'Dangerousness' and public health

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Civil detention of individuals with infectious diseases.

Much has been written about the ethics and law relating to indeterminate detention in the criminal justice system on the basis of dangerousness. However, very little has been written about the civil detention of individuals within the hospital system or in the community on the basis of public protection. This may be because such cases are rare or because decisions relating to civil detention are made in confidence and are therefore not publicly known. It may also be because people are simply unaware of the powers of the state to civilly detain those considered 'dangerous' to public health.

Individuals may be involuntarily detained under the civil law for various reasons. First, and perhaps most obviously, individuals may be detained because they are considered a danger to themselves or to others due to mental illness. Mental health legislation exists in all Australian States and Territories and has as its rationale, the care and treatment of individuals with a mental illness. However, certain provisions refer to the concept of dangerousness as a criterion for involuntary detention. For example, s.8(1)(c) of the *Mental Health Act 1986* (Vic.) refers to a person being detained for treatment for his or her health or safety or for the protection of members of the public. The Report of the National Inquiry into the Human Rights of People with Mental Illness (the Burdekin Report) and the Australian Health Ministers' National Mental Health Policy have helped focus public attention on this realm of civil detention.

Secondly, a person may be civilly detained if they have illegally entered the country pending deportation or a decision to grant legal entry status. The High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 held that such a power of detention was not punitive in nature and was not a part of the judicial power of the Commonwealth. Thirdly, Brennan, Deane and Dawson JJ stated in the same High Court case that the detention of a person in custody awaiting trial is an exercise of executive rather than judicial power. Fourthly, the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Western Australia have legislation which enables the involuntary detention for a short period of time of people found drunk in a public place.

A further avenue for involuntarily detaining individuals under civil law is on the ground that they have an infectious disease and it is thought that they pose a risk to public health. It is this power which will be explored in this article.

Infectious diseases and risks to public health

Containing the spread of infectious diseases has concerned public health authorities for centuries. For example, to combat the Black Death of 1347-1350, sufferers were isolated; a move that of course failed as rats rather than people were responsible for the plague.

In Australia, provisions relating to infectious diseases were drafted into the general colonial public health laws. Bidmeade and Reynolds

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write that 'these were not actively reviewed for most of the 20th century [and] [i]n some jurisdictions they remain much as they were originally set out and are clearly in need of review'.[1] All jurisdictions in Australia have provisions permitting the detention of a person suffering from an infectious disease in certain circumstances. These provisions may have lain dormant with the lessening of the importance of infectious diseases in terms of morbidity and mortality but for the rise of HIV/AIDS.

In 1989, Sharleen, a sex worker, was detained in a public hospital against her will because she had AIDS and was perceived as a danger to the community.[2] Similarly, in 1994, 'B' who had served time in prison for rape, indecent assault and assault with intent to rape was detained in a public hospital because he had AIDS and was thought to pose a serious risk to public health.[3]

HIV/AIDS is not the only infectious disease that may give rise to the civil detention power. Some of the infectious diseases that may bring public health legislation into play include typhoid, tuberculosis, hepatitis A and B, salmonella infection and even measles. One suspects however, that the power to detain is being used more readily in relation to HIV/AIDS because it is the sexual conduct of the person concerned in conjunction with the disease, rather than the disease itself, that has been brought to the attention of the authorities and is seen as 'dangerous'.

Human rights considerations

The International Covenant on Civil and Political Rights (ICCPR), to which Australia became a party in 1980, outlines a number of rights that are relevant to the involuntary detention of a person suffering from an infectious disease. For example:

- Article 7 sets out the right to freedom from cruel, inhuman or degrading treatment or punishment;
- Article 9 refers to the right to liberty and security of the person;
- Article 17 concerns the right to freedom from arbitrary interference with privacy and
- Article 27 mentions the right to equality before the law and the right to equal protection of the law.

Having a very broad power to involuntarily detain someone with HIV/AIDS in particular, brings with it the dangers of indeterminate detention and discrimination. On the other hand, individual rights of course have to be balanced against community interests. Justice Michael Kirby has stated in this regard:

> Obviously, human rights have limits ... Obviously, there is no human right to spread a life-threatening virus, such as HIV. On the contrary, there is a human obligation not to do so and a legitimate entitlement of the state, representing humans who are at risk of becoming infected, to take measures designed to limit that risk, if not to eliminate it.[4]

Balancing human rights and the protection of the public is usually problematic. To avoid the potential for abuse, legislation relating to involuntary detention on the basis of the protection of public health must not depend on arbitrary administrative power, must be a last resort and must provide 'due process' in the sense of time limits and appeal and review procedures.

Unfortunately, while there have been reforms in certain Australian jurisdictions which go some way towards finding a proper balance between individual rights and community protection, some provisions are in dire need of a complete overhaul. The next section provides a brief overview of existing legislation.

Australian legislation

Each State, Territory and the Commonwealth has powers to quarantine or isolate individuals in the case of an epidemic. The following outline of existing provisions deals with the detention of an individual with an infectious disease in the absence of an epidemic and, in some cases, the provisions outlined deal specifically with individuals with HIV/AIDS.

Certain provisions are very broad and do not specify time limits on the period of detention. For example, under regulation 7 of the *Public Health (Infectious and Notifiable Diseases) Regulations* (ACT), s.13 of the *Notifiable Diseases Act 1981* (NT) and s.249(6) of the *Health Act 1911* (WA), persons may be detained by the relevant Medical Officer until their release is authorised on the grounds that they are free from disease or no longer constitute a danger to the public health.

The provisions in Queensland (*Health Act 1937),* New South Wales (*Public Health Act 1991),* South Australia (*Public and Environmental Health Act 1987),* Victoria (*Health Act 1958)* and Tasmania (*HIV/AIDS Preventive Measures Act 1993*; *Public Health Act 1997),* make it clear that detention is the last resort. Only after measures such as asking the person to refrain from certain conduct and/or submit to supervision have been taken, can an order for detention be made. In Queensland, South Australia, Tasmania and New South Wales, it is up to the court to make or confirm an order for detention. The provisions in New South Wales, Victoria, Tasmania and South Australia also impose time limits on detention, with avenues for renewal of the order.

The South Australian and Victorian provisions also include a specific right to appeal against the order for detention.

Criticisms of the existing legislation

In February 1991, the Legal Working Party (LWP) of the Intergovernmental Committee on AIDS (IGCA) released a discussion paper entitled *Legislative Approaches to Public Health Control of HIV-Infection.* The LWP then released a series of further discussion papers before releasing its Final Report in November 1992. Both the LWP's first Discussion Paper (p.34) and the LWP's Final Report (p.21) expressed concern over the lack of adequate checks and balances on public health officials being able to involuntarily detain those with HIV/AIDS. These two documents recommended that public health legislation should *not* provide for automatic isolation of HIV-infected persons, but that this be used as a last resort in exceptional cases after restrictions had been placed on a person's living circumstances and employment. It was also recommended that only a court sitting in camera (closed to the public) could enforce such orders.

The Discussion Paper and Final Report suggested that detention only be used after the following criteria were satisfied:

- The person has in the past wilfully or knowingly behaved in such ways to expose the others to the risk of infection;
- The person is likely to continue such behaviour in the future;
- The person has been counselled, but without success, in achieving appropriate and responsible behaviour change; and
- The person presents a danger to others.

Since 1992, changes have been made in some jurisdictions that take these criticisms into account, but problems remain with most of the provisions in this area. The following sections deal with some of the matters that need to be addressed for legislation to balance potential harm to the public and an individual's right to freedom.

Administrative versus judicial orders

In four Australian jurisdictions, the decision to detain a person who has an infectious disease may be made by a public health official. In the other four jurisdictions, either a public health official makes the initial decision and has that confirmed by a court, or the court makes the order directly.

In *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28, Brennan, Deane and Dawson JJ stated that there is a general rule that the power to order involuntary detention is part of the *judicial* power of the Commonwealth entrusted exclusively to the courts. They quoted Blackstone's *Commentaries* (Book 4, para. 298) as stating:

> The confinement of the person, in any wise, is an imprisonment. So that the keeping [of] a man against his will ... is an imprisonment ... To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison.

However, they went on to say that there were qualifications to this general rule. They pointed to the detention of a person in custody awaiting trial as an exercise of executive rather than judicial power because the law does not view this as punitive:

> Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. [p.28]

With the case of an individual suffering from HIV/AIDS, it is difficult to see a person's involuntary detention as not being to some degree punitive. In the cases of Sharleen and 'B' mentioned above, it was their past sexual conduct in conjunction with AIDS, rather than the disease itself, which led to their detention. This seems to imply some notion of blameworthy behaviour and 'punishment' for it.

Conceptually, the essence of detention is the deprivation of liberty. This objective is in no way limited by stating that the detention is civil in nature. The same result is reached by a system of detention through either the civil system or through the criminal justice system. Professor Williams writes:

> Such [civil] incarceration is ... properly classified as a form of preventive detention akin to imprisonment. To make use of less harsh sounding labels is merely to seek to escape from the gravity of the issues inevitably involved in arguing in support of preventive detention.[5]

Because detention on the basis of the protection of the public from infectious disease may contain some element of punishment in depriving the person of his or her liberty, particularly as it relates to those with HIV/AIDS, the decision to make an order for detention is best left to the judiciary rather than to a public health official. This would enable appeals to be made through the court system. A further problem with imbuing public health officials with wide discretionary powers of detention is that review of administrative decisions in certain jurisdictions is limited to the legality rather than the merits of the decision on substantive and procedural grounds.

Criteria for detention

As noted above, the LWP suggested that individuals be detained only after an assessment of past risky behaviour and when they present a danger to others. The concept of 'dangerousness' is very difficult to define objectively and the usefulness of predictions of dangerousness in the criminal field has been subject to severe criticism. There is some consensus, however, that in assessing the risk of violence, well-trained clinicians may be able to make short-term predictions using techniques analogous to predicting the risk of suicide.[6] This involves a detailed assessment of the mental state of the person, any threats that have been made and, of course, previous behaviour.

In relation to the involuntary detention of those with HIV/AIDS, it is the sexual or criminal conduct of the individual in conjunction with the disease that really constitutes the 'danger' to the community. Therefore, an assessment of the risk that the person will spread the disease through unprotected sex seems to be mostly dependent on the person's past behaviour. A detailed clinical assessment of the person would seem a prerequisite before an order for detention is made and this should be specifically set out in the relevant legislation.

Time limits

The four jurisdictions that have time limits for detention vary in the length of time allowed. It is six months in New South Wales and South Australia as compared to 28 days in Victoria and Tasmania. Because of the deprivation of liberty involved, the 28 days limit is preferable. This is supported by the fact that predictions of dangerous behaviour are more accurate if made on a short-term basis.

Appeal provisions and periodic review

If a court is empowered to make detention orders, then the usual appeal process will come into play. If a public health official makes an order, the system of administrative review applies and, in general, a decision based on a discretionary power is very difficult to overturn. Even where a court makes the order, it is useful to set out specific appeal provisions to ensure an individual concerned knows that a decision is not final.

Having a time limit on an order is one way by which to ensure periodic review. That is, those jurisdictions which have time limits for detention orders also allow for the renewal of such orders for a further limited period. The LWP recommended that due process procedures be incorporated as has occurred in recent mental health legislation (Discussion Paper, p.35).

A model for law reform

The *HIV/AIDS Preventive Measures Act 1993* (Tas.) perhaps comes closest to achieving a balance between protecting individual human rights and protecting the community. Section 20 of that Act requires a person infected with HIV to take all reasonable measures and precautions to prevent the transmission of HIV to others. A breach of that provision may result in imprisonment for up to two years.

If the Secretary believes a person is not complying with s.20, he or she may apply to a magistrate for an order for the detention of that person. Under s.21(2)(c), the magistrate may make an order requiring that the person be isolated and detained by a person, at a place and in the manner specified in the order for a period not exceeding 28 days. That order may

then be renewed for a period or periods not exceeding 28 days (s.21(4)). Section 21(3) requires the magistrate to take into account:

(a) whether, and by what method, the person transmitted HIV;

(b) the seriousness of the risk of the person infecting other persons;

(c) the past behaviour and likely future behaviour of the person;

(d) any other matter the magistrate considers relevant.

This legislation therefore enables a magistrate, rather than a public health officer, to make the order, clearly sets out the matters that a magistrate must take into account, and sets a time limit for the order. Perhaps a specific provision dealing with a right of appeal would also assist, although having a magistrate make the order will automatically enable an appeal to be made if necessary against a decision.

Conclusion

In derogating from individual human rights, heed must generally be paid to the requirements of form, necessity and proportionality.[8] The requirement of form relates to legislation not depending on arbitrary administrative power. In this regard, only courts should be able to order the involuntary detention of a person with an infectious disease. There is a punitive component to the detention of individuals with HIV/AIDS because their sexual conduct in conjunction with the disease rather that the disease itself is being singled out and the deprivation of liberty can always be viewed as a form of punishment.

The requirement of necessity means that derogation from human rights should only exist where it is absolutely necessary to achieve a pressing social need. In this regard, the power of involuntary detention should only be used as a last resort after consideration of clear criteria. Finally, the requirement of proportionality aims at 'ensuring only the minimum necessary legal intervention where human rights ... may be interfered with in order to result in the desired social outcome'.[8] Again, this requires that involuntary detention be used as a last resort and that there be time limits and appeal and review processes clearly outlined in the relevant legislation. While the exercise of powers of civil detention is seemingly rare in Australia, the potential for indeterminate detention and discrimination still remain. There is a danger that the failure to provide adequate checks and balances on powers of civil detention will prevent those with infectious diseases presenting for treatment for fear that they may be detained indefinitely.

References

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3. An account of this case was presented by Dr Graham Rouch and Genevieve Howse at the Australian Institute of Political Science's conference, *Dangerous Behaviour and Public Policy*, Hotel Sofitel, Melbourne, 26-27 February 1998.
4. Kirby, M., 'HIV Infection: Human Rights, Public Health and the HIV Paradox' in *HIV Infection and AIDs*, Proceedings of the 1991 AGM, Australian Academy of Science, Canberra, 1991 p.87.
5. Williams, C.R., 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the *David* Case', (1990) 16(2) *Monash University Law Review* 161-183 at 179.
6. See Mullen, P., 'Dangerousness of the Mentally Ill' in W. Brookbanks (ed.) *Psychiatry and the Law*, Brooker's Ltd, Wellington, 1996, pp.93-114 at 104.
7. Kirby, M., above, p. 87.
8. Watchirs, H., 'HIV/AIDS and the Law: the Need for Reform in Australia', (1993) 1(1) *Journal of Law and Medicine* 9-27 at 11.