

**RESPONSE OF THE AUSTRALIAN GOVERNMENT
TO THE VIEWS OF THE COMMITTEE IN
COMMUNICATION NO. 1635/2007 TILLMAN V AUSTRALIA AND
COMMUNICATION NO. 1629/2007 FARDON V AUSTRALIA**

1. The Australian Government presents its compliments to the members of the Human Rights Committee.
2. The Australian Government notes that it has given careful consideration the Committee's Views in Communication No. 1635/2007 *Tillman v Australia* and Communication No. 1629/2007 *Fardon v Australia*, dated 10 May 2010, in consultation with the states of New South Wales and Queensland where Mr Tillman and Mr Fardon were detained.

Update on detention of Mr Tillman and Mr Fardon

• Mr Tillman

3. Mr Tillman was released from custody on the expiration of his continuing detention order on 31 October 2008, pursuant to an interim supervision order.¹ Until his release in October 2008, Mr Tillman had spent 17 months and 28 days in custody pursuant to orders made under the *Crimes (Serious Sex Offenders) Act 2006* (CSSOA).²
4. On 5 December 2008, a five year extended supervision order was imposed on Mr Tillman. An extended supervision order involves the monitoring of the offender in the community and the imposition of conditions determined by the Court, and is imposed by the Court if it is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence, if he or she is not kept under supervision.³ The conditions of Mr Tillman's

¹ The interim supervision order was imposed pending the outcome of an application by the New South Wales Attorney General for an extended supervision order.

² On 11 April 2008, the court extended the continuing detention order on Mr Tillman until 31 October 2008. Mr Tillman consented to this extension, as it provided him with the opportunity to complete the CUBIT rehabilitation program, which is a high intensity treatment program designed for sex offenders assessed as being of moderate to high risk of re-offending, whilst in detention.

³ Please note that on 7 December 2010, New South Wales amended the *Crimes (Serious Sex Offenders) Act 2006* in response to recommendations made by the NSW Sentencing Council and following a statutory review of the Act. An extended supervision order is now imposed if the Supreme Court is satisfied to a high degree of probability that the offender poses an 'unacceptable risk' of committing a serious sex offence if he or she is not kept under supervision.

extended supervision order include electronic monitoring and the imposition of a curfew.

5. Mr Tillman breached his extended supervision order in October 2009 by meeting his grandchildren without approval, which is prohibited under the extended supervision order. Mr Tillman was sentenced to six months imprisonment for this offence. His appeal against this sentence was dismissed on 15 August 2011.
6. Mr Tillman is currently awaiting hearing for breaches of his current extended supervision order allegedly committed in June 2009, which relate to the requirement that Mr Tillman provide a schedule of movements to his supervisors and prior approval for any changes to his proposed movements. Mr Tillman is on bail for these breaches, and the matter has been adjourned until 21 October 2011.
7. Mr Tillman has spent a total of 11 months and 11 days in custody (either in remand or serving a custodial sentence) as a result of breaches of his extended supervision order.

- Mr Fardon

8. Mr Fardon was released from custody on 4 December 2006, following the rescission of his detention order. Mr Fardon was released pursuant to a supervision order, which was set to expire on 8 November 2016.⁴ Mr Fardon had 38 conditions attaching to his supervision order.
9. Mr Fardon was imprisoned again from 24 July 2007 to 30 October 2007 for breaching the terms of his supervision order by leaving the locality specified in that order.
10. On 3 April 2008, Mr Fardon was charged with rape against an elderly woman, which led the Attorney-General of Queensland to file an application seeking either the imposition of another continuing detention order on Mr Fardon, or the amendment of the requirements of his supervision order due to the alleged breach of that order. Mr Fardon was ordered to be detained in custody until the final hearing of the contravention proceedings. On 14 May 2010, Mr Fardon was found guilty of one count of rape, and was sentenced to 10

⁴ A supervision order involves a release from custody with a range of conditions.

years imprisonment. On 12 November 2010, the Court of Appeal set aside that conviction and ordered that a verdict of acquittal be entered.

11. The contravention matter was finalised within the Supreme Court on 19 May 2011. It was ordered that Mr Fardon be released to the community subject to a supervision order. However, the Attorney-General lodged an appeal against the release. The Attorney-General's appeal was upheld by the Court of Appeal and it was ordered that Mr Fardon be detained subject to a continuing detention order on 1 July 2011. As a result, the supervision order was rescinded and Mr Fardon remains in custody.
12. The breaches by both Mr Tillman and Mr Fardon of their non-custodial supervision schemes following their release from preventive detention highlights the difficult nature of managing serious sex offenders in the community.

Factual findings in the Committee's Views

13. Australia would like to provide a response to the following factual findings by the Committee in its Views.

Requirement to demonstrate no less restrictive means

14. In line with the Committee's previous jurisprudence, the Australian Government accepts that Australia was required to demonstrate that there were no less restrictive means available to meet the objectives of preventive detention in assessing whether the authors' detention was justified. It maintains that, as a matter of fact, it demonstrated in its submissions to the Committee in these cases that there were no less restrictive means available to achieve the twin purposes of the CSSOA and *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* (DPSOA) of rehabilitation of the offender and protection of the community.
15. In relation to less restrictive means of rehabilitation, the New South Wales Government has advised that, in imposing a continuing detention order on Mr Tillman, the New South Wales Supreme Court was satisfied that at the relevant time, there was no treatment available in the community suitable to address his long standing offending behaviour. The Queensland Government has advised that the intensive counselling and rehabilitation programs Mr Fardon was required to undergo during his preventive detention were not available in psychiatric facilities outside of the prison environment.

16. While rehabilitation of the offenders is integral to the legislative schemes, protection of the community is also of central importance as a purpose of these schemes, and it was assessed by the Supreme Courts of New South Wales and Queensland at the time that continuing detention orders were imposed on Mr Tillman and Mr Fardon as not being able to be achieved through less restrictive means. Under the CSSOA and DPSOA, the New South Wales and Queensland Supreme Courts each have a duty to consider less restrictive means of achieving the purposes of the legislative schemes before imposing continuing detention orders. Under the CSSOA, a continuing detention order may only be imposed by the New South Wales Supreme Court where it has been determined that adequate supervision of the offender will not be provided by an extended supervision order. Under the DPSOA, the Queensland Supreme Court must decide whether adequate protection of the community can be reasonably and practically managed by a supervision order before imposing a continuing detention order. Therefore, both the New South Wales Supreme Court and the Queensland Supreme Court were actively required to consider less restrictive options when imposing a period of preventive detention on the authors. Therefore, Australia rejects the factual finding of the Committee that Australia did not demonstrate that no less restrictive means were available to meet the objectives of the relevant legislative schemes.

Requirement to rehabilitate

17. In relation to rehabilitation, Australia maintains that meaningful measures for reformation and social rehabilitation were in place throughout the incarceration of Mr Tillman and Mr Fardon, but that they failed to avail themselves of these measures by refusing to attend rehabilitation programs while incarcerated.⁵ In *Dean v New Zealand*, the Committee held that where the author chose not to attend certain rehabilitation programs, the delay of the author's release from preventive detention that was caused by his decision not to attend rehabilitation programs did not amount to a violation of article 10(3).⁶ In addition, each of the legislative schemes Mr Tillman and Mr Fardon were detained under require an assessment of an offender's risk of

⁵ *Fardon*, above n1, [4.2]; *Tillman*, above n1, [4.4].

⁶ *Dean*, above n24, [7.5].

recidivism after they have served their term of imprisonment. Therefore, one of the overall purposes of preventive detention in these cases was to facilitate rehabilitation of the offenders.

Summary

18. Australia maintains that, in light of the Committee's previous jurisprudence on this issue, preventive detention must serve a legitimate purpose and have a number of safeguards in place in order for it not to be considered arbitrary under article 9 of the Covenant. The New South Wales and Queensland Governments have emphasised the difficult circumstances of these cases, which deal with two serious sex offenders. Australia stresses that the community has a legitimate expectation to be protected from these offenders, and at the same time, that authorities owe these offenders a duty to try and rehabilitate them. The purpose of these schemes is not to indefinitely detain serious sex offenders, but rather to ensure as far as possible that their release into the community occurs in a way that is safe and respectful of the needs of both the community, and the offenders themselves.
19. In these circumstances, the New South Wales and Queensland Governments do not consider further action is necessary in relation to Mr Tillman and Mr Fardon, or the legislative schemes they were detained under.
20. The Australian Government avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.