

Preventive post sentence detention and Indefinite sentencing

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Background

- Rising prison numbers
- Expanding sexual offences
- Increasing acceptance of lengthy prison sentences
- Three issues-
 - Double jeopardy
 - Proportionality
 - Separation of powers

Regimes

- *Criminal Justice Act UK 2003 ss225-227*
 - Where significant risk of harm
 - Public protection >10yrs
 - Life sentence matters
 - 2-10yrs- extended period

Australia

POST SENTENCE PREVENTIVE DETENTION

- Qld, WA, NSW
- Sex offences
- Unacceptable risk of serious danger to community
- Regular review by Supreme Court

INDEFINITE DETENTION

- All states and territories
- Regular review by court / parole board
- Requires setting of nominal sentence
- Community protection key criteria

Double jeopardy

- Person should not be punished twice for same offence
- Sentencing factor should not be taken into account more than once re: sentence
- Most strongly levelled at post sentence preventive detention.

Post sentence detention = double jeopardy

YES

- Already sentenced for specific offence
- 2nd punishment imposed
- No intervening offence
- Sentenced on criteria of former conviction(s)

See Kirby J in *Fardon HCA*
2004

NO

- Civil not criminal- eg Gummow J in *Fardon* (but hybrid at best, in criminal lists Fryberg J in *Hynds QCA* 2007)...lack of legal rep.
- Non punitive- 'control'; 'care', 'treatment' (but held in prisons)
- Rehabilitative focus (but insufficient resources see White J in *Ainsworth SASC* 2008)

Proportionality

- Punishment should fit the crime.
- A key value- Ashworth
- A cardinal anchoring point- Von Hirsch
- Expected- Wilson

...[t]he principle of proportionality is now firmly established in this country ...a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.

Veen v The Queen (No. 2) (1988) 164 CLR 465 at [8] per Mason C.J., Brennan, Dawson and Toohey JJ.

But breach of proportionality justified....

- Indefinite sentencing legislation explicitly defeats the principle eg *Victoria, s6D Sentencing Act 1991*

the court may impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.

- Objective: community protection.
- Test: 'exceptional' circumstances....the protective potential of ordinary sentencing regime should be examined first ...*Buckley HCA 2006.*

Separation of powers

- *Kable* HCA 1996 vs *Fardon*
- *Robinson*, QCA 2007, per Holmes J, AG's role to maintain the rehabilitative character of detention.
- *Brookes*, NSWCA 2008, per McClellan CJ, fine line - judges ordering specific supervision vs directing how funds used.
- *Walker*, AllER 2007 lack of material to justify detention.
- *Byron*, WASC 2008, per Blaxell J, impractical supervision orders.
- Changes in Qld...relship btn availability of resources and availability of supervision orders....

Relationship b/n post sentence and indefinite detention

- ◉ *Buckley* QCA 2008 per Muir J
- ◉ Availability of post sentence a 'cogent consideration'
- ◉ Risk predictions better made later
 - Physical / mental changes over time
 - Advances in medical science
 - Extraordinary step of indefinite detention not justified.
- ◉ Legislative change planned in Qld.

Preventative post sentence detention and Indefinite sentencing

POST SENTENCE DETENTION

- Incoherent principle
- Double jeopardy
- Proportionality
- Separation of powers
- Risk assessment more fair?
- Option of supervision orders available (and preferred by judiciary).

INDEFINITE SENTENCING

- Incoherent principle
- Double jeopardy less issue
- Proportionality
- Separation of powers
- Risk assessment less fair?
- Stronger role for parole officers?