

Will post-sentence detention of convicted terrorists make Australia any safer?

Written by Tamara Tulich, Lecturer, Law School, University of Western Australia

Over the weekend, Prime Minister Malcolm Turnbull urged state and territory leaders to agree on the [design of nationally consistent laws](#) to enable convicted terrorists to be detained at the end of their prison sentences. This will be the [first order of business](#) when federal parliament resumes at the end of August.

Turnbull [said these measures](#) :

... will give our security agencies the tools they need to keep Australians safe.

But will they?

What are indefinite detention regimes?

Protecting the community from “dangerous” offenders is not a new concern for governments. In Australia, protective sentencing measures, such as indefinite or indeterminate sentencing regimes, began to appear at the start of the [20th century](#) , and continue to feature on statute books.

Post-sentence preventive detention regimes, by contrast, are of much more recent origin. These differ from indeterminate sentencing regimes; they enable liberty restraints to be imposed at the end of an offender’s term of imprisonment, rather than upon sentence.

State governments first enacted post-sentence preventive detention regimes in the 1990s. Crucially, these regimes specifically targeted a particular individual.

In the mid-1990s, the New South Wales parliament passed a law for the ongoing detention of Gregory Kable when he finished serving his sentence for the manslaughter of his wife. While in prison, Kable sent threatening letters to members of his deceased wife’s family, which raised

Will post-sentence detention of convicted terrorists make Australia any safer?

Written by Tamara Tulich, Lecturer, Law School, University of Western Australia

concerns for their safety on his release. Kable successfully challenged the constitutional validity of the law [in the High Court](#) .

In 2003, state parliaments again moved to create regimes of post-sentence preventive detention. However, this time they targeted a particular class of offender: serious sex offenders.

Queensland was the first state to [introduce legislation](#) empowering the Supreme Court to make a preventive detention or supervision order, where satisfied to a high degree of probability that the offender posed a “serious danger to the community.” That is, where there “is an unacceptable risk that the prisoner will commit a serious sexual offence” if an order is not made.

If so, offenders may be supervised in the community or detained in custody, indefinitely, after serving their sentences.

In the [first case](#) to challenge these new laws, the High Court upheld the Queensland regime’s constitutional validity.

Following the High Court decision, Victoria, Western Australia, NSW, the Northern Territory and South Australia each introduced serious sex offender post-sentence regimes. In 2013, NSW became the first Australian jurisdiction to extend its legislative scheme to high-risk, violent offenders. South Australia followed in 2015.

Australia is not unique in having post-sentence preventive detention regimes. The US, for example, introduced sexual predator laws in the early 1990s to detain “mentally disordered” sexually violent offenders at the end of their sentence.

Why adopt these regimes?

In 2012, Australia’s [Independent National Security Legislation Monitor](#) regarded the introduction of orders imposed against convicted terrorists who had failed to rehabilitate in prison as more justifiable than control orders against suspects.

Will post-sentence detention of convicted terrorists make Australia any safer?

Written by Tamara Tulich, Lecturer, Law School, University of Western Australia

A version of this has already been implemented. The [Foreign Fighters Act](#) extended the existing system of control orders to individuals who have been convicted of a terror-related offence.

A majority of the [NSW Sentencing Council](#) considered that a post-sentence regime was preferable to an indeterminate sentencing regime for high-risk offenders. This was because a risk assessment undertaken closer to release is more likely to be accurate than one undertaken at sentence.

This increases the likelihood that the regime will apply only to those who pose a high risk to the community prior to release.

This is borne out in the UK's experience with indeterminate sentencing for public protection. In 2003, its courts [were empowered](#) to make an order where satisfied that an offender posed a "significant risk to members of the public of serious harm" through further offending.

This regime was [heavily criticised](#) for setting the bar for risk too low and the bar for release too high, drastically increasing the prison population and rates of mental illness among prisoners.

Abolished in 2012, these orders have been replaced with an Extended Determinate Sentence framework. Under this framework, a court can extend a minimum sentence – but not by longer than the maximum penalty for the offence.

Comfort legislating?

A post-sentence regime for convicted terrorists will only keep Australians safe if an accurate assessment of risk is possible. Defensible post-sentence regimes [depend](#) :

... on the accurate and reliable assessment of an individual's risk of reoffending.

Will post-sentence detention of convicted terrorists make Australia any safer?

Written by Tamara Tulich, Lecturer, Law School, University of Western Australia

A regime that is not founded on accurate and reliable risk assessments will be error-prone, thus undermining its ability to protect the public by targeting those individuals likely to re-offend.

Post-sentence regimes can only target individuals who are in the justice system – in this case, those who are in prison for terror-related offences. It would not have stopped the horrific attacks in [Orlando](#) , [Nice](#) , or the [Sydney siege](#) .

Additionally, post-sentence regimes can be counter-productive – making us less safe, rather than more. For sex offenders, they [have been shown](#) to make the community feel more secure while simultaneously increasing offenders' anger and dissatisfaction. Detaining persons convicted of terror offences after they have served their time could also risk radicalising those who regard the measure as unjust.

While preferable to tamer forms of liberty restraint, post-sentence regimes have significant policy, legal and human rights implications – in particular regarding procedural fairness, proportionality and finality in sentencing.

The government must be vigilant to ensure that this regime, designed for public protection, does not become, in the words of eminent criminologist [Sir Leon Radzinowicz](#) :

... an instrument of social aggression and weaken the basic principle of individual liberty.

Tamara Tulich does not work for, consult, own shares in or receive funding from any company or organization that would benefit from this article, and has disclosed no relevant affiliations beyond the academic appointment above.

Authors: Tamara Tulich, Lecturer, Law School, University of Western Australia

Read more <http://theconversation.com/will-post-sentence-detention-of-convicted-terrorists-ma>

Will post-sentence detention of convicted terrorists make Australia any safer?

Written by Tamara Tulich, Lecturer, Law School, University of Western Australia

[ke-australia-any-safer-62980](#)