"*KEEP HIM IN JAIL*":[1] PROBLEMS WITH THE SOUTH AUSTRALIAN INDEFINITE DETENTION REGIME

By Eva Squire

University of Adelaide

[1] Nigel Hunt, "KEEP HIM IN JAIL", *The Advertiser* (Adelaide, 28 May 2018), 1. This was the frontpage headline of *The Advertiser* on 28 May 2018. It referred to the impending release of convicted paedophile Colin Humphrys, who had been detained under an indefinite detention order. A day after the headline appeared, the government introduced an amendment bill to prevent the release.

I INTRODUCTION

This essay examines the indefinite detention regime in Part 3, Division 5 of the *Sentencing Act 2017* (SA) (‘*Sentencing Act’*). In particular, it focuses on the effects of the amendments made by the *Sentencing (Release on Licence) Act 2018 (SA)* (‘*Amending Act’*). I argue that the indefinite detention scheme is a departure from the traditional role of the judiciary in a criminal justice system. Firstly, this essay canvasses the scope of the judicial power to detain and the problems posed by indefinite detention regimes. Secondly, the essay traces the development of the current scheme in South Australia and reveals a judicial reluctance to make indefinite detention orders as a result of the changes made by the *Amending Act.* The final section of this essay engages with the reasoning behind this reluctance and examines four key issues in the current scheme. The amendments to the indefinite detention regime in South Australia have created a system that is irreconcilable with role of the court in a criminal justice system.

II THE JUDICIAL POWER TO DETAIN

A *Scope of the Power*

Imprisonment is the harshest form of punishment in Australia. Involuntary detention is an exceptional deprivation of liberty and requires justification in any society governed by the rule of law.[2] In *Chu Kheng Lim v Minister for Immigration,*[3] the High Court set out principles governing the judicial power to detain:

> [P]utting to one side the exceptional cases… the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only

[2] Bernadette McSherry, ‘Indefinite and Preventative Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94, 107.
[3] (1992) 176 CLR 1 (*‘Lim’*).

> as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is 'ruled by the law, and by the law alone' and 'may with use be punished for a breach of law, but he can be punished for nothing else.'[4]

The exceptions referred to in the above passage include the civil detention of those with mental illness or infectious diseases, arrest and detention of a person accused of a crime, and the temporary 'administrative' detention of immigrants.[5] Aside from these circumstances, detention must always be ancillary to a judgment of criminal guilt.[6]

At common law, the judicial power to punish criminal conduct is governed by the principle of proportionality and the principle against double punishment.[7] The principle of proportionality requires a sentence to be commensurate with the offence for which the offender is convicted.[8] The principle against double punishment prevents an offender from being punished twice for overlapping elements of multiple offences.[9] Together, these principles circumscribe the power of the judiciary to order criminal incarceration.

B *Indefinite Detention*

Gleeson CJ has pointed out that 'the way in which the criminal justice system should respond to the case of the prisoner who represents a serious danger to the community upon release is an almost intractable problem.'[10] On one hand, a prediction that someone will cause harm is

---

[4] Ibid 27 (Brennan, Deane and Dawson JJ).
[5] Ibid 33.
[6] Mark Brown, 'Preventive Detention and the Control of Sex Crime' (2011) 36(1) *Alternative Law Journal* 10, 10.
[7] Tasmania Law Reform Institute, *A Comparative Review of National Legislation for the Indefinite Detention of 'Dangerous Criminals'* (Research Paper No. 4, July 2017) 7.
[8] *Chester v R* (1988) 165 CLR 611, 618; *R v Ainsworth* [2008] SASCFC 69, 253 [56]; R Fox, *Victorian Criminal Procedure* (Monash Law Book Cooperative Ltd, 2000) 298.
[9] *Pearce v The Queen* (1998 194 CLR 610; *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 14(7) ('*ICCPR*'); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 610 [74] (Gummow J), 643-5 [180]-[186] (Kirby J) ('*Fardon*').
[10] *Fardon* (2004) 223 CLR 575, [12].

not a judgment of criminal guilt and thus cannot justify punishment. Indefinite detention based on prediction alone is a violation of human rights and a hallmark of totalitarian systems of power.[11] On the other hand, such predictions may prove to be correct and cause foreseeable and extensive harm to the community.[12] The protection of the community is a central concern of the criminal justice system and is considered in, for example, sentencing and bail decisions.[13]

Although the terms are used interchangeably, there is a distinction between 'indefinite detention' and 'preventive detention.'[14] An order for indefinite detention is made *at the time of sentence* and enables an offender to be detained for an indeterminate duration. An order for preventive detention is made *during the period of the offender's incarceration* and permits individuals to be detained beyond the expiration of their sentence.[15] As discussed below, the South Australian regime in the *Sentencing Act* enables both indefinite and preventive detention.

Indefinite detention orders are an exception to the proportionality principle;[16] as such, they are valid only in exceptional cases.[17] Because they are made at the time of sentence, such orders

[11] John Pratt, 'Dangerous, Risk and Technologies of Power' (1995) 28 *Australian and New Zealand Journal of Criminology* 3, 4; Tasmania Law Reform Institute, *A Comparative Review of National Legislation for the Indefinite Detention of 'Dangerous Criminals'* (Research Paper No. 4, July 2017) 3; see also *Fardon* (2004) 223 CLR 575, 645 [188] (Kirby J).

[12] The case of *Veen v The Queen [No 2]* (1988) 164 CLR 465 provides an illustration of this problem. Veen was found guilty of stabbing and killing a man and sentenced to life imprisonment for the protection of the community. This sentence was reduced to twelve years on appeal. Eight months after his release, he stabbed and killed a man again. He was then sentenced to life imprisonment.

[13] Frederick Shauer, 'The Ubiquity of Prevention' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of Criminal* Law (Oxford University Press, 2013); see also *Fardon* (2004) 223 CLR 575, 603 [49] (Gummow J).

[14] Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38(2) *UNSW Law Journal* 792, 793.

[15] Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Criminology Research Council, December 2006) 10.

[16] Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal* Justice 145, 146; *Chester v R* (1988) 165 CLR 611, 618; *DPP v McIntosh* [2013] TASSC 21, [7]–[9].

[17] *McGarry v The Queen* (2001) 207 CLR 121, 141-2 [61] (Kirby J).

are 'tied to a finding of guilt' and are punitive in nature.[18] By contrast, a post-sentence preventive detention order does not draw its authority from sentencing.[19] It is not a punishment based on a finding of criminal guilt. Therefore, this form of detention can only be validly enforced where it is ordered for a legitimate non-punitive purpose.[20] These principles stem from constitutional doctrine beyond the scope of this essay, however they are relevant insofar as they govern the exercise of the judicial power in the criminal justice system.

II THE SOUTH AUSTRALIAN REGIME

A *The Regime Before the Amendments*

This section canvasses the operation of Part 3, Division 5 of the *Sentencing Act* prior to the amendments made by the *Amending Act*, which took effect on 25 June 2018. The Division targets offenders incapable of controlling, or unwilling to control, their sexual instincts. The scheme enables the Supreme Court to make an order that a relevant offender be detained in custody. This order remains in place indefinitely until the Supreme Court makes a further order either discharging the detention order or authorising the release on licence of the person detained.

The power to make an order of indefinite detention is enshrined in s 57 of the *Sentencing Act.* It substantially replicates its predecessor, s 23 of the *Criminal Law (Sentencing) Act* (SA) (the

[18] *R v Moffat* [1998] 2 VR 229, 251 (Hayne JA); see also *McGarry v The Queen* (2001) 207 CLR 121, 126 [8].
[19] *Fardon* (2004) 223 CLR 575, 610 [73] (Gummow J).
[20] Ibid 592 [20] (Gleeson CJ), 597 [34] (McHugh J), 610 [74] (Gummow J), 654 [216]-[217] (Callinan and Heydon JJ).

CL(S)A).[21] The section applies to persons convicted of a 'relevant offence', which is defined in s 57(1) to include a range of offences involving sexual conduct.[22] There are two ways in which an order can arise. Firstly, the Court may make an order at the same time as sentencing the defendant;[23] such an order may be made in addition to, or instead of, a sentence of imprisonment.[24] Secondly, the Attorney-General may make an application for such an order in relation to a person who has been convicted of a relevant offence and is in prison.[25] The scheme thus enables both indefinite and preventive detention.

The power to make an order for indefinite detention is discretionary. Subsection 57(7) provides:

> The Supreme Court may make an order that a person to whom this section applies be detained in custody until further order if satisfied that the order is appropriate.[26]

This discretion is conditioned by s 57(6), which requires the Court to direct at least two medical practitioners to inquire into the mental condition of the relevant person and report whether the person is incapable of controlling, or unwilling to control, their sexual instincts. While not expressly required, it is an implicit pre-requisite to the making of an order under s 57(7) that the Court be satisfied that the person is incapable of controlling or unwilling to

[21] As Hinton J notes at [3] in *R v Moyle* [2018] SASC 106, 'the only difference…is that under s 57(5) of the *Sentencing Act* an interim indeterminate detention order may be made whereas there is not power to make an interim indeterminate detention order under s 23 CL(S)A.'
[22] S 57(1) definition of 'relevant offence' includes offences under sections 48, 48A, 50, 56 58, 59, 63, 63A, 63B, 69 or 72 of the *Criminal Law Consolidation Act 1935.* It also includes an 'offence where the evidence indicates that the defendant may be incapable of controlling, or unwilling to control, the defendant's sexual instincts.'
[23] *Sentencing Act* s 57(2).
[24] Ibid s 57(12).
[25] Ibid s 57(3).
[26] *Sentencing Act* s 57(7) (emphasis added).

control his or her sexual instincts.[27] Even if the Court is so satisfied, there remains a residual discretion and an order of indefinite detention may be inappropriate.[28]

Once an order under s 57(7) is made, it remains in place until the Court discharges the order under s 58 or releases the person on licence under s 59. A person released on licence is subject to conditions set by the Parole Board.[29] Before the commencement of the *Amendment Act*, the Court's decision to release on licence or discharge an order was discretionary.[30]

As a result of amendments made in 2013,[31] the Court's paramount consideration in the exercise of its discretion to make an indefinite detention order or to release on licence must be the safety of the community.[32] In *R v Schuster*, Kourakis CJ considered the legal significance of this amendment:

> The Amendment Act did not make the safety of the community a condition precedent to the favourable exercise of the discretion. The legislature did not require that the Court be satisfied that there is no, or no material, risk to the safety of the community before the discretion is enlivened. Nor did the legislature prescribe a 'minimum' acceptable risk. It could not do so in any practicable way because the risk here in issue cannot be measured with mathematical precision.[33]

The discretion thus remains a balancing exercise between competing factors; the difference is the weight given to the factor of public safety.[34]

---

[27] *R v Hoare* [2017] SASC 7, [63] (Hinton J); *R v Schuster* (2016) 125 SASR 388, [97]-[98]; *R v Whyte* [2006] SASC 56, [10] (White J); *R v Ainsworth* 100 SASR 238, [24], [101].
[28] *R v Hoare* [2017] SASC 7, [63].
[29] *Sentencing Act* s 59(8).
[30] *R v Humphrys* [2018] SASCFC 69, [2].
[31] *Criminal Law (Sentencing) (Sentences of Indeterminate Duration) Amendment Act 2013* (SA).
[32] *Sentencing Act* s 57(8), 58(3), 59(3).
[33] *R v Schuster* (2016) 125 SASR 388, [79].
[34] Ibid, [80]; *R v Hoare* [2017] SASC, [72].

Significantly, since 2015 the indefinite detention regime has operated alongside the *High Risk Offenders Act 2015 (*'HRO Act'). Under this Act, certain high risk offenders may be subject to extended supervision orders ('ESO') after the expiry of their sentence.[35] A breach of an ESO can lead to a period of further detainment under a continuing detention order.[36] This provides an alternate means of ensuring the safety of the community,[37] and it is increasingly common for an application for an indefinite detention order to be brought concurrently with an application for an ESO.[38] In *R v Hoare,* Hinton J did not consider the ESO regime to be a substitute for the indefinite detention regime in the *Sentencing Act;* the former focuses on 'treatment first and foremost' whilst the latter provides for supervision in the community and can include treatment.[39]

B *The 2018 Amendments and R v Humphrys*

In March 2018, Kelly J made an order to release notorious paedophile Colin Humphrys on licence. Humphrys' sentence expired in 2013, but since 2009 he had been subject to an indefinite detention order.[40] Notably, the release was granted despite evidence that Humphrys was unwilling to control his sexual instincts and that treatment in prison was unlikely to alter this.[41] In exercising her discretion to release him, Kelly J emphasised that Humphrys had never had the opportunity to demonstrate compliance with licence conditions.[42] Her honour concluded that:

---

[35] *HRO Act* s 7.
[36] Ibid, s 18.
[37] *R v Hoare* [2017] SASC 7, [74].
[38] *Thomas v Attorney-General* [2019] SASCFC 21; *Attorney-General v Webb* [2018] SASC 189; *Attorney-General v Smallbone* [2018] SASC 2; *R v Hoare* [2017] SASC 7; *R v Slater* [2017] SASC 70.
[39] *R v Hoare* [2017] SASC 7, [5], [177].
[40] *R v Humphrys* [2009] SASC 198 (Sulan J).
[41] *R v Humphrys* [2018] SASCFC 69, [46] (Full Court).
[42] *R v Humphrys* [2018] SASC 39, [50] (Kelly J).

> I do not consider that the point has been reached with regard to this particular applicant that it is as yet appropriate to incarcerate him in all probability for the rest of his natural life because he has been found unable or unwilling to control his sexual instincts.[43]

This decision was appealed to the Full Court.

In anticipation of the Full Court's decision,[44] the *Sentencing (Release on Licence) Amendment Bill 2018* was introduced to Parliament. The Bill was signed into law on the same day that the Full Court confirmed the decision to release Humphrys on licence.[45] Under these amendments, the Court's power to order a release on licence or to discharge a detention order is no longer discretionary. Instead, s 59(1a) reads:

> A person detained in custody under this Division cannot be released on licence unless the person satisfies the Supreme Court that –
>
> (a) the person is both capable of controlling and willing to control the person's sexual instincts; or
>
> (b) the person no longer represents an appreciable risk to the safety of the community (whether as individuals or in general) due to the person's advanced age or permanent infirmity.

The Act also amended Schedule 2 so that, on application by the DPP, the Supreme Court is required to cancel an earlier release on licence unless the person establishes one of the above conditions.[46] Evidently Humphrys' release would be thusly cancelled, and he now challenges the validity of the legislation.

C *Judicial Responses to the 2018 Amendments*

[43] Ibid [57].
[44] South Australia, *Parliamentary Debates,* House of Assembly, 29 May 2018, 581.
[45] *R v Humphrys* [2018] SASCFC 69.
[46] *Sentencing Act 2017* (SA) sch 2.

In this section, I argue that recent decisions of the South Australian Supreme Court demonstrate that the *Amending Act* has drastically altered the operation of the indefinite detention regime. The removal of the judicial discretion to release on licence has resulted in a judicial reluctance to make indefinite detention orders, ultimately undermining the operation of the regime.

The table below depicts every case since January 2017 involving an application for an indefinite detention order under either the *Sentencing Act* or the repealed *CL(S)A.* Strikingly, there have been no indefinite detention orders made since the *Amending Act* took effect. In the preceding 14 months, five orders were made.[47] While the amendments have been in place for less than a year, this empirical trend is supported by the reasoning of the Supreme Court. In both *R v Moyle* and *Thomas v Attorney-General (SA)* (*'Thomas'),*[48] the Court had regard to the effect of the amendments in refusing to make an order for indefinite detention. Both judgments point out that, although the *Amendment Act* did not amend the language of the s 57 power to detain, the nature of that power has been radically altered by the removal of the judicial discretion in ss 58 and 59.[49] The judicial hesitancy seems likely to continue: in *Thomas*, Kourakis CJ explicitly emphasised that future decisions should bear in mind the 'draconian consequences' of a s 57 order.[50]

The *Amendment Act*, aimed solely at keeping Humphrys in prison, has had the unintended consequence of preventing further indefinite detention orders from being made. As the Law Society of SA forewarned in its submissions on the amendments, 'there is always a danger

[47] *Attorney-General (SA) v Thomas* [2018] SASC 45; *Attorney-General v Smallbone (SA)* [2018] SASC 2; *Attorney-General (SA) v Kelly* [2017] SASC 164; *R v Hoare* [2017] SASC 70; *R v Slater* [2017] SASC 7.
[48] *R v Moyle* [2018] SASC 106; *Thomas* [2019] SASCFC 21, [73].
[49] *Thomas* [2019] SASCFC 21, [73]; *R v Moyle* [2018] SASC 106, [146].
[50] *Thomas* 2019] SASCFC 21, [73].

involved in the formulation of a general change in order to address the circumstances of an individual case.'[51] That danger manifested itself in the transformation of the s 57 power into judicial anathema. Similar levels of reluctance to make indefinite detention orders have been observed in other Australian jurisdictions, the United Kingdom and New Zealand.[52] This speaks to a widespread discomfort with a process that challenges fundamental principles of judicial practice. In the next section, I examine some of these challenges.

Case Name	**Date**	**Judge(s)**	***HRO Act* application?**	**Outcome**
Thomas v Att-G [2019] SASCFC 21	6/3/2019	Kourakis CJ, Nicholson and Parker JJ	Yes	Indefinite detention order set aside. ESO order made.
R v Omar [2019] SASC 26	22/2/2019	Bampton J	No (application made with sentencing)	Application dismissed - s 57 order refused. Sentence provides for best protection of community
R v Mountford [2019] SASC 16	26/1/2019	Nicholson J	No (application made with sentencing)	Application dismissed - s 57 order refused. At same time as sentencing, release is not imminent.
Att-G v Webb [2018] SASC 189	12/12/2018	Kelly J	Yes	ESO order made. S 57 application withdrawn.
R v Smith [2018] SASC 185	11/12/2018	Hinton J	No (application made with sentencing)	Application dismissed - s 57 order refused. Release not imminent, 'no utility' in indeterminate detention
R v Halse [2018] SASC 178	30/11/2018	Stanley J	No	Application dismissed - s 57 order refused. Evidence does not establish proper

[51] Law Society of South Australia, Submissions to Vicky Chapman, Parliament of SA, *Sentencing (Release on Licence) Amendment Bill 2018* (8 June 2018) [3].

[52] Arie Freiberg , 'Protecting dangerous offenders from the community: The application of protective sentencing laws in Victoria' (2004) 4(1) *Criminal Justice* 81; Arie Freiberg , 'Guerillas in our midst? Judicial responses to governing the dangerous' in Brown M and Pratt J (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 51.

				foundation. Not contended 'incapable'.
R v F, JM [2018] SASC 150	17/9/2018	Bampton J	No	Refused release on licence. Did not satisfy new test of willing and capable of controlling sexual instincts.
R v Moyle [2018] SASC 16	25/7/2018	Hinton J	No – separate proceedings	Application dismissed - s 57 order refused. ESO order more appropriate.
R v Humphrys [2018] SASCFC 69	25/6/2018	Kourakis CJ, Vanstone and Nicholson JJ	No	Release on licence confirmed.
Sentencing (Release on Licence) Amendment Act 2018 commences **25/6/2018**				
Att-G v Thomas [2018] SASC 45	5/4/2018	Stanley J	Yes	Application granted – s 23 order made. One day before expiry of sentence.
R v Humphrys [2018] SASC 39	27/3/2018	Kelly J	No	Released on licence
Att-G v Smallbone [2018] SASC 2	17/1/2018	Hinton J	Yes	Application granted – s 23 order made. Unwilling to control sexual instincts. One day before expiry of sentence.
Att-G (SA) v Kelly [2017] SASC 164	15/11/2017	Nicholson J	No	Application granted – s 23 order made. Unwilling to control sexual instincts. 18 months before expiry of sentence.
R v Marshall [2017] SASC 157	2/11/2017	Vanstone J	No	Application for release on licence refused. Risk to community paramount.
R v Slater [2017] SASC 70	21/4/2017	Kourakis CJ	Yes	Application granted – s 23 order made. Unwilling to control sexual instincts. Two days before expiry of sentence.

R v Hoare [2017] SASC 7	3/2/2017	Hinton J	Yes	Application granted – s 23 order made. Unwilling to control sexual instincts. One day before expiry of sentence.

III PROBLEMS WITH THE REGIME

A *Indefinite or Preventive Detention?*

Indefinite detention orders made at the time of sentence fall within the Court's usual role of punishing criminal conduct. These regimes have existed for close to a century and are less controversial than post-sentence detention.[53] As discussed, the *Sentencing Act* provides mechanisms for both indefinite and preventive detention orders.[54] Past studies of the South Australian regime suggest that in practice, indefinite detention orders were made almost exclusively at the time of sentencing.[55] This practice has now been displaced by a tendency to make orders closer to the expiry of an offender's sentence.[56] Indeed, judges now consider it 'inutile' to make detention orders when an offender still has a significant amount of time to serve on a sentence.[57] It appears that the more common practice is to make an order when an offender is approaching the end of his or her sentence; four of the last five orders were made mere days before the sentence expiry date.[58]

[53] McSherry, 'Indefinite and Preventative Detention Legislation: From Caution to an Open Door' (n 2) 94.
[54] *Sentencing Act 2017* (SA) s 57 (2), (3).
[55] Keyzer and McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (n 14) , 796; Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Criminology Research Council, December 2006) 22.
[56] *Attorney-General (SA) v Thomas* [2018] SASC 45; *Attorney-General v Smallbone (SA)* [2018] SASC 2; *Attorney-General (SA) v Kelly* [2017] SASC 164; *R v Hoare* [2017] SASC 70; *R v Slater* [2017] SASC 7.
[57] *R v Smith* [2018] SASC 185, [111] (Hinton J); see also *R v Omar* [2019] SASC 26; *R v Mountford* [2019] SASC 16.
[58] *Attorney-General (SA) v Thomas* [2018] SASC 45; *Attorney-General v Smallbone (SA)* [2018] SASC 2; *R v Hoare* [2017] SASC 70; *R v Slater* [2017] SASC 7.

The likely instigator of this shift was the introduction of the ESO regime in the *HRO Act* in 2015. An application for an ESO must be brought within 12 months of the expiry date of the offender's sentence.[59] ESOs are often sought as a less invasive alternative to indefinite detention orders and it is common for the two applications to be brought concurrently by the Attorney-General.[60]

This development is significant because it removes the operation of the indefinite detention regime in the *Sentencing Act* from the ambit of the judicial function in a criminal justice system. Because it is not given at the time of sentencing, such an order can no longer be regarded as form of punishment ancillary to a judgment of criminal guilt.[61]

B *The Principle of Legality and Human Rights Concerns*

Before it was removed by the *Amending Act*, the Supreme Court viewed the judicial discretion to release on licence as a vital corollary of the Court's power to indefinitely detain. As the Full Court stated in *R v Schuster:*

> The imposition of indefinite detention, not to punish for a crime actually committed, but for preventative purposes, is antithetical to common law and human rights principles. It is for that reason that in a democratic society, ordered by the rule of law and respectful of fundamental human rights, it is natural to find that a regime of indefinite preventative detention… incorporates a mechanism for the discharge of the order.[62]

---

[59] *Criminal Law (High Risk Offenders) Act 2015* (SA) s 7(2).
[60] *Thomas v Attorney-General* [2019] SASCFC 21; *Attorney-General v Webb* [2018] SASC 189; *Attorney-General v Smallbone* [2018] SASC 2; *R v Hoare* [2017] SASC 7; *R v Slater* [2017] SASC 70.
[61] Brown (n 6) 10.
[62] *R v Schuster* (2016) SASR 388, [76].

The means by which these rights are protected is the principle of legality.[63] That principle is fundamental to the exercise of judicial power and requires the court, in the absence of clear legislative direction to the contrary, to have regard to common law rights and liberties.[64] Thus, by locating the mechanism for discharge in the exercise of a judicial discretion, the regime ensured that a person would not be detained any longer than strictly necessary for the protection of the community.[65]

In *Thomas,* Kourakis CJ examined how the *Amendment Act* imperilled the right to liberty as enshrined in Article 9 of the *ICCPR*.[66] In the absence of a judicial discretion and its concomitant regard to the principle of legality, there is 'considerable tension' between the amended s 58 power to release on licence and the human right to liberty.[67] His honour pointed out that treatment in the 'artificial environment of prison' will rarely, if ever, result in a reversal of a person's capability or willingness to control their sexual instincts.[68] As such, the most likely result of an indefinite detention order is that a person detained will only be released when, by reason of advanced age or infirmity, he or she is physically incapable of committing an offence.[69]

It is unclear whether the concerns expressed by Kourakis CJ impugn the legality of the indefinite detention scheme. In *Thomas,*[70] his honour quoted a decision of the United Nations Human Rights Committee which held that the Queensland preventive detention scheme

[63] *R v Humphrys* [2018] SASCFC 69, [12].
[64] Ibid.
[65] Ibid.
[66] *Thomas* [2019] SASCFC 21, [43].
[67] Ibid [49].
[68] Ibid [48].
[69] Ibid.
[70] Ibid [47].

violated Article 9 of the *ICCPR*.[71] However, the validity of that same scheme was upheld by the High Court in *Fardon*, in which Gleeson CJ emphasised that the *Constitution* does not contain any general statement of rights and freedoms.[72] More recently, the High Court passed up an opportunity to draw upon the strong legality presumption surrounding regimes of indefinite detention.[73] Moreover, last month in the context of case regarding a civil guardian's power to detain, Hinton J expressed a degree of reservation towards equating the principle of legality with *ICCPR* rights.[74] Nonetheless, these concerns confirm McSherry's observation that 'judges are wary of imposing indefinite sentences, given the inroads into civil liberties such sentences require.'[75]

C *Double Jeopardy*

In *Fardon*, Gummow J found that the Queensland detention regime did not implicate the principle against double punishment:

> The making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted. The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure.[76]

---

[71] Human Rights Committee*, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) 8.
[72] *Fardon* (2004) 223 CLR 575, 590 [14]. In that case, only Kirby J, in dissent, had regard to the human rights implications of the regime.
[73] *Pollentine v Bleijie* (2014) 253 CLR 629; Hanna Solomons, '*Pollentine v Bleijie: Kable* in Pieces' (2015) 37 *Sydney Law Review Case* 607, 613; see also Chief Justice Spigelman, 'The Principles of Legality and Clear Statement of Principle' (Speech delivered at New South Wales Bar Association Conference, Sydney, 18 March 2005) 25–6.
[74] *The Public Advocate v C, B* [2019] SASCFC 58, [79].
[75] McSherry, 'Indefinite and Preventative Detention Legislation: From Caution to an Open Door' (n 2) 105.
[76] *Fardon* (2004) 223 CLR 575, 610 [74].

Although the offender's status as a convicted criminal was the 'factum' upon which the regime turned,[77] the detention order did not amount to criminal punishment.

Echoing Gummow J, Hinton J in *R v Hoare* emphasised the non-punitive purposes of the indefinite detention regime under the *Sentencing Act* (prior to the 2018 amendments):

> While a conviction for a "relevant offence" is a precondition to the engagement of the scheme, the scheme's purpose is not punitive…The scheme does not punish an offender twice for the same offence or increase the punishment for those offences. While it operates by reference to an offender's status as a person convicted of a relevant offence, it sets up its own normative structure.[78]

At that point, the purpose of the scheme was to ensure the protection of the community and treatment of the offender.[79] Although some argue that imprisonment is always punitive,[80] Australian courts have long imposed detention for legitimate non-punitive purposes.[81]

The *Amending Act* has fundamentally changed the purpose of the South Australian indefinite detention regime. In *R v Moyle*, Hinton J stated that the licence amendments have caused a 'degree of disconnect' between the applicable test to detain a person and the test required to discharge or release that person on licence.[82] There may be some people who are unwilling to control their sexual instincts, but in relation to whom detention is not required to protect the community.[83] In that situation, 'ongoing detention is no longer protective or necessary for

[77] Ibid 619 [108].
[78] *R v Hoare* [2017] SASC 7, 14 [64].
[79] *R v Ainsworth* (2008) 100 SASR 238, [81] (White J, Doyle CJ agreeing).
[80] Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth' (2008) 30 *Sydney Law Review* 100.
[81] Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive Detention for "Dangerous" Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Criminology Research Council, December 2006) 22.
[82] *R v Moyle* [2018] SASC 106, [146].
[83] Ibid.

treatment. It is punitive.'[84] Faced with the 'real risk' of ordering double punishment,[85] Hinton J chose instead to make an ESO under the *HRO Act.* In *Thomas,* Kourakis CJ expressed a similar concern that the amendments had 'radically changed the purpose of the indefinite detention order regime.'[86] Although the *Sentencing Act* ostensibly retained the requirement that the paramount consideration of the Court must be the protection of the community,[87] this was no longer the purpose of the regime but merely 'surplusage left over from a time when the Court exercised a real discretion to release on licence.'[88] These cases demonstrate that the *Amending Act* has created a regime that violates the fundamental principle against double punishment.

D *The 'Unwilling' Offender: Notions of Criminal Responsibility*

The closest domestic analogue to the South Australian indefinite detention regime is contained in s 18 of the *Criminal Law Amendment Act 1945* (Qld).[89] For the purposes of this paper, the most important difference between the two regimes is that an offender can only be detained under the Queensland regime if he or she is 'incapable' of controlling his or her sexual instincts and such incapacity is capable of being cured by continued treatment.[90] The scheme does not apply to those who are capable of controlling their instincts but choose not to, nor to those whose 'sexual instincts' are considered untreatable.[91]

[84] Ibid.
[85] Ibid.
[86] *Thomas* [2019] SASCFC 21*,* [48].
[87] *Sentencing Act 2017 (SA)* s 58(3).
[88] *Thomas* [2019] SASCFC 21*,* [28].
[89] Keyzer and McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (n 14) 792.
[90] *Criminal Law Amendment Act 1945* (Qld) s 18(4).
[91] Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General and Minister for Justice).

The validity of this scheme was unanimously upheld by the High Court in *Pollentine v Bleijie.*[92] In his judgment, Gagelar J found that the detention order was 'wholly protective' and exercisable for 'purely preventative and therapeutic' purposes.[93] His honour stated that this has been a permissible purpose of detention since the *Criminal Lunatics Act 1800* (UK).[94] As such, the Queensland regime fell within one of the classic exceptions recognised in *Lim.*[95] Although the joint judgment did not conclusively characterise the purpose of the regime, it too aligned the scheme with the longstanding lunacy jurisdiction which enables the court to indefinitely detain a person on proof of unfitness or insanity.[96]

This position conforms with contemporary penal jurisprudence, which posits that a state's ability to deprive people of their liberty is constrained by the justifications of desert or disease.[97] A person may be detained either because they deserve punishment, or because they are not a responsible agent due to a mental abnormality.[98] In locating the Queensland regime within the legacy of the lunacy jurisdiction, the decision in *Pollentine v Bleijie* replicates the logic of 'disease' jurisprudence predicated on a denial of responsible agency.

By contrast, the SA regime extends to offenders who are 'unwilling' to control their sexual instincts. It is on this basis, rather than incapacity, that detention orders are most commonly

[92] *Pollentine v Bleijie* (2014) 253 CLR 629.
[93] Ibid 656-7 [72].
[94] Ibid; see also JH McClemens and JM Bennet, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4(1) *Sydney Law Review* 49.
[95] *Pollentine v Bleijie* (2014) 253 CLR 629, 656 [70]; Solomons (n 66) 611.
[96] *Pollentine v Bleijie* (2014) 253 CLR 629, 650 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[97] Stephen J Morse, "Protecting Liberty and Autonomy: Desert/Disease Jurisprudence" (2011) 48 *San Diego Law Review* 1077, 1078-9; Colin Gavaghan, Jeanne Snelling and John McMillan, *Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand* (Report for the New Zealand Law Foundation, University of Otago, 7 November 2014) 66-80.
[98] Stephen J Morse, 'Protecting Liberty and Autonomy: Desert/Disease Jurisprudence' (2011) 48 *San Diego Law Review* 1077, 1078-9

made.[99] The notion of willingness implies an autonomous and responsible agent who is capable of exercising control. Unlike the Queensland regime, then, the indefinite detention scheme outruns justifications of disease and desert alike. It provides a scheme of detention that is non-punitive in nature but is linked to the factum of conviction, that focuses on treatment but is premised on agency. Such a regime is a far cry from the judicial function of adjudging and punishing criminal guilt identified by *Lim.*

IV CONCLUSION

The indefinite detention regime in the *Sentencing Act* sits outside the usual role of the judiciary in a criminal justice system. Not only does the scheme violate the principle of legality and the principle against double punishment, it is irreconcilable with jurisprudential theories of criminal agency. The Supreme Court's emergent reluctance to impose detention orders should be a warning sign that the scheme threatens proper judicial function. Moreover, the regime demonstrates that the protection of the community is not always best served by 'penal populism.'[100]

[99] *Attorney-General v Smallbone* [2018] SASC 2; *Attorney-General v Kelly* [2017] SASC 164; *R v Hoare* [2017] SASC 7; *R v Slater* [2017] SASC 70.

[100] Colin Gavaghan, Jeanne Snelling and John McMillan, *Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand* (Report for the New Zealand Law Foundation, University of Otago, 7 November 2014) 93; see also Anne Susskind, 'Rethinking the Justice Response to Sexual Violence' (2011) 49(9) *NSW Law Society Journal* 17.

BIBLIOGRAPHY

A *Articles/Books/Reports*

McSherry, Bernadette 'Indefinite and Preventative Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94

Brown, Mark, 'Preventive Detention and the Control of Sex Crime', (2011) 36(1) *Alternative Law Journal* 10

Tasmania Law Reform Institute, *A Comparative Review of National Legislation for the Indefinite Detention of 'Dangerous Criminals'* (Research Paper No. 4, July 2017)

Fox R, *Victorian Criminal Procedure* (Monash Law Book Cooperative Ltd, 2000)

Pratt, J 'Dangerous, Risk and Technologies of Power' (1995) 28 *Australian and New Zealand Journal of Criminology* 3

Shauer, Frederick, 'The Ubiquity of Prevention' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of Criminal* Law (Oxford University Press, 2013)

Keyzer, Patrick and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38(2) *UNSW Law Journal* 792

Bagaric, Mirko 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal* Justice 145

Richardson E and Arie Freiberg , 'Protecting dangerous offenders from the community: The application of protective sentencing laws in Victoria' (2004) 4(1) *Criminal Justice* 81

Freiberg, Arie, 'Guerillas in our midst? Judicial responses to governing the dangerous' in Brown M and Pratt J (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 51

Solomons, Hanna '*Pollentine v Bleijie: Kable* in Pieces' (2015) 37 *Sydney Law Review Case* 607

Spigelman CJ 'The Principles of Legality and Clear Statement of Principle' (Speech delivered at New South Wales Bar Association Conference, Sydney, 18 March 2005)

Keyzer, Patrick, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth' (2008) 30 *Sydney Law Review* 100

McClemens, JH and JM Bennet, 'Comment: Historical Notes on the Law of Mental Illness in New South Wales' (1962) 4(1) *Sydney Law Review* 49

Morse, Stephen J 'Protecting Liberty and Autonomy: Desert/Disease Jurisprudence' (2011) 48 *San Diego Law Review* 1077

Gavaghan, Colin and Jeanne Snelling and John McMillan, *Better and Better and Better? A Legal and Ethical Analysis of Preventive Detention in New Zealand* (Report for the New Zealand Law Foundation, University of Otago, 7 November 2014)

Susskind, Anne, 'Rethinking the Justice Response to Sexual Violence' (2011) 49(9) *NSW Law Society Journal* 17

Hunt, Nigel, "KEEP HIM IN JAIL", *The Advertiser* (Adelaide, 28 May 2018)

B *Cases*

Attorney-General (SA) v Kelly [2017] SASC 164

Attorney-General (SA) v Thomas [2018] SASC 45

Attorney-General v Smallbone (SA) [2018] SASC 2

Attorney-General v Webb [2018] SASC 189

Chester v R (1988) 165 CLR 611

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1

DPP v McIntosh [2013] TASSC 21

Fardon v Attorney-General (Qld) (2004) 223 CLR 575

McGarry v The Queen (2001) 207 CLR 121

Pearce v The Queen (1998) 194 CLR 610

Pollentine v Bleijie (2014) 253 CLR 629

R v Ainsworth (2008) 100 SASR 238

R v Ainsworth [2008] SASCFC 69

R v Hoare [2017] SASC 7

R v Hoare [2017] SASC 70

R v Humphrys [2009] SASC 198

R v Humphrys [2018] SASC 39

R v Humphrys [2018] SASCFC 69

R v Moffat [1998] 2 VR 229

R v Mountford [2019] SASC 16

R v Moyle [2018] SASC 106

R v Omar [2019] SASC 26

R v Schuster (2016) 125 SASR 388

R v Slater [2017] SASC 7

R v Smith [2018] SASC 185

R v Whyte [2006] SASC 56

The Public Advocate v C, B [2019] SASCFC 58

Thomas v Attorney-General (SA) [2019] SASCFC 21

Veen v The Queen [No 2] (1988) 164 CLR 465

C *Legislation*

Criminal Law (High Risk Offenders) Act 2015 (SA)

Criminal Law (Sentencing) Act 1988 (SA)

Criminal Law Amendment Act 1945 (Qld)

Criminal Law Consolidation Act 1935 (SA)

Sentencing Act 2017 (SA)

D *Treaties*

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976)

D *Other*

Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/ D/1629/2007 (10 May 2010) 8

Law Society of South Australia, Submissions to Vicky Chapman, Parliament of SA, *Sentencing (Release on Licence) Amendment Bill 2018* (8 June 2018)

Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003

South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2018