (Q), which provides that courts may deny bail where there is an unacceptable risk that an offender will fail to appear (s. 16). It is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade.[33]

Their Honours Callinan and Heydon JJ made this point very strongly in their joint judgment. They noted that "an unacceptable risk to the community, relevantly a risk established according to a high degree of probability, that the prisoner will commit another sexual offence if released, established on and by acceptable and cogent evidence, adduced according to the rules of evidence, is one which courts historically have had regard to in many areas of the law".[34]

In describing that this process is not a novel one, their Honours Callinan and Heydon noted the predictive exercise of an assessment of damages for future losses is also a daily occurrence in the courts and the prevalent use of predictive analysis in Family Court proceedings. They noted further that "section 13(6) of the Act uses the expression 'paramount consideration' which is similar to the expression 'paramount interests' referred to in *M v M*, and is one that is well familiar to, and regularly construed by family courts".[35]

These two judges also make the important point that, even in criminal proceedings, predictive analysis is a routine part of processes such as sentencing: "Sentencing itself in part at least may be

a predictive exercise requiring a court on occasions to ask itself for how long an offender should be imprisoned to enable him to be rehabilitated, or to ensure that he will no longer pose a threat to the community".[36]

Hayne J made a similar point in describing the sometimes lack of clarity in the distinction between civil and criminal proceedings and punitive and preventative detention:

> And once it is accepted, as it has been in Australia, that protection of the community from the consequences of an offender's re-offending is a legitimate purpose of sentencing, the line between preventative detention of those who have committed crimes in the past (for fear of what they may do in the future) and punishment of those persons for what they have done becomes increasingly difficult to discern.[37]

To have found, as they did, the UNHRC had to conclude that the type of predictive analysis inherent in the original decision to detain Fardon pursuant to the provisions of the DSOA was somehow a process foreign to the law or improper in either civil proceedings leading to preventative detention or criminal proceedings leading to punishment. What the judges of the High Court of Australia say above is that, while this analysis is not without its accompanying difficulties and one warranting cautious application, it is neither novel nor legally improper.

Indeed, as an aside on this point, the predictive analysis of the original decision of the Queensland court proved itself to be not entirely without merit. During his later release on strict supervision orders that was nominally to continue until 8 November 2016, Fardon breached his orders on two different occasions, one that resulted in three months imprisonment in 2007.[38]

At the time of the Human Rights Committee decision, Fardon had been in custody following sexual offence charges against an elderly woman in April 2008; at first instance in May 2010 Fardon was sentenced to 10 years imprisonment for that crime.[39] It should be fairly noted that, however, on appeal, the Queensland Supreme Court of Appeal upheld Fardon's second ground of appeal that the "verdict was unsafe and unsatisfactory in the sense that it was unreasonable, or cannot be supported having regard to the evidence' ".[40]

A civil process resulting in preventative detention or a criminal process resulting in punitive detention

As noted above, there is some considerable lack of clarity about whether the UNHRC actually made a determination as to whether the decision in question was the result of civil or criminal proceedings. It may be concluded on balance, however, that in finding that the "new sentence" was the result of new proceedings that fell within the prohibition of Article 15, par 1, that the UNHRC found that the outcome was punitive and likely the result therefore of non-civil proceedings. In any event, what can be seen from an examination of the High Court decision is that the description of the detention as punitive rather than preventative is, again, wrong at law.

Allowing for what Gummow J described as the sometimes considerable difficulty in distinguishing a civil from a criminal proceeding, the High Court determined by a clear majority that the detention was not punitive and did not amount to double punishment or a breach of the rule against double jeopardy.

Gummow J described the regime established by the Act as one of preventative detention and made the following comments with direct reference to the principle of double jeopardy:

> 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 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. The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure.[41]

And further: "The making by the Supreme Court of a continuing detention order under s 13 is conditioned upon a finding, not that the person has engaged in conduct which is forbidden by law, but that there is an unacceptable risk that the person will commit a serious sexual offence".[42]

This is very similar to the conclusion reached in the joint judgment of Callinan and Heydon JJ who characterised the relevant provision of the Act in the following terms:

> In our opinion, the Act, as the respondent submits, 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. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes.[43]

In reaching this conclusion their Honours highlighted that the DSOA's purpose was not to punish people for past conduct but, rather, it was a protective measure which nevertheless and desirably was attached to a process which exhibited many of the safeguards inherent in a judicial trial.[44]

In essence, the High Court had held that the detention under the DPSOA did not contain elements of his first offence and underlined the preventative character of his detention. The determination of preventative detention under the DPSOA was designed by the Queensland Parliament as a civil proceeding and was protective in character which therefore meant that it did not involve the question of a criminal offence. On precisely this same question the majority of the UNHRC appears to have reached a different legal conclusion. In a judgment where the minority of the UNHRC resembled closely the reasoning of the High Court, the quality of the judicial reasoning of the UNHRC is seriously in question when compared to the thorough and precise analysis of our own High Court.

Similarly, the vague assertion of the majority that predictive decision-making is "problematic" in one or either of criminal and civil processes, when compared to the reasoning on the same issue by the High Court, is neither correct nor even a particularly well argued piece of judicial reasoning. Were the decision of the UNHRC to have been binding, then Australia would have substituted an inferior quality legal analysis and an incorrect legal determination for the excellence of our own High Court on the same questions in dispute.

However, the decision is not binding, which raises the further question regarding what may be the eventual effect of the existence of international decisions that are potentially at odds with community sentiment on public policy issues or simply wrong at law or both.

Consequence of a divergence between domestic courts and international human rights bodies

The final observation of this paper concerns the notion that the decisions of quasi-judicial international human rights are non-binding and, therefore, an unproblematic addition to the Australian public policy environment.

The often put contention on this point is that, even if the determination being reached by such bodies diverges significantly from the outcome sought to be obtained by the domestic parliaments that have devised the legislation under consideration, this is not an inherently anti-democratic process because the human rights decision is not binding. While this analysis has focused on the human rights decisions of international bodies, it is obvious that, in consideration of decisions such as *KL*, the same criticism is applicable – the potentially undemocratic effect of the decisions made by domestic non-binding human rights bodies.

It seems likely that, if decisions such as that of the UNHRC in *Fardon* were binding and so resulted in the immediate release of a person deemed properly detained (by both domestic parliaments and courts) as a dangerous sex offender posing serious risk to the community, then the criticism that the process was undemocratic would be particularly acute.

As it presently stands, the standard response to the anti-democratic characterisation is that the non-binding nature of the decisions of human rights bodies is such that they do not, in practice, operate in a way which displaces an outcome previously reached by a democratically-elected parliament. The contention, that decisions which may be legally wrong by the standards set by the High Court, and contrary to the policy intent of a democratically-elected parliament, is one which deserves some scrutiny.

A central proposition of this paper is that, particularly in relation to international human rights bodies, to assume that, because their decisions are non-binding, that they are therefore of no consequence, is a superficial and incomplete analysis. The alternative probability is that such decisions, albeit non-binding, are likely to have a significant and practical effect on the capacity of domestic Australian legislatures and executives to effect outcomes that they consider represent those desired by the citizens they represent.

In this respect, the decision of the AHRC in *KL* is a useful starting point. That decision found that the Act complained of constituted discrimination in employment on the basis of criminal record. This was ostensibly a non-binding decision but it is instructive to note the terms of the letter, dated 15 April 2010, by which the subject department provided its response to the recommendations:

> The Department does not propose to take any action with respect to the recommendations of the President. Notwithstanding the President's findings, the Department, with respect, maintains its view that the refusal of Mr KL's application for employment in 2007 was not conduct that amounted to discrimination within the meaning of s. 3 of the *Australian Human Rights Commission Act 1986*. The Department notes that the President accepted the Department's characterisation of the relevant inherent requirements of the job of a teacher in NSW Government Schools and maintains its view that, at the relevant time, after careful consideration of the nature and extent of Mr KL's criminal record was regarded as inconsistent with those inherent requirements. Notwithstanding the above, the Department is prepared, in this case, to take into account the President's findings and to extend to Mr KL casual approval to teach in NSW Government Schools for an initial period of 12 months. Mr KL will nevertheless be required to undertake some administrative processes, which all applicants must satisfy, before the casual approval can take effect.[45]

Despite the assertion above that the relevant Department "does not propose to take any action with respect to the recommendations", in effect the relevant NSW Department did precisely what it asserted it was not doing. The Department reversed the most important and fundamental component of its original decision – to deny the subject employment as a teacher – and granted approval to teach in NSW.

In the matter of *KL* it can be reasonably argued that the public policy principle sought be imposed by the Department, that persons with serious criminal records (even where the offending occurred

sometime previously), should not be allowed to teach children, is a protective principle which would likely receive extremely strong community support. Further, the public policy outcome asserted as the correct one in these circumstances by the AHRC is essentially the opposite of that sought to be achieved by domestic parliaments and the State departments which they instruct. Notwithstanding this fact, and the fact that the AHRC decision is nominally non-binding, it is the outcome preferred by the AHRC which prevailed. What this situation demonstrates is that to describe a decision of a human rights body as incapable of affecting a democratically produced outcome ignores the fact that, even in their non-binding form, they have already been demonstrated as having the effect of substituting a democratically arrived at outcome for the non-democratic outcome.

Domestically, this is a process of dubious legitimacy. The process becomes seriously questionable if it is considered as a mechanism of international lobbying by which a particular minority view as to a desirable outcome can apply pressure to democratically legitimate decision-makers in a particular area of public policy to reverse their original decision. Often this non-binding process is described as an educative, "dialogue"-based process.

There should, however, be seen to exist a distinction between an educative process and a process which seeks directly to apply pressure to reverse a specific public policy decision. Upon examination there is good reason to consider that the term, "educative process", is a euphemism to describe what is more accurately a process of direct and anti-democratic lobbying by a quasi-judicial body attempting to substitute its decision for that of parliaments and departments already subject to domestic judicial review of legislative and administrative action. And, further, when this process of lobbying emanates from a non-elected quasi-judicial body which is non-domestic, the process becomes even more questionable.

The process that applies to the UNHCR is very similar to that applying in the case of *KL*, relating to the AHRC.

Using *Fardon* as an example, although non-binding, the decision by the UNHRC requires that the Australian Government prepare a response within 180 days outlining how it plans to give effect to the United Nation's decision. This process of lobbying has an impact not only on the New South Wales and Queensland versions of preventative detention but also on those in Western Australia and Victoria as well as any other State that may wish to introduce such legislation. By this process, the Australian Commonwealth is told that State legislation is non-compliant and is obliged to provide a positive response regarding what it intends to do to address that non-compliance. As will be noted in the conclusion to this analysis, what the response in *Fardon* will be remains to be seen.

While the decision of the UNHRC is not binding, simply put, the point of the decision is to make doing nothing in response an increasingly difficult option for any domestic government. While non-binding, the very point of the process to which the Commonwealth Government has subjected itself and all State governments is one whereby pressure from a non-elected, quasi-judicial non-domestic body is applied to our own domestic governments to change the outcome at issue so that it conforms to the outcome desired by the UNHRC.

The disapproval and opprobrium of the "international community" is clearly meant to be a mechanism, the object of which is to try and supplant an outcome determined as appropriate by an unelected international body for an outcome determined as appropriate by a democratically elected domestic parliament (already scrutinised by a robust domestic system of courts with a reputation for judicial excellence). This is a remarkable process at least insofar as it demonstrates an unwarranted lack of confidence in the ability of Australian parliaments to generate representative and balanced public policy outcomes. It also demonstrates a lack of confidence in the Australian court system and other domestic review mechanisms which have a long and successful history in the Australian political system of providing sound review of legislation and administrative decision-making.

The fact is that for more than a hundred years, since federation in Australia, democratically-elected parliaments have produced legislative outcomes and democratically-elected executive governments

have made administrative and budgetary decisions which these bodies have considered represent public sentiment as to desired outcomes. These decisions have been, in turn, reviewed and often modified (sometimes very substantially) by domestic courts and other bodies of administrative review to produce an outcome which is the product of an intricate system of checks and balances. This system of checks and balances is Australian and the ultimate product of Australian citizens' choices expressed through their elected parliaments. The bodies of review have been created by those parliaments and the original Constitution which was democratically agreed upon by a majority of electors in a majority of States.

Indeed, it is instructive to recall that, as a nation, Australia placed great importance on the notion that our system of judicial review should end with an Australian court. Thus, through the mechanism of the *Australia Acts* 1986 (Cth)[46], Australia ended the previous practice of allowing an appeal against a decision of the High Court of Australia to the Privy Council.

It is instructive to note the similarity between the process by which the decisions of quasi-judicial international rights bodies seek to supplant outcomes (and which this paper depicts as a process of lobbying) with the "dialogue" process that accompanies statutory bills of rights. In considering the dialogue process attaching to a statutory bill of rights, Professor James Allan has noted that in the United Kingdom, wherever there has been a declaration of incompatibility, the outcome sought to be achieved by courts has always prevailed: "It is a remarkable and relevant fact that since the enactment of the United Kingdom's statutory bill of rights the Parliament there has never once stood up to judges when a Declaration of Incompatibility has been issued – not one single time ever in dozens of cases!".[47]

Allan considers that the reason why a non-binding declaration which is legally non-binding has, in the statutory bill of rights context, become binding in practice in the United Kingdom is due to the fact that the declarations are worded "so as to make it near on impossible for Parliament to stand up to the judiciary". And, further, "The wording implies that judge's decisions about rights – how they apply, when limits are reasonable, what to do when different ones conflict, and much more – are to be treated as somehow indisputably correct and certainly authoritative".

This paper joins issue with Allan in his depiction of why the lobbying exercise inherent in declarations of incompatibility with statutory bills of rights has proven very successful if not irresistible. But it is also worth adding that much of the moral and intellectual authority of the courts that mends what to the idea judicial views on these matters are somehow superior emanates, ironically, from the fact that courts in Australia and, until recently, the United Kingdom, have not traditionally been required to make such decisions and thereby have not been the focal point for public resentment to given outcomes on public policy issues.

It might be expected, however, that respect for judicial authority and decision-making prowess will rapidly diminish in Australia if it were the case that the public came increasingly to recognize the courts as being the ultimate decision-makers on divisive public policy issues related to immigration and border protection, free speech and racial vilification, and the lines to be drawn between these and other conflicting rights, as well as influencing or directly controlling spending decisions in these or other public policy areas.

Interestingly, what is complained about in decisions under the *Kable*[48] principle in Australia is that if a court is, in reality or appearance, directed to a certain result by the executive as to the content of judicial decisions, that process gives "the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action".[49] As stated by Justice McHugh in *Kable*, "At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of executive government …".[50]

This was said to have the potential or likely effect of impairing impartial administration of the judicial functions of the Supreme Court. In effect, what Australian courts are seeking protection against by the *Kable* decision is the borrowing of their longstanding and hard earned reputation

for an impartial ability to make decisions which, rather than being political decisions, are simply intellectual applications of prevailing law to known facts. It is not too difficult to conceive that the reputation for non-political impartiality which the *Kable* decision seeks to prevent the executive from appropriating is a reputation which will be swiftly and irretrievably lost if a reverse process occurs whereby courts increasingly make what are inherently political decisions under rights documents and cloak those decisions in the guise of impartial application of law to facts.

As noted above, the Commonwealth Government is required to respond to the UNHRC's decision. What lends weight to the characterisation of the process as one of lobbying is that if the Commonwealth in *Fardon* fails to acquiesce in the UNHRC requests to reverse the decision, this "failure" is unlikely to stop similar prisoners arguing almost identical cases before the UNHRC. Robert Fardon's detention under the Queensland *DPSOA* came before the Human Rights Committee only after Mr Fardon exhausted his domestic avenues of appeal.[51]

In a later and very similar matter a prisoner, Kenneth Davidson Tillman,[52] made an identical application to the UNHRC.

Tillman had been convicted of two counts of sexual intercourse with a child under the age of 10 years and one count of attempted sexual intercourse with the same child. He was sentenced in NSW to concurrent terms of 10-years imprisonment.

In April 2007, one week prior to the applicant's release from prison, the Attorney-General of NSW filed an application under s. 17(1)(b) of the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) (CSSOA) requesting that the applicant be detained for a further five years. The objective of the CSSOA, as stated in s. 3(1), "is to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community". On 18 June 2008, after a series of hearings and judgments, the NSW Supreme Court held that the applicant be detained for a further period of one year.

The applicant alleged that this detention, imposed by civil proceedings and without the determination of guilt or punishment, amounted to double punishment and undermined the principle that deprivation of liberty must not be arbitrary. The applicant, on this basis, applied to the UN Human Rights Committee, alleging that the actions under the CSSOA violated Article 9, para 1 and Article 14, para 7 of the ICCPR.

This paper will not set out in detail the result of the UNHRC decision in *Tillman* other than to note that the majority reasons were very similar in reasoning and effect to the majority decision in *Fardon*. On the issue of jurisdiction, it was relevant that Tillman, unlike Fardon, had not taken his matter to the High Court. The UNHRC held at [6.3] that the state party questioned the admissibility of Tillman's communication. The state party had submitted that Mr Tillman had not exhausted all avenues of appeal within Australia, namely appealing to the High Court of Australia. Tillman had argued that any appeal to the High Court would not have been successful due to the decision in *Fardon* that the Queensland legislation equivalent to the CSSOA was constitutional. Tillman was almost certainly correct on this point. The Committee agreed with Tillman on the basis of UNHRC jurisprudence which states in effect that an author is not required to exhaust domestic remedies, if the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts. Thus Tillman was determined to meet the requirements of Article 5, paragraph 2(b), of the Optional Protocol.[53]

Ultimately the UNHRC found that Tillman had served his 10-year imprisonment and that his further imprisonment amounted to a continuation of incarceration under the same prison regime as detention which, in substance, amounts to a fresh term of imprisonment "which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law".[54] Further, the UNHRC found that Tillman's further term of imprisonment was the result of court orders that were made "in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence".[55]

In both the *Tillman* and *Fardon* decisions the UNHRC outlined that Australia's signing of the ICCPR means that Australia has "recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to Article 2 of the ICCPR, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised by the Covenant".[56] This, in the view of the UNHRC, requires that Australia provide an effective and enforceable remedy to any violation. What is most instructive with respect to the idea that the decisions are not anti-democratic because they are non-binding is that even when the Australian Commonwealth government fails to provide an effective and enforceable remedy (as it has yet to do in *Fardon*), this does not prevent precisely the same argument being put to the UNHRC by another prisoner. The view clearly being taken by domestic applicants to the UNHRC is that, while non-binding, the decisions are a powerful tool utilized with the clear purpose of creating a cumulative source of lobbying pressure designed to have the Australian domestic decision reversed.

What is observable is that recourse to the UNHRC is increasingly being utilized by domestic Australian litigants to pressure a reversal of the outcome reached by Australian legislation interpreted and reviewed by Australian domestic courts.

A recent matter arising in Western Australia provides a further example of this lobbying process. On 27 September 1995 Kurt Russel Seel was convicted of wilful murder for the stabbing death of a manager of a Perth hotel. The victim was stabbed in the chest and had his throat slit three times on 10 November 1994. From the evidence presented to the court at trial, it appears that this act was made after Seel accused the man of assaulting a female acquaintance. The force of the attack not only severed the victim's trachea but severed the major muscles that held the deceased's head to his body. Seel was sentenced to life imprisonment with a non-parole period of 17 years under s. 40D(2d) of the *Offenders Community Corrections Act* 1963 (WA) which required that a person sentenced to life imprisonment without parole must serve between *15 and 19 years* before being eligible for parole [emphasis added].

Section 40D(2d) was introduced in an amendment which came into effect on 20 January 1995, after the offence had been committed but before sentencing. Prior to the introduction of this amendment, the equivalent section in the previous Act provided that for persons charged with wilful murder, they would be considered for parole after a period of only 12 years.[57]

As the offence was committed prior to the amendments taking place, Seel, in 2006, relied on s. 10 of the *Sentencing Act* 1995 (WA). It provided that if a penalty changes after the commission of the offence, then the lesser statutory penalty shall be applied. Seel thus applied to the Supreme Court to correct the sentence to 12 years. Both the Director of Public Prosecutions (DPP) of Western Australia and Legal Aid, erroneously, supported the application. Miller J of the Supreme Court, in 2006, allowed the application and replaced it with a sentence of life imprisonment with a non-parole period of 12 years as per s.34(2)(d) *Offenders Community Act* 1963 (WA) (prior to 20 January 1995).

However, neither the DPP nor Legal Aid realised that s. 40D(2d) applied retrospectively by virtue of the s. 40D(2f). Section 40D(2f) stated that subsection (2d) applied irrespective of whether the offence concerned was committed before, on or after the commencement of the amending provisions. Accordingly, once the DPP realised this error, the DPP applied to the Full Court in 2007 to have the original sentence restored under s. 40D(2d).[58]

Seel has petitioned the UNHRC alleging that the operation of s. 40D(2f) is in breach of Article 15 of the ICCPR in that it allows the amendment to act retrospectively and thus allows the court to impose a heavier penalty than one that was applicable at the time when the criminal offence was committed.

In this situation it may be seen that one possible view is that the legislation in effect in Western Australia intentionally and diametrically opposes Article 15 of the ICCPR. This view would hold that section 40D(2f) demonstrates an intention of the Western Australian legislature that the relevant sentencing regime is to operate retrospectively, whereas Article 15 requires that more retrospective sentencing regimes should be avoided.

The primary question is whether the outcome democratically determined and judicially reviewed in the domestic Australian jurisdiction should be subject to pressure to be reversed by what is simply a preference for a different public policy outcome preferred by non-elected international jurists who (unlike their domestic counterparts) do not possess the important quality of being appointed by Australian executive governments responsible to domestic parliaments.

It is also notable that it is not merely the decisions of the UNHRC which are presenting as a mechanism designed to supplant domestic Australian public policy outcomes with those preferred by an international body. A further and powerful mechanism designed to replace domestic Australian public policy outcomes with a standard or outcome devised and preferred by an international body appears in the mechanisms arising out of the signature of optional protocol documents. One such example is known as OPCAT.

Australia signed the Optional Protocol to the Convention against Torture (OPCAT)[59] on 19 May 2009. When ratified, OPCAT places clear requirements on state parties to ensure that the Convention against Torture[60] is not breached by detention institutions within states.

After ratification, OPCAT requires that Australia establish, fund and staff a national preventative mechanism (NPM) and extend to the NPM powers necessary to achieve the functions set out in Articles 19 and 20 of OPCAT.[61] The NPM must be independent, impartial and expert, and be able to carry out visits without warning to all places of detention.[62]

Australia must also allow the International Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the sub-committee), a UN body comprised of a range of international experts, to visit places of detention within Australia.

Not only will the NPM have powers to inspect detention institutions, it will also have the power to develop standards, to critique and assess domestic legislation and examine compliance of all Australian places of detention with respect to what are rather vaguely described as "UN norms".[63]

What is inevitable is that the OPCAT will provide a mechanism for far greater levels of intrusion by international bodies and domestic bodies applying "UN norms" into State laws, administration, and policy relating to prison facilities. These are all areas of public policy that have been the traditional and exclusive constitutional responsibility of Australian State parliaments.

By giving the NPM the power to make recommendations and, in effect, develop standards to meet unspecified international and national expectations obviously means that prisoners and other detained persons in Australia will be accorded treatment under standards not determined nor agreed to by State parliaments informed by State communities but rather as fixed by the NPM under the watchful supervision of the UN Sub-committee. At the present time, before legislation which will bring the NPM into effect, it is very difficult to determine with any precision what actually are the UN norms or standards that will sought to be applied.

There are notable cases determined under international human rights documents which are suggestive of the likelihood that, with respect to the administration of State prisons, the standards required by "UN norms" may well diverge from the standards of administration determined as appropriate by Australian domestic governments.

One notable case which indicates a high possibility of divergence between international standards informed by quasi-judicial bodies' interpretations of human rights documents and domestic administrative standards prevailing in sovereign national jurisdictions is the case of *Van der Ven v The Netherlands*[64] before the European Court of Human Rights.

In that case, the applicant, Mr Van der Ven, a Dutch national, brought a case to the European Court for Human Rights alleging that his detention whilst on remand constituted inhuman and/or degrading treatment, a violation of Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

The applicant was remanded on charges including murder, manslaughter, grievous bodily harm, rape and narcotics offences in Maastricht, the Netherlands, from 11 September 1995 until 2002

when he was sentenced to 15 years imprisonment in strict confinement at the discretion of the Dutch government.

During the applicant's time in remand, he was considered by Dutch authorities to be a prisoner warranting special security precautions. Information from Dutch intelligence services indicated that there was a significant likelihood that he was intending to escape, with help from others, and would pose an unacceptable risk to society. From October 1997, at the request of Dutch prosecutors concerned about the applicant's escape risk, the Dutch prison authorities remanded the applicant in the maximum security EBI.[65]

The EBI regime was introduced in the Netherlands after public and prisoner officer concern over a large spate of highly publicised and violent breakouts using knives and firearms, and often taking of hostages. In one case an attempted escape by a helicopter resulted in a helicopter crash within the prison grounds. The EBI is intended for prisoners who pose an unacceptable risk to society if they escape from detention, but priority is given to prisoners who are extremely likely to attempt to escape.[66]

Detainees in the EBI are subjected to a rigorous security regime where all contact, including by telephone and correspondence, is screened.[67] At the time of the applicant's detention, detainees were permitted to have one visit per week for one hour behind a glass partition and one visit per month with immediate family or spouses without a partition; physical contact was limited to a handshake at the beginning and end of the meeting. Detainees could never be in contact with more than three other inmates at a time and could only be in contact with staff individually. Cells were subjected to a thorough search weekly, at which time a detainee was to be frisked and strip searched regardless of whether or not they had left their cell. Strip-searching included external viewing of the body's orifices and crevices including an anal inspection. Strip-searching also took place on entrance and exit from the EBI, before and after open visits, and after visits to the clinic, dentists or hairdressers. The EBI governor or, if urgent, a prison guard, could subject a detainee to an internal body inspection if that was deemed necessary.[68]

The EBI was inspected by the UN Committee for the Prevention of Torture (CPT) between 17 and 27 November 1997. The CPT report suggested that prison authorities try and create a "good internal atmosphere" within EBI units, yet the CPT found that the detainees were subject to a "very impoverished" regime creating feelings of helplessness, powerlessness, anger and communication difficulties in detainees.[69]

In response to suggestions to improve these conditions, the Dutch Government re-affirmed its stance that the strict measures were needed to ensure a secure environment and that their first priority was to create "fail safe security" arrangements. The Government stressed that the detainees were predominantly hardened criminals, members of extremely dangerous criminal organisations or previous detainees who had taken staff hostage in attempts to escape. The Government made clear that the EBI was a last resort and sanctioned its use only for a very small number of very dangerous persons.

The applicant was held in the EBI from October 1997 to May 2001. During that period he alleged that Article 3 had been breached. Article 3 provides: "No one shall be subjected to torture or inhuman or degrading treatment or punishment".

The applicant claimed that the psychological effects of the EBI manifested psychological and physical complaints even when he had not left his cell, and that he felt feelings of powerlessness, loneliness, tension and frustration due to reduced contact with other persons. The lack of human contact was a fundamental tenet of the applicant's argument as he only had contact with medical professionals behind a glass partition. The applicant claimed this "inhuman" treatment fostered psychological conditions and alleged that the Dutch Government had failed to strike a fair balance between the security within the EBI and his wish for physical contact.[70]

The Dutch Government vehemently denied the allegations and cited the need for strong security measures because of the serious risks posed by the class of persons the applicant was a member of. It maintained it had adequately provided for psychological and psychiatric medical examination and care and that the applicant never suffered from any serious psychopathology.[71]

The Court found in favour of the applicant, stating: " . . . the Court concludes that the combination of routine strip-searching and the other stringent security measures in the EBI amounted to inhuman or degrading treatment in breach of Article 3 of the Convention".[72]

The Court emphasised that weekly strip searches degraded the applicant's human dignity and gave rise to "feelings of anguish and inferiority capable of humiliating and debasing him".[73] Although stressing that high security remand or detention does not necessarily breach Article 3, the Court emphasised that Article 3 is an absolute provision, rather than a proportionate provision.[74] Therefore, torture, or inhuman or degrading treatment which goes beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, will violate Article 3.

Ultimately, the Dutch Government was required to pay Euro €3000 damages to the prisoner in question.

In this case a specific outcome in respect of a specific prisoner was reached which represented the domestic state's preferred balance between competing public policy principles. That preferred outcome was relevantly substituted for the outcome preferred by the ECHR and the domestic government penalised and the prisoner monetarily benefited in the process.

Two results may follow if a similar process of substituting a divergent international standard in the administration of correctional facilities occurs in Australia under the requirements of OPCAT. First, there may be significant public disquiet, Second, the safe running of Australian prisons may well become practically more difficult, particularly if the most dangerous prisoners in the system – imprisoned accordingly in special handling units – cannot be subject to intensive security regimes including regular and random strip-searches.

Conclusion

This paper has not sought to argue that Australian legislative outcomes or executive and administrative decisions should not be the subject of robust judicial review.

Clearly, a properly functioning democracy must subject the outcomes produced by its parliaments and executives to close and ongoing scrutiny. What this paper argues is simply that this review should be conducted by Australian courts pursuant to Australian precedent and Australian legal standards. Indeed, in the course of this paper several examples have been given which indicate the robust system of judicial review already existing in Australia.

Further, the primary focus of this paper was not to make the argument about why the substantive decisions to create and implement public policy should lie with democratically elected legislatures and executive governments. Rather, if the primacy of democratic institutions in public policy determinations is accepted as proper, the point of this paper is to highlight a means by which there is presently occurring, and will continue to occur, a diminution of the sovereignty of Australia's domestic democratic institutions through the procedures enlivened by the continuing signature of international documents.

The analysis examined a number of decisions of international human rights bodies and contends that these decisions are often at odds with accepted judicial principle prevailing in Australia as well as prevailing public opinion. If these types of decisions were binding in the sense that they automatically substituted the public policy determinations and preferred outcomes of unelected international bodies for those devised by democratically elected domestic legislatures and executives (properly reviewed by domestic courts), then criticism of these decisions would likely be intense. However, the concern about the determinations of these international bodies is, at present, somewhat muted,

perhaps because their decisions, no matter how divergent from Australian standards, are perceived as harmless because they are "non binding".

Indeed, the very nature of the assertion that decision-making by such bodies is not anti-democratic because it is non-binding gives rise to the obvious question as to what is the point of Australia succumbing to the process at all. Sometimes the answer to this question is framed in terms of some educative value attaching to the existence of this level of decision-making which is said to promote a "dialogue" regarding rights. But even if such a value were accepted as possible, it is timely to consider who is intended to be educated, and what particular education is required. Accepting the value pluralist position described at the commencement of this paper, which position holds that equally valid public policy outcomes may exist in any given and specific area of public policy, an answer emerges. The answer would appear to be that the majority of electors that have elected a parliament to effect that majority's preferred and rational outcome (already subject to domestic judicial review) must now be educated as to an alternative minority view held by international jurists and expressed through dialogue emanating from a human rights decision-making body which is unelected and which is often legally wrong by Australian legal standards. The results of this approach will almost certainly be the greater likelihood of public policy outcomes being supplanted for the outcomes actually desired by Australian electors.

Endnotes

1. C. Porter, "Pluralism, Parliamentary Democracy and Bills of Rights", in J. Leeser, J and R. Kaddrick, (eds), *Don't Leave us with the Bill: The Case Against an Australian Bill of Rights*; The Menzies Research Centre, 2009, chapter 10.
2. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
3. *Ibid.,* [161].
4. Keane J described at [162] that "The legislative policy judgment which informs the amending Act is that, without the amending Act, the fundamental human right of women and children in these Indigenous communities to protection against violence will continue to be enjoyed by them to a lesser extent than this right is enjoyed by residents of other parts of Queensland".
5. *Ibid.,* [162].
6. I. Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, John Murray, 1990, 70.
7. [2010] AusHRC 42.
8. *Ibid.*, 18 [70].
9. *Ibid.*, 3 [5].
10. *Ibid.*, 18 [72].
11. *Ibid.*, 18 [75].
12. *Ibid.*, 18 [73].
13. *Ibid.*
14. *Ibid.*, 4 [11].

15. Human Rights Committee, *Decision: Communication No. 1629/2007*, 98th sess, CCPR/C/98/D/1629/2007 (18 March 2010, adopted 10 May 2010) ('*Fardon v Australia*') and Human Rights Committee, *Decision: Communication No. 1635/2007*, 98th sess, CCPR/C/98/D/1635/2007 (18 March 2010) ('*Tillman v Australia*').

16. *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*International Covenant on Civil and Political Rights*').

17. *International Covenant on Civil and Political Rights*, art 9, para 1. Article 9, paragraph 1 states 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

18. *International Covenant on Civil and Political Rights*, art 14, para 1. Article 14, paragraph 1 states 'No 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'.

19. *A-G (QLD) v Fardon* [2003] QSC 200.

20. (2004) 223 CLR 575.

21. *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 1642 UNTS 414 (entered into force 23 March 1976).

22. *Fardon v Australia,* [7.4].

23. *Ibid.*, [7.5].

24. It is interesting to note that the UNHRC decision had in the previous paragraph referred to the procedure under the DPSOA as being 'nominally characterised as "civil proceedings", at [7.4(2)].

25. *Fardon,* per Gleeson CJ, [1].

26. *Fardon v Australia*, [7.3].

27. *Ibid.,* [7.4].

28. *Ibid.,* [7.4(4)].

29. *Ibid*.

30. *Ibid*.

31. *Fardon* (2004), [163].

32. [1988] HCA 68.

33. *Fardon* (2004), [22].

34. *Ibid.,* [225].

35. *Ibid.,* [228].

36. *Ibid.,* [226].

37. *Ibid.,* [196]. See also *Veen v The Queen* (1979) 143 CLR 458 at 463-465 per Stephen J and at [70] per Gummow J.

38. *A-G (Qld) v Fardon* [2007] QSC 299, 3-4.

39. Referred to in *R v Fardon* [2010] QCA 317, 2.

40. *Ibid.*

41. *Fardon* (2004), [74].

42. *Ibid.*, [76].

43. *Ibid.*, [217].

44. *Fardon* per Callinan and Heydon JJ at [219].

45. *KL,* [114].

46. Appeals to the Privy Council from the High Court and all federal courts were severed in two stages, in 1968 and 1975. Appeals from State courts were ended by the Australia Acts 1986 (Cth) noting that these were acts of the Commonwealth of Australia and the Parliament of the United Kingdom. The only remaining legal avenue for an appeal to the Privy Council from an Australian court is now for inter se cases under section 74 of the Constitution with a certificate from the High Court, which because the High Court has stated certificates will no longer be granted is at present at least only a theoretical avenue for appeal – see commentary in C. Saunders, *The Australian Constitution*, published by the Australian Centenary Foundation, 1997 second ed..

47. Allan, J., "You Don't Always Get What You Pay For", *New Zealand Universities Law Review*, Vol. 24, 179 at 184.

48. *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24; (1996) 189 CLR 51.

49. *South Australia v Totani* [2010] HCA 39 per French CJ at [82] ("Kable").

50. *Kable* at [40].

51. *Fardon v Australia*, [6.3].

52. *Tillman v Australia*.

53. Human Rights Committee, *Decision : Communication No. 1533/2006,* CCPR/C/91/D/1533/2006 (31 October 2007) ('*Zdenek Ondracka and Milada Ondracka v Czech Republic*').

54. *Ibid.*, [7.4.1].

55. *Ibid.*, [7.4.2].

56. *Fardon v Australia,* [10].

57. *Offenders Community Act 1963* (WA), s 34(2)(d) prior to 20 January 1995.

58. *Western Australia v Seel* [2007] WASCA 271.

59. *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2002, 2375 UNTS 237 (entered into force on 22 June 2006). (OPCAT).

60. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). The Convention was signed by Australia 10 Dec 1985 and ratified by Australia, 8 Aug 1989.

61. OPCAT, art 17.

62. *Ibid.,* art 18.

63. *Ibid*., art 18-19.
64. *Van der Ven v The Netherland* [2003] ECHR 50901/99 (4 February 2003).
65. Extra Beveiligde Inrichting, or Extra Security Facility.
66. *Van der Ven*, [27].
67. Except for privileged contact.
68. *Van der Ven*, [31].
69. *Ibid.,* [32].
70. *Ibid.,* [36]-[41].
71. *Ibid*., [42]-[45].
72. *Ibid*., [63].
73. *Ibid*., [62].
74. *Ibid*., [46].