Dangerous prisoners and sexual offenders act in queensland

Law, Common Law

The new Dangerous Prisoners (Sexual Offenders) Act (2003) In Queensland permits prisoners to be kept in prison beyond their release date where a court finds that there is a ‘ high degree of probability' that they represent a ‘ serious danger to the community'. Other jurisdictions have enacted similar legislation to restrict the release of prisoners assessed to be dangerous. Do you think that dangerousness legislation of this sort is justified or unjustified? Several states across the Country have enacted or attempted to enact legislation which can enable detention of a prisoner past his/her release date. This type of legislation's general purpose is to provide a mechanism whereby prisoners who, if released pose an unacceptable risk of committing further serious offences, may be detained where it is deemed appropriate to do so for the protection of the community (Field, 2003). The most recent of these being the Queensland Government's passing of the Dangerous Prisoners (Sexual Offenders) Act 2003. Similar laws were introduced in New South Wales in 1994, however they were ultimately ruled invalid by the High Court. Prior to this in 1991 Victoria enacted legislation known as the Community Protection Act 1990, which allowed for the continued detention of one prisoner known as Garry David. Whilst this Act applied to no one else the Victorian Government attempted to broaden the legislation with Draft Bill proposals which ultimately lapse in the face of wide ranging criticism from lawyer, psychiatrists and academics. (Greig 1995) This type of legislation has been devised to allow for the detention of people based upon assessments of risk of re-offending, this essay will explore the concerns with these practices. This essay further aims to explore the moral and practical implications of such sentencing provisions and the impact it has on the whole Justice

System. The writer will also address the conflicting goals of Corrections and the purpose and impact of indefinite sentencing while exploring the justifications against such legislation. This essay also aims to show that even though we may feel disgust for these types of offences we must remember the fundamentals of the Criminal Law system and understand that people are entitled to equality and fairness in the eyes of the law. It has been suggested that this type of legislation has largely been introduced to fill a perceived gap (Field, 2003). Whilst most jurisdictions have sentencing provisions that allow for indefinite sentencing at the time of original judgement there are few which have legislation which allows for the extension of a persons detention based upon the presumption that they may commit further crimes. This type of legislation provides a framework whereas an application can be made to further detain a prisoner who is due to release as they are deemed to be an unacceptable risk of further offending and their further detention will protect the community (Field, 2003). Whilst it is generally accepted that the community broadly welcomes such imposing and punitive legislation, it is imperative that our disgust for these offences/offenders does not prevent us from finding the injustice on an ethical and moral basis (Wortley and Smallbone, 2003). One of the fundamental principles of the Criminal Law System is the presumption of innocence until proven guilty (McSherry, 2003). By enacting punitive legislation such as the examples given above, it has been said that it is removing this Common law right from the individual (Greig, 1995). It has also been said that it creates an exception to the general principle of law that no person shall be imprisoned unless a court comprised of Judge/Jury is

convinced, beyond reasonable doubt that the person committed a very serious offence. Thereby effectively allowing people to be detained without the burden of proving guilt (Keon-Cohen, 1992). Whilst it is appreciated that the offenders who will be subject to such legislation are in the worst case category it then opens up a subjective element to decide who it applies to and who is doesn't apply to. Where is the line drawn, the 13% of Queensland's prison population who are sex offenders are unlikely to be comforted by the fact that the act will only effect very serious offenders (Bennett, 2003). With a Criminal Law system which places so much emphasis on parity of sentencing how is that some will be further detained and some simply released. This allows for too many arguments about truth and equality in sentencing and injustices created by our legal system. (NSW Law Commission, 2004). Full time imprisonment is the gravest sanction and deprivation of ones liberty is the most serious form of punishment that can be imposed under our domestic law (Keon-Cohen, 1992). Because of this it is a fundamental principle of sentencing at Common Law that imprisonment is a last resort and only to be imposed where a non-custodial disposition is not appropriate (Greig, 1995). Once an offender has been convicted of a crime and sentenced to a term of imprisonment they are effectively paying their dues. Upon completion of their original sentence, under existing law, they are said to have paid their debt to society and are entitled to be released as a free person. However with the introduction of such legislation we are effectively allowing for the people to do their time over and over again (Field, 2003). One of the paramount responsibilities in sentencing is to ensure that the goals of Corrections are neatly balanced to ensure the best outcome.

What is often overlooked is that the state has two functions: its parens patriae function, where the state must protect the community and on the other hand, they are equally responsible for ensuring vulnerable people are treated in humane manner (Greig, 1995). The consequences of making the correct choice are radically different in social terms, one leads to moral condemnation and the loss of rights to the prisoner, the other to a desire to help the vulnerable and maximise those freedoms when deemed appropriate. The goals of Imprisonment include: retribution, incapacitation, deterrence and rehabilitation The First goal to consider is retribution being based upon the eye for an eye principle aims to subject the offender to punishment because of their actions. By enacting legislation to detain offenders indefinitely it is applying the goal of retribution prospectively on offences that have not yet been committed. Secondly incapacitation, which is the desire to protect the community by detaining the offender based on the rationale that it seeks to prevent further crimes. With legislation like the one in question its principle goal is to incapacitate the offender so they cannot commit further crimes, even if this is only based on a presumption. Thirdly the goal of deterrence is separated in to two areas, general and specific. General deterrence is aimed at preventing other like minded individuals from committing similar crimes based on the punishment of another. Specific deterrence is targeted directly at the offender and its rationale is that if the consequence for the crime was unpleasant it might stop them becoming a recidivist. However with the legislative example used it is impossible to see how it could possibly specifically deter someone from committing another crime if they are punished on the likelihood of

committing that crime. It is more likely to anger the offender which could make the chances of re-offending more likely upon eventual release because of the injustice that they feel. The legislation also does little for general deterrence as studies have shown that the possibility of imprisonment is not a successful deterrent from committing crimes (McSherry, 2003). Lastly, the goal of rehabilitation is to attempt to treat the causes of offending behaviour so as to reduce the likelihood of re-offending. It is important to remember that virtually all prisoners will be released at some stage and that denying release may only really delay re-offending (NSW Law Commission, 2004). Punitive legislation such as the examples given removes the rehabilitation goal from the equation and focuses on the goal of incapacitation. By further detaining someone for the possibility of crimes the Government is admitting that prison offers limited rehabilitation and that it has failed to assist the prisoner in becoming rehabilitated during his/her sentence imposed by the court (Wortley and Smallbone, 2003). It is effectively saying that the system could not rehabilitate the offender in the time given by the sentence so they are punishing him/her for their failure to rehabilitate (Bennett, 2003). By removing the goal of rehabilitation and placing the emphasis on incapacitation the system moves further away from the humanitarian reform and the rights of the individual become clouded. The principle rationale for using indefinite sentencing as an option is the protection of the community. It is argued that at the time of sentencing it is difficult to determine when the offender will be suitable for release so the release date is variable, to be decided at a later date, usually by Parole Boards. The function of this is to enable monitoring of the offenders risk level and when deemed that the risk

no longer appears, the offender will be released. This idea is consistent with the gaol of incapacitation, however problems arise (Wortley and Smallbone, 2003). The first concern is that this type of sentencing contravenes the just deserts principle that the offender should receive a sentence directly in proportion to the amount of harm caused, (Wortley and Smallbone, 2003), lex talionis, or an eye for an eye. The underlying principle of this theory is that offenders should only be sentenced for crimes that they have committed, not for prospective crimes. Indefinite sentencing also poses problems with parity in sentencing. Two offenders with similar offences could have remarkably different sentences in the end, based upon their behaviour whilst being detained (Wortley and Smallbone, 2003). The second issue arises by the fact that indefinite sentencing allows the presumption that it is possible to accurately determine the risk of recidivism. In reality there is no accurate basis for determining this risk. The judgements made upon a persons risk are based wholly on the offender's behaviour in a prison, an artificial and dehumanising environment. In effect this may not be an accurate reflection upon how the offender would behave in the outside world (NSW Law Commission, 2004). It has been further argued that this type of legislation is unconstitutional in that the State Parliament had sought to invest a court with a function incompatible with the constitution and the judicial power of the Commonwealth (Cranny, 2003). The High Court decided in the instance of the New South Wales legislation that it was in fact unconstitutional. Whilst the Queensland legislation attempted to correct the misgivings of the New South Wales experience it is still yet to face a constitutional challenge in the High Court (Cranny, 2003). It can be further

said that by allowing another Judge to exercise power over an individual already being detained, it is illegally performing the function of a quasi appellate court by extending the sentence based upon the prospect of rehabilitation which is taken into consideration at the time of original sentencing (Bennett, 2003). As outlined, indefinite sentencing can be dangerous due to the complexities involved in determining who it does and who it does not apply to. Selective incapacitation based upon the perceived dangerousness of the offender is inevitably going to be problematic. Predictions of recidivism are notoriously flawed and it is conceded that half of those classified as risks would be wrongly classified (NSW Law Commission, 2004). Despite the fact that there is an abundance of information and material on the prediction of risk, there is still no reliable actuarial device which guarantee's certainty. Therefore indefinite sentences based on flawed assessments amount to arbitrary imprisonment and emphasises the prejudice in the legislation (NSW Sentencing Review 2003). Imprisonment of this nature also highlights a violation of human rights and places the system in the draconian times of earlier sentencing principles. It has also been argued that this type of imprisonment amounts to cruel and unusual punishment and violates the International Covenant on Civil and Political Rights, (ICCPR) (NSW Law Commission, 2004). Whilst the ICCPR has not been incorporated into domestic law, therefore not directly enforceable, Australia remains a signatory. This means that possible implications could include a person adversely affected by this legislation filing a petition with the Human Rights Committee. Balancing the rights of the individual against community safety is a complex task. Whilst indefinite sentences defy the just

deserts theory it can be argued that it does support the goal of incapacitation. However the subjective nature of detaining someone after their release date is further complicated by the fact that there is no accurate basis for determining which offenders are likely to re-offend and which ones are not (Wortley and Smallbone, 2003). Is this type of legislation justified? In simple terms no. It removes basic human rights such as the Common Law belief of innocent until proven guilty, it also takes away the adversarial nature of our justice system and replaces it with the possibility of arbitrary imprisonment (NSW Law Commission, 2004). This type of legislation also fails to adequately balance the goals of Imprisonment instead focuses on the punitive goals and contradicts the goal of rehabilitation. People detained under this legislation can be forgiven for arguing that they are being punished over and over again for their crimes whilst some offenders get to serve their time and move on with their lives. Unfortunately the very principle of the legislation is to detain offenders until they are no longer a risk, when in reality the risk of re-offending could escalate because of the powerful feeling of injustice created by the legislation. WORD COUNT: 2367