"For the Term of his Natural Life"

Indefinite sentences – a review of current law and proposal for reform

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The English common law tradition has long contained at least a de facto capability to sentence people to indefinite sentences as preventative detention. To at least some commentators in the 18th and 19th centuries, the fact that a prisoner had no fixed end date to his imprisonment other than death, but retained the possibility of release for good behaviour was positive in that it provided a very high incentive to "reform". A proponent of this model was the well intentioned, but ill-fated Norfolk Island prison reformer Alexander Maconochie.

To Australians, the most well known form of indefinite sentences are the sentences of life imprisonment and transportation to one of "His (or Her) Majesty's Colonies" imposed on some convicts in the 18th and19th Centuries. In an age when "the criminal classes" were seen as a threat to the established order, indefinite detention in exile was strongly influenced by the perceived need to protect British society from further crime by these prisoners. The prisoner subject to such a sentence was then subject to sentence for life, but could, by bowing to the system, achieve a form of freedom under a "ticket of leave". The brutality of that system is well recorded in Robert Hughes's "The Fatal Shore"[2]. In essence, the convicts sentenced to life were subject to a system of indefinite detention. Many prisoners were never released, either because they died from overwork and brutality or because when the system was prepared to release them they were so aged and institutionalized that they were no longer capable of supporting themselves and so remained as inhabitants of Port Arthur or other prisons.

Theories of sentencing and imprisonment were a late development in the common law, partly at least because lengthy imprisonment was rare prior to the late 18th century and even then, it was generally constituted by exile to do forced labour rather than a prolonged prison sentence.

In the early 19th Century it appears that courts were capable of using indefinite sentences in inventive ways. One sentence imposed on a Richard Carlile by the Court of the Kings Bench on Tuesday, November 16, 1819 for "two libels" (which appear to have been publishing indecent books) included a jail term for three years after which "he should enter into securities for his good behaviour for the term of his natural life, himself in 1000 pounds and two sureties in 100 pounds each; that he should be further

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[2] Hughes, R, "The Fatal Shore", Vintage, 1988. See also the influential novel on convict life from which the title of his paper is drawn- Clark, M, "For the Term of His Natural Life", Melbourne 1874

imprisoned until the fines were paid and the securities found". This sentence was noted in "Occurrences in London and its Vicinity, The Gentleman's Magazine", 1819.

The effect of that sentence was to use the threat of indefinite imprisonment until Richard Carlile found 1000 pounds and convinced two other people to put up 100 pounds each as sureties that he would be of good behaviour for the rest of his life. That judge did not regard the power to order an indefinite sentence of that type as being beyond his powers.

After imprisonment rather than exile or execution became the norm as punishment in the late 19th century, most common law jurisdictions passed statutes allowing for the indefinite or additional detention of "habitual offenders"[3]. Additionally, at least in a de facto sense, there was preventative detention through life sentences or sentences of death commuted to life sentences imposed for serious offences, but subject to possibility of release on licence or parole.

The use of "habitual offender" statutes fell out of favour as the 20th century progressed.[4] However, in the 1990's revised forms of indefinite preventative detention statutes were passed in every state and territory in Australia except the ACT (and as is discussed below, indefinite detention was introduced in NSW but unsuccessfully). These indefinite preventative detention statutes and related jurisprudence will be considered in this paper.

Indefinite sentencing statutes in Australia

The Australian statutes dealing with indefinite sentences are set out in Table 1 at the conclusion of this paper. The procedures for indefinite sentencing provisions differ in each state and territory, but the ultimate questions that a court has to decide under the statutes are very similar:

- "the offender is a serious danger to the community" (Qld, Vic & NT),
- "would be a danger to society" (WA),
- "a declaration" "is warranted for the protection of the public" (Tas),
- "warrants a particularly severe sentence in order to protect the community" (SA)

Queensland and South Australia also have separate provisions which empower the executive to apply for a prisoner serving a sentence for sexual offences not to be released from a finite sentence. The test that the court has to apply is whether the prisoner will be danger to the community on his release.

Some Acts such as the South Australian *Criminal Law (Sentencing) Act 1988* are couched in very general terms so that the court may make an order "if of the opinion that the person's history of offending warrants a particularly severe sentence in order to protect the community"[5] or "is satisfied that the order is appropriate".[6] There are

[3] As early as 1870, South Australia enacted the *Habitual Criminals Act 1870*
[4] Strong v The Queen (2005) 79 ALJR 1171 per Kirby J
[5] *Criminal Law (Sentencing) Act 1988* (SA) - s20B(3)(b)
[6] *Criminal Law (Sentencing) Act 1988* (SA) s23(3).

some procedural safeguards, but the ultimate test does not set as high a standard as some of the other statutes (such as those of Queensland or Victoria). However, as will be demonstrated in this paper, the High Court has held that provisions such as those used by the states and territories are governed by over-riding common law principles and can only be applied where there is cogent evidence of a high level of physical risk to the community (including sexual offending).[7]

Common to all the Australian statutes is that the person is kept within the normal prison system and is treated in the same way as an ordinary prisoner serving a lengthy fixed sentence for serious offences would be treated. None of the statutes provides either a regime for treatment in psychiatric facilities at the conclusion of the normal sentence while remaining under an indefinite sentence or for a higher level of treatment and supervision during the prisoner's punitive imprisonment or subsequent preventative detention.

Whilst it may have been (optimistically) assumed by the respective legislatures that all prisoners have access to sufficient psychiatric or psychological care, none of the Australian statutes specifically recognise the greater obligation to provide treatment seeking to achieve a reduction in risk because these particular prisoners are being held in the latter stages of their imprisonment only because of the risk they present to the community.

That a prisoner is such a danger to the community that he should not be released is a difficult concept because it involves predictions of dangerousness that are notoriously difficult.[8] The consequence of a false positive decision is indefinite incarceration in a prison and the consequences of a false negative decision are that a further crime is committed with blame possibly being directed towards the court that released the person.

It is likely that in all indefinite sentence cases, the person who is alleged to be too dangerous to be released will have some form of mental disorder or impairment, but will not have received a defence of insanity (under the very high standard that applies).

This means that a judge making a finding of "dangerousness" will have to weigh competing psychiatric opinions in an area that is much disputed in order to make a prediction that will have very important consequences. None of the Australian statutes require that use be made of the expertise that the various mental health courts or tribunals have in this area, either in assisting in making the initial prediction of "dangerousness" or in the review and possible staged release of the "dangerous prisoner" through a combination of the corrective services and mental health systems.

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[7] Chester v The Queen (1988) 165 CLR 611

[8] McSherry B 2004. "Risk assessment by mental health professionals and the prevention of future violent behaviour". Australian Institute of Criminology, Trend and Issues in Crime and Criminal Justice No 281

Indefinite sentencing statutes in selected common law jurisdictions

The statutes from New Zealand, United Kingdom and Canada allowing for preventative detention are set out in Table 2 at the conclusion of this paper.

The tests set out in these statutes are:

- "the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date … of any sentence, other than a sentence under this section that the court is able to impose" (New Zealand),
- "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons" (Canada),
- "the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences" (UK)

The tests that the New Zealand, Canadian and United Kingdom courts are called upon to decide under these statutes are very similar to the Australian tests and to each other. The same practical considerations will apply in all jurisdictions of examining the record of past conduct and the psychiatric evidence about the assessment of risk if released at some time in the future. Quite distinct bodies of jurisprudence about the imposition of indefinite preventative detention have developed in each country. For example in Canada there are constitutional considerations while in the UK consideration must be given to EU human rights legislation.

The procedures for indefinite sentences under each system differ. In New Zealand for example an indefinite preventative sentence imposes a minimum term for the indefinite sentence and then allows the parole board to administer the timing and conditions of supervised release without the sentence being brought back to the sentencing court. The New Zealand system of indefinite sentencing effectively allows for the imposition of a life sentence, but with the court being able to recommend consideration for parole after a minimum of five years imprisonment.

The shared legal system and similar history of New Zealand makes it the closest comparable foreign system to Australia. It is therefore interesting to see the very different operation of similar preventive detention legislation in New Zealand.

The case law from the New Zealand Court of Appeal shows a great contrast in the outcomes in the application of indeterminate preventative sentencing. It appears that New Zealand Courts have enthusiastically adopted the concept of preventive detention and apply indefinite sentences much more commonly and for less serious offences than is the case in Australia. This is so even though the New Zealand legislation states that the sentencing court must take into account "the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society".[9]

[9] *Sentencing Act 2002* (NZ) s87(4)(e)

An example of this is R v Carroll[10] in which the New Zealand Court of Appeal upheld an indefinite preventative sentence for a 32 year old man who had been convicted of offences of burglary, robbery, deprivation of liberty and threats to kill and other offences which arose out of one incident in which he led a group of young men (aged 16, 17 and 19) into a house and demanded drugs and money from the occupants. After threatening to kill them and holding a knife close to the complainant's face, property, a car (which was later burnt) and a bank keycard were taken. The offences were undoubtedly serious, but no person was physically injured in the "home invasion" which appears to have been instigated because the occupants were believed to be drug dealers with access to drugs and money. Mr Carroll was arrested the next day and pleaded guilty to the offences. Mr Carroll had been imprisoned in the past for offences of violence and robbery, but none of his past offences (described in the Court of Appeal judgement) were of the highest level of seriousness (no convictions for high level robberies, grievous bodily harm, or wounding, etc).

The original sentencing court was provided with a report from a clinical psychologist and a forensic psychiatrist. The psychologist stated that because of Mr Carroll's deprived background and failure to comply with previous remediation programmes that he would be a high risk of future offending. The psychiatric report did not contain an overt risk assessment, but stated that Mr Carroll did not have any psychiatric disturbance, but may have some cognitive dysfunction due to his history of drug use and head injuries.

As will be demonstrated in the analysis of the Australian High Court cases reviewed in this paper, it is highly unlikely that this sentence of indefinite imprisonment would have been upheld on an appeal or even ever requested by the prosecution given the paucity of clear psychiatric risk factors, the absence of actual physical harm to any person and the availability of a substantial proportionate sentence of imprisonment to punish the offender for the offence. [11]

Other New Zealand Court of Appeal cases demonstrating that New Zealand jurisprudence allows for the imposition of indeterminate detention for offenders with much lower level of offending that Australian jurisprudence would currently allow even though applying very similar tests are *Rowe v R*[12] and *Keremete v R*.[13]

<u>The Australian common law position on indefinite sentences - Veen (No 1) and Veen (No 2)</u>

Even without preventative detention statutes, in extreme cases the common law still allows courts to impose indefinite preventative detention to protect the community from the danger that offender will present if released. The circumstances in which this can be done are arguably very circumscribed, but the High Court case of *Veen v The Queen (No.2)*[14] illustrates that the practical effect of the common law is not greatly different from an order under an indefinite sentencing regime at least in very extreme cases where the maximum penalty is life imprisonment.

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[10] R v Bevan James Carroll [2003] NZCA 264 (18/11/03)
[11] See for example *Chester v The Queen* (1988) 165 CLR 611
[12] Rowe v R [2005] NZCA 44 (14/3/05)
[13] Keremete v R [2004] NZCA 138 (8/7/04)
[14] (1988) 164 CLR 465

The facts of *Veen (No 1)*[15] and *Veen (No 2*[16]*)* are striking. The two High Court cases relate to the same prisoner (Robert Veen), the same offence (manslaughter) and the same issue (whether the sentencing judge and the Court of Criminal Appeal were correct in imposing a life sentence for manslaughter largely for the purpose of protecting the community), but the two homicides were nearly nine years apart.

In 1975 when he was 20 years old, Robert Veen was convicted of the manslaughter of Terry Ward after a jury found him not guilty of murder but guilty of manslaughter by virtue of diminished responsibility. Robert Veen had stabbed the deceased 50 times with a kitchen knife in the deceased's house after being insulted and refused payment for his sexual services by the deceased, with whom he had spent the weekend. The psychological evidence upon which the judge based his sentence was accumulated in one afternoon session and the effect of the psychologist's opinion was that "the prisoner had a form of brain damage which could cause him to act in an uncontrollable aggressive manner when he was severely provoked, or had an intake of alcohol."[17]

The Court was informed that Robert Veen had two known prior instances of stabbings. He had stabbed himself while in police custody when he was 15 years of age. When he was 16 years of age and had been drinking heavily, he stabbed his landlady in the back three times and once in the chest with a knife. Veen was convicted of wounding for that stabbing.

The judge on the sentence hearing for manslaughter decided that although life imprisonment would not otherwise be the appropriate sentence, the information in the psychologist's report led him to conclude that a life sentence should be imposed to protect the community from the prisoner's uncontrollable urges when he was drinking. This sentence was upheld by the NSW Court of Criminal Appeal, but was set aside by the High Court which substituted a sentence of 12 years imprisonment.

Robert Veen served 8 years of that sentence and was released in 1983. Nine months after his release, Veen killed another man, Paul Hoson by stabbing him repeatedly with a bread knife. The killing occurred in very similar circumstances to the 1975 killing. Hoson was a homosexual man who had invited Robert Veen to his flat for sex after they had been drinking together at a hotel. Veen later told police that he had decided to kill Hoson as soon as they had entered the apartment and there was no reason for this decision.

The Crown accepted a plea to manslaughter (by virtue of diminished responsibility) and Veen was again sentenced to life by the judge at first instance and this sentence was upheld by the NSW Court of Criminal Appeal.

Mr Veen appealed to the High Court again in *Veen (No2),* but this time the High Court by a majority decision of 4 to 3, dismissed his appeal against the life sentence, holding that the protection of the community was a legitimate consideration in the decision to impose a life sentence.

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[15] Veen (No1) (1979) 143 CLR 458
[16] Veen (No 2) (1988) 164 CLR 465
[17] Veen (No 1) at 485

In dismissing the appeal and upholding the life sentence, the majority judgement of Mason CJ, Brennan, Dawson and Toohey JJ considered the decision of *Veen (No 1).* They stated that although a sentence should be proportionate to the crime, "the protection of society" was "a factor in determining a proportionate sentence."[18] They further observed that "[i]t must be acknowledged however, that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgement of experience and discernment." [19] Commenting upon the conflicting prior authorities on sentences imposed primarily to protect the community, the majority stated:[20]

"It is desirable to refer here to the two Queensland cases which were quoted in Veen (No.1): Reg. v. Gascoigne (1964) Qd R 539 and Reg. v. Pedder (unreported,29 May 1964). The value of Gascoigne was that it emphasized the principle of proportionality and the impermissibility of sentences of mere preventive detention. In this respect it was cited with approval by Jacobs J. and in the New South Wales cases mentioned by him. But Gascoigne was expressed in terms which were capable of being understood as denying the orthodoxy in determining a proper sentence of taking account of the fact that a prisoner's mental illness makes him a menace when at large. That proposition was erroneous, as Gibbs J. made clear in Pedder in a passage cited by Brennan J. in Channon v. The Queen (1978) 20 ALR 1, at p 10:

" '... R. v. Gascoigne is no doubt authority for the proposition that any sentence imposed must be in respect of and appropriate to the crime committed but it does not, in my opinion, decide that the protection of the public is not a matter that should be considered in imposing sentence. Indeed the protection of the community is one of the most important results that the criminal law is designed to secure.'"

In Veen (No.1) (at p 469), Mason J. cited a further passage from the judgment of Gibbs J. in Pedder including the following:

" '... In some cases in which it appears that there is no likelihood that the convicted person would be a danger to the public if set at liberty, and that there were mitigating circumstances, a light term of imprisonment or no imprisonment at all may be appropriate. On the other hand there are cases in which the mental condition of the convicted person would make him a danger if he were at large and in some such cases sentences of life imprisonment may have to be imposed to ensure that society is protected.'"

Mason J. then said:

"In my opinion, his Honour's observations express the principle which is to be applied to cases of this kind. They demonstrate that in such a case there is no opposition between the imposition of a sentence of life imprisonment with the object of protecting the community and the proportionality principle. The court imposes a sentence of life imprisonment on taking account of the offender's record, his propensity to commit violent crime, the need to protect the community and the very serious offence of which he stands convicted, imprisonment for life being a penalty appropriate to very serious manslaughter when it is attended by the additional factors to which I have referred."

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[18] Veen (No 2) at 474
[19] Veen (No 2) at 474
[20] Veen (No 2) at 474

That passage remains, in our opinion, an accurate statement of the law. Gascoigne should not be understood as excluding the protection of society from the factors to be considered in determining the sentence to be imposed."

The majority judgement also stated that the judge at first instance "was entitled to attach great weight to the protection of society as a factor in that determination".[21] The majority concluded that:[22]

"The killing of Hoson was particularly horrible in the manner and violence of its execution. There was an intentional taking of his life. There was no provocation. The mental abnormality which entitled the prisoner to the verdict of manslaughter under s.23A of the Crimes Act is such that the prisoner is a danger to society when he is at large. The doubt which attended this proposition in *Veen (No.1)* has now been dramatically dispelled. The circumstances show that the case was in the worst category and that the appellant's mental abnormality makes him a grave danger to society if he goes at large. The tragedy of Veen's life, which appears from the moving testimony of his foster sister, Brother Loth and Ms Fitzwalker and which must excite sympathy for him, has to be balanced against the exigencies of the criminal law especially the protection of society. Disastrous though the consequences of the sentence of penal servitude for life are for Veen, it cannot be said that the balance was wrongly struck."

Justice Deane (along with Wilson and Gaudron JJ in separate reasons) dissented from the conclusion of the majority and held that the common law did not allow for a sentence of preventive detention. He would have allowed the appeal and remitted the matter to the New South Wales Court for a sentence to be imposed "proportionate to the crime of which the applicant stands convicted".[23]

However in his reasons, Deane J stated that although a criminal sentence for life for the protection of the public against future crimes was not consistent with the common law, an appropriate statutory regime that allowed for "preventive restraint" would remove the pressure on the common law to accommodate extreme situations such as was present in *Veen (No. 2)*. At paragraph 9 of his judgement Deane J stated[24]:

"There is one further matter which I would briefly mention. That is that the protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts. The courts will impede rather than assist the introduction of such an acceptable system if, by disregarding the limits of conventional notions of punishment, they assume a power to impose preventive indeterminate gaol sentences in a context which lacks the proper safeguards which an adequate statutory system must provide and in which, where no non-parole period is fixed, the remaining hope of future release ultimately lies not in the judgment of experts but in the exercise of a Ministerial discretion to which political considerations would seem to be relevant. I say "by

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[21] *Veen (No2)* at 477
[22] *Veen (No2)* at 478
[23] *Veen (No2)* at 495
[24] *Veen (No2)* at 495

disregarding the limits of conventional notions of punishment" for the reason that to increase a sentence of imprisonment by reason of a propensity, flowing from abnormality of mind, to commit further offences is to punish a person for that abnormality of mind and not for what he has done. Indeed, in the circumstances of the present case, it would be effectively to punish the applicant not for his offence against society but for an abnormality of mind which must realistically be seen as having been at least partly caused by the oppressive and deforming yoke of emotional deprivation and sexual abuse and exploitation which society laid upon his formative years."

In this passage Deane J was conceding the need for the preventative detention of certain individuals who posed a great risk to society, but hoped that the preventative detention would be separate from detention in prison and would be aimed at rehabilitation rather than further punishment. Deane J held that the common law did not authorise preventative detention even in extreme cases such as *Veen (No 2),* but recognising that preventative detention would be necessary in some extreme cases held that it was a matter for the legislature to provide for an appropriate regime similar to the involuntary detention of the mentally ill where they posed a threat to themselves or others.

However, the majority in *Veen (No 2)* did hold that the common law authorised indefinite preventative detention at least in extreme cases where the maximum penalty was life imprisonment.[25] The facts in *Veen (No 2)* are clearly an extreme example of demonstrated propensity for violence.

In the oral submissions before the High Court in *Buckley v The Queen* [2006] HCA 7 on 9 December 2005, Gleeson CJ commented on the Veen decisions and the role of preventative detention as part of allowable common law sentencing and observed: "I have always thought that an interesting exercise in advocacy would be to explain the decision in *Veen [No 1]* to the relatives of the victim in *Veen [No 2],* but *Veen [No 2]* acknowledges that danger to the community is a legitimate matter to take into account in ordinary sentencing."

Chester v The Queen

The High Court decision of *Chester v The Queen*[26] was decided on 6 December 1988 only nine months after *Veen (No 2)* and appeared to retreat from some of the statements in *Veen (No 2)* in order to affirm the common law principles of proportionality in sentencing.

Chester was dealing not with a life sentence imposed for the protection of the community utilizing the limited common law power as in *Veen (No2),* but instead with a sentence imposed under the statutory regime for indefinite sentences contained in s662 of the Western Australian Criminal Code.[27]

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[25] The Queen v C [1998] QCA 207 (25/7/98) is a recent example of a common law preventative sentence of indefinite duration. A sentence of life imprisonment was imposed upon an aboriginal offender for the sodomy of a child. At page 5, Davies JA (with whom the other judges agreed) said "… he is plainly a danger to the community when affected by alcohol and there is not the slightest suggestion that he has any intention, if released of overcoming his alcohol dependence."

[26] (1988) 165 CLR 611

[27] Since repealed and replaced by s98-101 of the Sentencing Act 1992 (WA)

Mr Chester had psychiatric problems which had been diagnosed as chronic paranoid schizophrenia. He also had a criminal history which included a conviction in 1976 for causing an explosion and damage to property when he tried to blow up a woodchip loading facility. In 1987, Mr Chester stole a car and used it to drive to a bank which he robbed of $19,000 while armed with a knife. No-one was injured in the robbery.

Mr Chester pleaded guilty to these charges and was sentenced to a total of 4 years and 6 months imprisonment. The maximum penalty for armed robbery was life imprisonment. The sentencing judge then considered the psychiatric evidence contained in the pre-sentence report which stated that although Chester regretted the psychological effect on the bank employees, he was not remorseful and had been reported to hear voices and believe that he was "God's Avenger" and had tried to convert his wife and family to his beliefs through violent means.

Based on this evidence, the sentencing judge ordered that at the expiration of the term of imprisonment, Mr Chester was to be detained under s662 of the Criminal Code (WA) because he constituted a constant threat to the community because of his mental health.

The decision to order an indefinite sentence for the protection of the community under s662 of the Criminal Code (WA) was appealed to the Court of Appeal, but by majority the sentence was upheld. The Court of Appeal heard further psychiatric evidence from another psychiatrist whose opinion was that although Mr Chester held strange religious beliefs, he was not suffering from schizophrenia, but instead had a mixed personality disorder and was therefore not so mentally ill as to require an indeterminate sentence. Despite this evidence, the majority of the Court of Appeal held that the indeterminate sentence was still required. Burt CJ dissented, holding that the mental health of the prisoner would have required a higher maximum term of imprisonment of 6 years with a minimum term of three years to deal with the factors that the dangers of his mental health raised, but not an indefinite sentence.

On appeal to the High Court, in a unanimous judgement the High Court overturned the decision to impose an indefinite sentence. The matter was remitted to the Court of Appeal to decide what finite sentence should then be imposed.

The High Court did not review the decision of *Veen (No 2)* closely in *Chester*. The Court made a strong statement that the common law did not sanction preventative detention and that the principle of proportionality did not permit a sentence of imprisonment beyond what is proportional to the crime merely to protect society from the anticipated recidivism of the offender. This seems difficult to reconcile with the Court's statements in *Veen (No 2),* particularly when the High Court acknowledged when referring the matter back to the WA Court of Appeal that a higher sentence than was imposed as the "nominal" sentence might be required based on the reasoning of Burt CJ.[28]

[28] *Chester v The Queen* (1988) 165 CLR 611 at 620

The High Court's position on the use of indefinite sentencing regimes was stated in the following passages[29]:

"The Solicitor-General, during the course of his argument, suggested that, when it was initially introduced, s.662 was intended to serve a purpose in contributing to the reform or improvement of a person who had a propensity to commit serious crimes. Why indeterminate detention would bring about reform or improvement of such a person was not satisfactorily explained. Conceding that the section serves no such purpose now, the Solicitor-General submitted that the object of the provision is also to protect the public from persons who have a propensity to commit serious crimes.

Plainly enough, the extraordinary power which the section confers on a court is to be exercised with the object of protecting the public from the commission of further crimes by the person directed or sentenced to be detained for an indeterminate period. But it is not so plain that the object is to protect the public from persons who have a propensity to commit serious, as distinct from violent, crimes. The section makes no reference to such a propensity or indeed to crimes of any kind. The section confers on the sentencing judge a large discretionary power without specifying a precise criterion according to which the power is to be exercised. Section 662 is not intended to protect the community from the crimes which would be committed by habitual criminals: s.661 is the provision enacted for that purpose. Nor should the power conferred by s.662 be contemplated when in due course it may be more appropriate that there be a justice's order under the Mental Health Act 1962 (W.A.) for the reception into and detention in an approved hospital of a person suffering from mental disorder who should be admitted to an approved hospital for treatment in the interest of the public: see s.29(1) and Div.IV of Pt 4 of the Mental Health Act."

The Court then stated:[30]

"The exercise of the power should be reserved for those very exceptional cases which do not attract the operation of s.661 of the Code or for which s.29(1) of the Mental Health Act is unlikely to be appropriate and in which the sentencing judge is satisfied by acceptable evidence that the convicted person is, by reason of his antecedents, character, age, health or mental condition, the nature of the offence or any special circumstances, so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community.

The stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not by judicial, decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community in the sense already explained. What we have said accords with the view expressed by Burt C.J. in the Court of Criminal Appeal in the present case."

The High Court ruled that the relatively general preventative detention provisions found in s662 of the Criminal Code (WA) had to be looked at within the context of the common law's strong objection to indeterminate sentences for the protection of the community and that its application was therefore limited to extreme cases where there was very clear evidence that the prisoner represented an ongoing danger to the personal safety of members of the community.

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[29] *Chester* at 617
[30] *Chester* at 618

The decision of the High Court in *Chester* meant that the Western Australian statutory provision providing for indefinite sentences added very little to what the common law itself would allow (as expressed in Veen (No 2)). Importantly *Chester* confirmed that the common law principles relating to sentencing were not completely displaced by a provision such as s662 of the Criminal Code (WA) and the provision had to be interpreted in light of those principles which meant that it could only be applied where there was clear evidence of the physical danger the offender posed to the community.

Kable v The Director of Public Prosecutions for New South Wales

New South Wales does not have indefinite sentencing legislation at the present time. It does have statutory provisions in the *Habitual Criminals Act 1957* for preventative detention for 5-14 years concurrently with any sentence passed upon the prisoner. The prerequisites of the Act are that the offender is aged twenty-five years or more and has been imprisoned twice previously for indictable offences. The 1957 Act replaced a 1907 Act of the same name. However the 1957 Act had largely fallen into disuse by the l980's and 1990's.[31]

The *Habitual Criminals Act 1957* provides that the test for pronouncing a convicted person a "habitual criminal" is that the sentencing judge "is satisfied that it is expedient with a view to such person's reformation or prevention of crime that such person should be detained in prison for a substantial time".[32] The power to release a person serving the additional period of "reformative" detention imposed under the Act is vested in the Governor.

The effect of the *Habitual Criminals Act 1957* is potentially draconian in its application to persons convicted of less serious indictable offences, but because the maximum term of detention that can be imposed is 14 years concurrent with any sentence of imprisonment, it does not allow for the preventative detention of a person who has committed a very serious offence for which they would receive a sentence of 14 years or more in any case. For this reason the Act was inapplicable in the *Veen* cases. It would also not be applicable where a person had not previously been sentenced to two terms of imprisonment in the past.

The *Habitual Criminals Act 1957* was the only statute allowing for preventative detention in NSW at the time the NSW parliament passed the *Community Protection Act 1994*. This Act was directed solely at ensuring that a single named person - Gregory Wayne Kable was held in prison until he was found not to pose a threat to the community.

Mr Kable was charged with murdering his wife, but the Crown accepted a plea to manslaughter based on diminished responsibility and he received a sentence of 5 years 4 months with a minimum term of 4 years. This sentence was not appealed by the Crown. The relatively short term of imprisonment imposed upon Mr Kable is in contrast with the life sentence (ultimately reduced to 12 years by the High Court) imposed upon Robert Veen for his first conviction for manslaughter based on diminished responsibility.

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[31] *Strong v The Queen* (2005) 79 ALJR 1171 at 1177 [28], 1182-1183 [57]-[62]; 216 ALR at 226, 233-236

[32] *Habitual Criminals Act 1957*, s4(1)

Due to certain threatening letters he had sent to his wife's relatives while he was serving his sentence, he was viewed as being a serious danger to the community. He was charged with offences arising out of sending those letters and was remanded in custody for those offences at the time the NSW parliament passed the *Community Protection Act 1994*. The Act had originally been an Act of wider application, but during the passage of the Bill it had been revised such that the only person to whom it applied was one named person – Gregory Wayne Kable. The *Community Protection Act 1994* did not directly link the imposition of a detention order to a sentence for any new criminal act. Instead the Act purported to give the Supreme Court of New Wales the discretion to decide whether Mr Kable was a danger to the community if he was released and to order that he be held in custody for periods of up to six months with the DPP able to apply for further periods of detention at the expiration of each period.

In *Kable v The Director of Public Prosecutions for New South Wales*[33], the constitutionality of the Act was challenged before the High Court. The High Court ruled that the appearance of institutional impartiality of the Supreme Court of New South Wales was seriously impaired by being made the instrument of an ad hominem statute for political purposes. The High Court held that the Constitution relied upon an integrated Australian court system and contemplated that state courts would exercise federal jurisdiction and that any legislation that destroyed the institutional integrity of a state court would be incompatible with the court's role as the potential exerciser of federal jurisdiction and would therefore be invalid.

The appropriateness of a similar Act empowering the preventative detention of dangerous prisoners, but of general application and with appropriate safeguards was not directly decided in *Kable.* It was the ad hominem nature of the Act and the appearance of political pressure or control due to the timing of the passage of the Act that were the reasons the majority held that the Act was constitutionally impermissible.

The case of *Fardon v Attorney-General for the State of Queensland*[34] related to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Queensland). The Queensland legislation authorised the Supreme Court to order that a prisoner be detained in custody if it was satisfied that there were reasonable grounds for believing that the prisoner was a serious danger to the community. The Act was of general application, but came into operation only a matter of weeks before Mr Fardon's full time release date after serving a 14 year sentence.

In *Fardon*, the High Court held that this Act was not invalid as the Supreme Court was able to exercise judicial decision making powers without being dictated to by the Parliament as was the case with *Kable* and so did not compromise the institutional integrity of the Supreme Court within the federal system under the Constitution. In *Fardon*, the High Court emphasised that it wasn't the general subject matter of the Act in *Kable* that was the problem, but rather the manner in which it compelled the Supreme Court of New South Wales to purport to exercise judicial power under an Act towards a single named individual when the Act was in reality an executive fiat.

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[33] *Kable* (1996) 189 CLR 51
[34] *Fardon* (2004) 78 ALJR 1519, HCA 46

New South Wales did not try to amend the *Community Protection Act 1994* after *Kable*, nor to enact other preventative imprisonment statutes. It presently only has the *Habitual Offenders Act 1957* as a preventative detention statute which allows for preventative detention for up to fourteen years.

Moffat v R

The Victorian legislation which is found in s18A to 18P of the *Sentencing Act 1991* (Vic) was challenged in *Moffat v R*.[35] The Victorian Court of Appeal dismissed an appeal against the imposition of an order for indefinite preventative detention, but in doing so discussed the principles relevant to making orders under such statutes. *Moffat* was not appealed to the High Court, but was commented upon in later judgements of the High Court and contains a useful exposition of the history and principles relating to such statutes.

Hayne JA reviewed the relatively long history of habitual offender statutes in Australia. He concluded his judgement with the following observation which has been widely quoted in later cases:[36]

"The power to impose an indefinite sentence is one that will fall to be exercised in few (perhaps very few) cases. It is a sentence that goes beyond punishing the offender to the extent that is proportionate to his or her crime. In *Chester* the High Court said at (at 618; 387) of the Western Australian preventive detention legislation that:
" …. The power to direct or sentence to detention contained in s662 [of the Western Australian Code] should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm …"

Buckley v The Queen

The position in Australia is therefore that states can potentially legislate to provide for preventive detention of persons convicted of crimes either at the time they are sentenced for criminal offences or at a later time while they are still serving their sentence. These statutes have some limited parallels in the common law, in that *Veen (No 2)* held that protection of the community was a factor that could be taken into account even under the common law to extend the otherwise appropriate sentence in cases where the risk of physical harm to members of the community was clearly demonstrated.

The recent High Court case of *Buckley v The Queen*[37] illustrates the caution with which the High Court approaches the use of indefinite sentences. Jason Buckley pleaded guilty and was sentenced to an indefinite sentence of imprisonment with a nominal sentence of 22 years for the violent rape of three women during a nine month period. He did not have a significant criminal history prior to these offences and he had never previously been sentenced to any term of imprisonment. However, he did

[35] *Moffat* (1997) 91 A Crim R 557
[36] *Moffat* at 584
[37] *Buckley* [2006] 80 ALJR 605, HCA 7 (8 March 2006)

have some significant mental health issues which saw him referred to the Mental Health Court to determine whether he was fit to plead. The Mental Health Court held that he was fit to plead and the psychiatric evidence was that he had an anti-social personality disorder exhibiting features of sexual sadism and zoophilia. One of the psychiatrists found that the long term possibility of florid mental illness could not be excluded, but that he did not currently need to be hospitalised. All of the psychiatrists who saw him found it difficult to predict the level of danger that he would present to the community in 20 years time.

The extremely violent nature of the rapes and associated assaults appeared to demonstrate an aberrant dissociation from pain caused to others. The psychiatric reports disclosed that Buckley had a long history of sexual behaviour towards animals and that this had included shooting horses prior to having sexual intercourse with the corpses. Buckley had disclosed to one psychiatrist that the feelings he had when he raped the three women was similar to the feelings had had with "the animals."

It was with this factual background that the High Court observed that the sentencing judge's decision to impose an indefinite sentence could have been upheld by the Court of Appeal, but that the decision was "by no means inevitable".[38]

The High Court was critical of the sentencing judge's failure to refer to any of the authorities relating to the imposition of indefinite sentences or to the principles established by those authorities. The sentencing judge referred to the fact that the offender had admitted to one psychiatrist to having had sexual intercourse with animals and then killed those animals. This was inaccurate in that the actual admission was to having killed the animals before intercourse occurred.

The sentencing judge also referred to Buckley having been boastful of his offending behaviour and having attempted to minimise his culpability by blaming alcohol. Justice Holmes in the Queensland Court of Appeal held that these two assertions had been inaccurate, but when exercising the sentencing discretion afresh, she held that the indefinite sentence was warranted. The other two members of the Queensland Court of Appeal held that the sentencing judge had not made the factual errors that had been attributed to him or alternatively that his sentencing remarks showed that he had not relied upon these matters in coming to his decision.

In a judgement of the Court, the High Court held that factual errors had been made and that as the sentencing judge had not clearly recognised the exceptional nature of the power to impose an indefinite sentence, the Court of Appeal should have reconsidered the discretion itself.

The High Court referred the case back to the Queensland Court of Appeal so that it could re-consider the evidence to decide whether an indefinite sentence was required, after giving close consideration to the adequacy of a long sentence with a definite term sufficiently reducing the risk to the community such that the indefinite sentence was not required. It is clear that the Court of Appeal would not be limited to the 22 year sentence that had been imposed and could substitute a higher sentence. The High Court considered that there were difficulties in assessing the risk that Mr

[38] *Buckley* at page 11 paragraph 44

Buckley would pose in 20 years based on the evidence of his paraphilia in the psychiatric evidence, but that the psychiatric evidence on this issue would have to be closely considered on the sentence before the Court of Appeal.

In *Buckley*, the High Court stated that:[39]

"In the authorities earlier mentioned, courts, including this Court, have stressed, and the legislation to be applied in the present case recognises, the exceptional nature of the power to impose an indefinite sentence. A proper exercise of the power involves an understanding of why it is exceptional, and careful attention to the considerations that call for its exercise. The nominal sentence required by s 163(2) of the Act is significant not merely for purposes related to the review provisions of Pt 10. It has an important role in the decision to be made under sub-ss (3) and (4) of s 163. In particular, in considering the risk of serious harm to members of the community if an indefinite sentence were not imposed, a sentencing judge is required to consider the protective effect of the finite sentence that would otherwise be imposed.
In this case, the prosecution argued, at first instance, for a life sentence. An examination of the sentencing judge's reasons indicates that he rejected that proposal mainly because of the pleas of guilty. On appeal, it was not argued that he erred in considering a nominal sentence of 22 years to be appropriate. Having identified 22 years as an appropriate nominal sentence, the learned judge was then required to consider, and explain in detail (s 168(1)), why a proper exercise of sentencing discretion called for the imposition of an indefinite sentence rather than such a lengthy finite term.

Serious violent offenders will commonly present a danger to the community. Protecting the community may be one of the purposes of the imposition of a lengthy custodial sentence. Such custodial sentences remain the norm for the punishment of offenders convicted of serious offences of violence. Indefinite sentences are not the norm. Part 10 of the Act proceeds upon the basis that there may be certain cases where the extraordinary step of imposing an indefinite sentence may be justified as a response to the risk of serious danger to the community. The risk to be weighed is the risk "if an indefinite sentence were not imposed" (s 163(4)(d)). Where the appropriate finite term, according to ordinary sentencing principles, is 22 years, then it is necessary to consider whether the protective purpose in contemplation could reasonably be met by such a term. If it were otherwise, the consequence would be the banalisation of indefinite imprisonment."

The transcript of the appeal hearing in the High Court shows that the possibility that the passing of indefinite sentences could become simply "banal" is of great concern to the Court. This was the case even though the Court was informed during the hearing of the appeal that only approximately twelve indefinite sentences had been successfully imposed in Queensland in the fourteen years since the provisions came into being with the *Penalties and Sentences Act 1992* (Q) and that the consent of the Attorney-General had to be obtained before an indefinite sentence was sought by the Crown. The Court stressed that in a case such as this, the potential for a very long finite sentence to be imposed, combined with the ability of the parole and mental health system to deal with a potentially dangerous offender during the period of the sentence was something that needed to be closely considered before deciding upon the need for an indefinite sentence.

The High Court cases on indefinite sentences such as *McGarry* [40]and *Buckley*[41] and on dangerous prisoner legislation such as *Fardon*[42] show that the legislation is not

[39] *Buckley* [2006] 80 ALJR 605, HCA 7 at [41]
[40] *McGarry* (2001) 207 CLR 121

looked at in isolation from the common law principles of proportionality and that is only where there is clear, cogent evidence that the prisoner will be a physical danger to the community on his release that such an order will be upheld.

Suggestion for reform

The High Court cases emphasize that indefinite sentences should only be imposed where:

- There has been a scrupulously careful examination of the facts of the case, the prisoner's history and mental health;
- There is cogent evidence showing that an indefinite sentence is demonstrably necessary to protect society from physical harm ; and
- There has been a clear distinction drawn between the proportionate and preventative aspects of the sentence being passed and consideration given to the necessity for a preventative sentence of indefinite duration given the length of the otherwise appropriate sentence.

Taking into account the comments in the dissenting judgements of Deane J in *Veen (No 2)*[43] and Kirby J in *Fardon*,[44] a suggestion for reform is that a specialist court should impose such sentences and that the regime after the expiration of the ordinary sentence should be focused on treatment, and if possible, not be served in an ordinary prison. Presently indefinite preventative sentences are served in the same way as any other sentence being served by a serious offender.

It is assumed by the legislation that all persons who are held in preventative incarceration as a continuing danger to society have been appropriately assessed as not being insane within the meaning of the *M'Naghten* rules or their statutory forms. It is possible that this assumption is not correct in all cases and it is also possible that a person who was found to be a continuing danger to society and sentenced to an indefinite sentence may become significantly more seriously mentally ill after their conviction and incarceration.

Even with the assumption that a prisoner is not presently insane under the *M'Naghten* rules, they may still be suffering from significant mental impairment, whether it is the result of mental retardation, psychiatric conditions or significant personality disorders. In all the cases reviewed in this paper, the prisoner has been a person who has suffered from one or more of those factors. In practice a person who is not suffering from at least one of those factors will not be perceived as such a danger to society that they will be held indefinitely. The difficulty in assessing these factors tends to support the referral of indefinite sentences to a court which has specialist expertise in mental health issues.

It then appears that what separates the prisoners for whom it is thought that indefinite incarceration beyond the length of a proportionate sentence is appropriate and those who are not in that category is that they are persons with mental disabilities or

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[41] *Buckley* [2006] HCA 7
[42] *Fardon* (2004) 78 ALJR 1519; 210 ALR 50
[43] *Veen(No2)* at 495
[44] *Fardon* (2004) 78 ALJR 1519; 210 ALR 50

significant personality or psychiatric disorders. To hold those persons in a prison without clearly distinguishing between their imprisonment as "punishment" proportionate to their crime and their imprisonment because of the danger they represent due to their mental disability or personality disorder and without ensuring that there are attempts made to minimise their risk to the community, does not appear to be in the long-term interests of the community.[45]

This is not to dispute that certain individuals with these factors may not be a continuing danger to society; even the strongly dissenting judgements in the High Court included an acknowledgement of this. However, it does appear that there should be a clearer distinction between the punishment of the criminal act and the protection of society from the dangerous person.

The case of *Fardon*[46] dealt with the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Q). The High Court held that the legislation did not offend Chapter III of the Federal Constitution and it was therefore within the power of the Queensland parliament to grant such powers to the Queensland Supreme Court.

It is an interesting aspect of the case that both Gleeson CJ who held that the Act was constitutional and Kirby J who dissented from that view both referred to the same comments made by Deane J in his dissenting judgement in *Veen (No 2)*. Those comments are quoted in full above, but the critical part of it states that[47]:

"[T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts."

Gleeson CJ describes the final sentence as being "a hope about a statutory system"[48], and concluded in *Fardon* that the system provided for by the Queensland parliament was not unconstitutional even though it would keep those sentenced to indefinite preventative detention in gaol rather than in "an institution other than a gaol".

In his lengthy dissenting judgement Kirby J states that[49]:

"In Veen v The Queen [No 2], Deane J pointed out that cases may exceptionally arise where a prisoner, who has completed the punishment, judicially imposed upon proof of a criminal offence, may continue to represent a danger to the community. Where such a danger arises from an established mental illness, abnormality or infirmity which requires and justifies civil

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[45] R v Smith [2001] QCA 417 is an appeal against an indefinite sentence imposed under the Queensland regime. At paragraph 13 of the leading judgement of Chesterman J, reference is made to a psychiatric report which suggests that the offender's aberrant attitudes and self-beliefs are only be reinforced in the particular prison environment he is in. Where a prisoner is seen as so dangerous they shouldn't be released, the need for treatment is particularly great.

[46] *Fardon* (2004) 78 ALJR 1519; 210 ALR 50

[47] Veen (No 2) at 495

[48] *Fardon* at [10]

[49] *Fardon* at [191]

commitment, the law already provides solutions. If it is desired to extend powers to deprive of their liberty persons who do not exhibit an established mental illness, abnormality or infirmity, it is possible that another form of detention might be created. It is also possible that judges might play a part in giving effect to it in ways compatible with the traditional judicial process and observing the conventional nature of legal proceedings. However, at a minimum, any such detention would have to be conducted in a medical or like institution, with full facilities for rehabilitation and therapy, divorced from the punishment for which prisons and custodial services are designed."

A problem with the imposition of indefinite sentences by judges in the normal course of imposing criminal sentences is that the sentencing judge does not necessarily have the background or expertise to assess the often conflicting psychiatric opinions put before them.

A suggestion for reform in the Queensland jurisdiction is that indefinite sentences should be imposed by the Mental Health Court after an application by the prosecution or a referral from the original sentencing judge who has decided the "nominal sentence". The Mental Health Court could either impose an indefinite sentence or decide not to do so and then affirm or amend the nominal finite sentence set by the sentencing judge after having heard psychiatric evidence.

In Queensland, the Mental Health Court decides (subject to a right to also put these issues before a jury) whether an accused is of sound mind, is fit to stand trial, or in the case of murder whether a defence of diminished responsibility exists. The Mental Health Court is composed of a Supreme Court judge assisted by two psychiatrists. One Supreme Court judge generally presides in this jurisdiction for a number of years, as well as also sitting in the civil and criminal jurisdictions of the Supreme Court. The Mental Health Court sits for as many weeks per year as are required by the case load, but will generally sit for a week or more at every two months.

The High Court was informed in *Buckley* that only twelve successful applications for indefinite sentences had been made in the previous fourteen years. The requirement that the Attorney-General's consent is required before the Crown can seek an indefinite sentence is a further restriction on the number of applications. It is therefore clear that dealing with applications for indefinite sentences would form a very small component of the work of the Mental Health Court.

There is also the practical advantage that the psychiatrists and psychologists who would give evidence on an application for an indefinite sentence are also likely to be the same experts who are regularly appearing before the Mental Health Court and so there is less likelihood of conflicting court obligations for these expert witnesses.

The next distinct advantage is that the *Mental Health Act* (Q) contains mechanisms for the ongoing review of persons who are being held because of their mental health status which could be used for the review of indefinitely sentenced prisoners. The Patients Review Tribunal is the body that conducts the initial reviews of the detention and the conditions of leave from detention of persons held under the *Mental Health Act*. The Patients Review Tribunal also has the power to refer matters to the Mental Health Court and the patient has the power to seek the review of the decision of the Patients Review Tribunal to deny them release from detention or the level of security of their detention.

If an indefinite sentence is imposed, then the Mental Health Court could be empowered to make recommendations for ongoing treatment and to determine the place in which the prisoner is detained (forensic psychiatric hospital or prison). This placement could be reviewed at the application of the State or the prisoner. At the end of the statutory non-parole period for the nominal sentence, the Mental Health Court could have the power to direct that the prisoner be detained in a forensic psychiatric hospital or other psychiatric facility without being released from his sentence. At the end of the nominal sentence, the prisoner would not be kept in prison (unless sentenced for another offence) and would be housed in a forensic psychiatric hospital or other facility specialised in dealing with the mental health problem or disability from which the prisoner suffers. The prisoner would remain under the indefinite sentence and would be considered under a separate legislative regime, but through the same review mechanisms as those who are being held in preventative detention under the *Mental Health Act*.

To illustrate the effect of this proposal with the recent case of *Buckley*, the prosecution would have indicated to the sentencing court that the Attorney-General's consent had been granted and an indefinite sentence was sought. The judge would have been informed that this decision had been made on the basis of the facts of the case (the violent rape of three vulnerable victims) and the existence of certain psychiatric reports which would be tendered on sentence. The sentencing judge would then have arrived at a sentence based on those materials using the normal sentencing principles (including those set out in *Veen (No2)* and s9 of the *Penalties and Sentences Act 1992*(Q) which allow for consideration of protection of the community in arriving at a suitable proportionate sentence in serious cases). The sentencing judge would not have had to hear evidence from any psychiatrists, but could have done so.

The matter would have then been referred to the Mental Health Court (rather than, as actually happened in *Buckley*, adjourned to a date when the psychiatrists could give evidence before the sentencing judge). The Mental Health Court would then have heard the psychiatric evidence and decided whether an indefinite sentence was warranted based on the test in the Act and the principles established in *Moffat*[50], *Chester*[51] and *McGarry*[52]. In *Buckley* prior to sentence, the matter had in fact already been before the Mental Health Court to determine that he was fit to plead and so the Supreme Court judge and assisting psychiatric experts would already have had some familiarity with the case.

Were an indefinite sentence imposed on Mr Buckley, then the treatment obligations of the regime would have to be considered both during the currency of the "punitive" nominal sentence and after it expired. This would include whether the treatment required that the prisoner be housed in a mental health facility rather than a prison. Based on the nominal sentence of 22 years that was imposed on Mr Buckley at first instance, Mr Buckley would be eligible for consideration for parole after 15 years and at this time there would be consideration of removal to a non-prison treatment facility, but this would not be mandatory. Under the present regime, after 11 years, Mr

[50] Moffat (1997) 91 A Crim R 557
[51] Chester (1988) 165 CLR 611
[52] McGarry (2001) 207 CLR 121

Buckley would be considered for removal from the indefinite sentence, but the effect of this if granted would be simply to place him back in the prison system as an ordinary prisoner with another four years before he had eligibility for parole. If after the full 22 years were served, Mr Buckley were still held in a prison, then the system would require that he be removed to a non-prison facility although this would be likely to be a secure area of a psychiatric hospital (assuming that he had been considered inappropriate for removal from prison up to this point). Mr Buckley would still be under an indefinite sentence and his staged release or non-release due to ongoing concerns about his "dangerousness" would be considered via the normal Patient's Review Tribunal and Mental Health Court review channels, but with a clear classification as being a person held under an indefinite sentence rather than under the Mental Health Act. This would mean that after the expiration of the full term of his 22 year sentence, Buckley would then be in virtually the same situation as a person who was found not guilty by reason of insanity and who had been held indefinitely under a forensic order for the protection of the community and or himself.

The proposed system would therefore allow for the punishment of an offender to the full extent that proportionate punishment would allow, but would recognise that the "dangerousness" required special consideration for rehabilitation during that term and would ultimately only hold the person after the expiration of the term of imprisonment on the same basis as a person whose mental health made them a danger to society or to themselves.

It is suggested that this proposal for reform of the system of imposing indefinite sentences would accord with the High Court's emphasis on the care to be taken in imposing indefinite sentences and the dissenting concerns of some members of the High Court that there should be a clear distinction between the implementation of detention proportionate to criminal offending and the implementation and review of preventative detention.

Table 1: Indefinite detention provisions in Australia

Jurisdiction	**Statute and section numbers**
Queensland	*Penalties and Sentences Act 1992* – Sections 163-179 (relates only to offences for which a sentence of life imprisonment is the maximum penalty) *Dangerous Prisoner (Sexual Offencers) Act 2003* – (Act permitting the continued detention of prisoners who pose a serious danger to the community – application made during term of incarceration rather than at the time of sentence)
New South Wales	No indefinite detention provisions. *Habitual Criminals Act 1957* allows for preventative detention for up to 14 years with this order to be made at the time of sentence and to be concurrent with any other sentence imposed.
Australian Capital Territory	No equivalent provisions. A life sentence can be imposed for certain offences with release being under the administration of the Parole Board under the *Crimes (Sentence Administration) Act 2005*
Victoria	*Sentencing Act 1991* – Sections 18A-18P
Tasmania	*Sentencing Act 1997* – s19-23
South Australia	*Criminal Law (Sentencing Act) 1988* – s20A-29 – allows for non-proportionate sentencing for the protection of the community and also for indeterminate sentences for sexual offenders who are a risk to the community
Western Australia	*Sentencing Act 1992* – s98-101
Northern Territory	*Sentencing Act* – s65-78
Commonwealth	No equivalent provisions. S17 of the *Crimes Act 1914* (this section was repealed in 1990) previously allowed for preventative detention of habitual criminals

Table 2: Indefinite detention provisions in certain common law jurisdictions

Jurisdiction	**Statute and section numbers**
Canada	Criminal Code 1985 – Part XXIV sections 752-761
New Zealand	*Sentencing Act 2002* – sections 87-90
United Kingdom	*Criminal Justice Act 2003* – chapter 5, sections 224-236