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TO BE OR NOT TO BE (WILLING) AT HER MAJESTY'S PLEASURE: *HORE V THE QUEEN* (2022) 273 CLR 153

'Between the idea
And the reality
Between the motion
And the act
Falls the Shadow'[1]

I Introduction

Indefinite detention laws have existed in Australia for centuries. Stemming from English common law tradition, prisoners in the 19th century could be indefinitely detained at His or Her Majesty's pleasure.[2] Such laws allow a monarch or a judge to consider the risk an offender poses to the community when determining their sentence, and consequently impose an unfixed limit and indeterminate sentence. With the increase of reports of sexual offending in Australia,[3] nothing infuriates communities more than the imminent release of a sex offender from prison, especially those who victimise children. The growth of public outcry as a result of societal and political interest in the punishment of sex offenders and protection from sexual offending[4] has led to post-sentence detention legislation being enacted in Australian states and territories allowing the detention of sex offenders

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1 TS Eliot, *Collected Poems 1909–1962* (Faber and Faber, 1963) 91–2, quoted in Mark Brown, 'Preventive Detention and the Control of Sex Crime: Receding Visions of Justice in Australian Case Law' (2011) 36(1) *Alternative Law Journal* 10, 10 ('Preventive Detention and the Control of Sex Crime').

2 Ben Power, '"For the Term of His Natural Life" Indefinite Sentences: A Review of Current Law and a Proposal for Reform' (2007) 18(1) *Criminal Law Forum* 59, 59.

3 Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Report, August 2020) 3 <https://www.aihw.gov.au/getmedia/0375553f-0395-46cc-9574-d54c74fa601a/aihw-fdv-5.pdf.aspx?inline=true>.

4 Lorana Bartels, Jamie Walvisch and Kelly Richards, 'More, Longer, Tougher … or Is It Finally Time for a Different Approach to the Post-Sentence Management of Sex Offenders in Australia?' (2019) 43(1) *Criminal Law Journal* 41, 41.

in prison for an indefinite period.[5] Under such legislation, convicted sex offenders are not released if they are still deemed by a court to be a risk to the safety of the community, regardless of whether they have served their time. It follows then that the distinctive nature of indeterminate sentences allows for the imprisonment of an individual until certain conditions are satisfied.[6]

South Australia has a regime for the indefinite detention and release of sex offenders who are 'incapable of controlling, or unwilling to control' their sexual instincts in pt 3 div 5 of the *Sentencing Act 2017* (SA) ('*Sentencing Act*') — particularly within ss 57–9. In 2018, the Liberal Government swiftly introduced ss 58(1a), 59(1a) and 59(4a)[7] of the *Sentencting Act* to strengthen this regime.[8] These amendments were introduced in response to the Supreme Court of South Australia's ('Supreme Court') decision to release Colin Humphrys in *R v Humphrys* ('*Humphrys*'),[9] and in anticipation of an unsuccessful appeal in the South Australian Court of Appeal ('Court of Appeal'),[10] to prevent Humphrys from being released.[11]

5 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5C; *Sentencing Act 1995* (NT) s 65; *Criminal Law Amendment Act 1945* (Qld) s 18; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) pt 2; *Penalties and Sentences Act 1992* (Qld) s 163, sch 2; *Sentencing Act 2017* (SA) s 57(7) ('*Sentencing Act*'); *Dangerous Criminals and High Risk Offenders Act 2021* (Tas) s 4; *Sentencing Act 1991* (Vic) ss 18A–18B; *Serious Offenders Act 2018* (Vic) s 61; *Sentencing Act 1995* (WA) s 98. See generally: ibid 42–4; Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38(2) *University of New South Wales Law Journal* 792; Tamara Tulich, 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *University of New South Wales Law Journal* 823.

6 Daniel Piggott, 'During Her Majesty's Pleasure: *Pollentine v R*' (1998) 20(1) *University of Queensland Law Journal* 126, 126.

7 *Sentencing Act* (n 5) ss 58(1a), 59(1a), 59(4a), as inserted by *Sentencing (Release on Licence) Amendment Act 2018* (SA) pt 2 ('*Amendment Act*').

8 South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2018, 581 (Vickie Chapman, Attorney-General) ('*Parliamentary Debates*, House of Assembly'). See also South Australia, *Parliamentary Debates*, Legislative Council, 19 June 2018, 496–9 (Rob Lucas, Treasurer) ('*Parliamentary Debates*, Legislative Council').

9 [2018] SASC 39 (Kelly J) ('*Humphrys*'). Humphrys was released on licence under s 24(1) of the *Criminal Law (Sentencing) Act 1988* (SA) ('*Repealed Act*') which was the predecessor to s 59(1) of the *Sentencing Act* (n 5).

10 This appeal was dismissed in *R v Humphrys* (2018) 131 SASR 344 (Kourakis CJ, Vanstone and Nicholson JJ) ('*Humphrys Appeal*'). The judgment was delivered on 25 June 2018 on the same day that the *Amendment Act* (n 7) was enacted.

11 *Parliamentary Debates*, House of Assembly (n 8) 581; *Sentencing Act* (n 5) s 59(10)(b), as inserted by *Amendment Act* (n 7) cl 4(3) where 'the appropriate board' may 'cancel the release of a person on licence' if satisfied that 'there is evidence suggesting that the person may now present an appreciable risk to the safety of the community'.

Even though the constitutional validity of indefinite detention has been upheld by the High Court of Australia,[12] its practical application and operation is an enduring enigma. In practice, determining indefinite detention sentences for sex offenders is difficult.[13] In *Hore v The Queen* (2022) 273 CLR 153 ('*Hore*'), the High Court clarified when persons will be deemed 'willing' pursuant to s 59(1a)(a) of the *Sentencing Act* in order to be released on licence. The High Court's interpretation of 'willing', giving it the converse meaning of 'unwilling' in s 57(1), as well as its finding that licence conditions can be considered when determining willingness, are consistent with the undoubtable intention of Parliament to strengthen the regime under which sex offenders are indefinitely detained or released for the protection of the community.[14] Nonetheless, *Hore* highlights the difficulty faced by courts in determining whether an individual is capable of controlling or willing to control their sexual instincts. This is not a concept defined in the legislation. The answer to this turns ostensibly to the wording of the statute and ultimately, the reasoning of the court.

II Background

A *Legislation*

In 2018, South Australia passed the *Sentencing Act*, replacing the former *Criminal Law (Sentencing) Act 1988* (SA) ('*Repealed Act*'). Sections 57–9 of the *Sentencing Act* are found in pt 3 div 5 which deals with offenders who have been determined to be incapable of controlling, or unwilling to control, their sexual instincts. Section 57 empowers the Supreme Court to order such persons, who have been convicted of certain sexual offences, be detained in custody until further order.[15] The Supreme Court may also authorise the release into the community of a person detained in custody.[16] Section 58 allows the Supreme Court to discharge a detention order made under s 57,[17] while s 59 permits the Supreme Court to release persons 'on licence', meaning certain conditions are attached to the person's release.[18]

12 See *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*') where the High Court of Australia dismissed a constitutional challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) which allowed the continuing detention of sex offenders if they are a serious danger to the community: at 593 [24] (Gleeson CJ), 602 [44] (McHugh J), 621 [117] (Gummow J), 648 [198] (Hayne J), 658 [234] (Callinan and Heydon JJ), Kirby J dissenting at 193 [647].

13 See Part IV(B) below.

14 *Parliamentary Debates*, House of Assembly (n 8) 581–5; *Parliamentary Debates*, Legislative Council (n 8) 496–9.

15 *Sentencing Act* (n 5) s 57(7). See also s 57(1).

16 Ibid ss 58(1), 59(1).

17 Ibid s 58(1).

18 Ibid s 59(1).

An order may be made under ss 58 or 59 if — and only if — the Supreme Court is satisfied that the person: (a) 'is both capable of controlling and willing to control the person's sexual instincts';[19] or (b) 'no longer presents an appreciable risk to the safety of the community … due to the person's advanced age or permanent infirmity'.[20] The Supreme Court has broad discretion to determine if these elements are satisfied, however, it is required to consider the reports of the Parole Board[21] and medical practitioners, as well as any relevant evidence that the applicant wishes to put to the Supreme Court.[22]

'[W]illing', for the purposes of ss 58(1a) and 59(1a), is not defined in the *Sentencing Act* and is the point of contention in *Hore*. However, s 57(1) provides that, for the purposes of s 57

> a person … will be regarded as *unwilling* to control sexual instincts if there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts.[23]

B *Facts*

Daryl Wichen[24] and Jacob Hore[25] were found by the Supreme Court (and subsequently by the Court of Appeal)[26] to be incapable of controlling their sexual instincts. Accordingly, their applications for release on licence were refused, with the effect that they were to be detained indefinitely, without a release date.

Wichen had a significant history of criminal offending commencing when he was 12 years old, including convictions for two attempted rapes and indecent assault.[27] He pleaded guilty on 5 February 2003 to one count of serious criminal trespass in a place of residence[28] and one count of assault with intent to rape,[29] and was sentenced to 10 years' imprisonment.[30] On 30 August 2011, Gray J declared that

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19 Ibid ss 58(1a)(a), 59(1a)(a).

20 Ibid ss 58(1a)(b), 59(1a)(b).

21 Ibid s 59(4)(c).

22 Ibid ss 59(2), 59(4)(a)–(b).

23 Ibid s 57(1) (definition of 'unwilling') (emphasis added).

24 *Wichen v The Queen* [2020] SASC 157 (Kourakis CJ) ('*Wichen*: Supreme Court').

25 *Hore v The Queen* (2020) 285 A Crim R 94 (Hughes J) ('*Hore*: Supreme Court').

26 *Wichen v The Queen* (2021) 138 SASR 134 (Kelly P, Lovell and Bleby JJA) ('*Wichen*: Court of Appeal'); *Hore v The Queen* (2021) 289 A Crim R 216 (Kelly P, Lovell and Bleby JJA) ('*Hore*: Court of Appeal').

27 *R v Wichen* (2005) 92 SASR 528, 532–3 [18]–[22].

28 *Hore v The Queen* (2022) 273 CLR 153, 161 [8] ('*Hore*').

29 Ibid.

30 Ibid.

'Wichen was incapable of controlling his sexual instincts' and made an order for his indefinite detention[31] under s 23 of the *Repealed Act*.[32]

Hore was a 'registrable offender'[33] as a consequence of his criminal history of sexual offences, including indecent assault and aggravated indecent assault against children.[34] Hore pleaded guilty to three counts of failing to comply with reporting conditions without reasonable excuse as a registrable offender and one count of possessing child pornography, and was sentenced to 16 months' imprisonment, with a 10 month non-parole period, on 24 February 2015.[35] On 9 February 2016, Nicholson J ordered under s 23(4) of the *Repealed Act* that Hore be detained until further order,[36] and declared that 'Hore was incapable of controlling his sexual instincts'.[37]

C *Applications for Release on Licence*

Hore and Wichen each applied for release on licence under s 24(1) of the *Repealed Act*. Due to the transitional provisions of the *Sentencing Act*, their applications were determined pursuant to s 59 of the *Sentencing Act*.[38] Chief Justice Kourakis and Hughes J denied Hore and Wichen's applications, respectively.[39]

Regarding Wichen, Kourakis CJ held that Wichen was not 'willing' for the purpose of s 59(1a). His Honour concluded that 'willing' has the opposite meaning of 'unwilling' — namely, that

> a person is *willing* to control their sexual instincts where there is not a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of their sexual instincts.[40]

His Honour reached this construction of 'willing' by considering s 57 together with s 59 of the *Sentencing Act*, finding that they could only be read together as a 'coherent regime' for detention and release on license, if 'willing' is construed as the opposite of 'unwilling'.[41] This finding was based on his Honour's observations

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31 Ibid 161–2 [9]–[10].

32 Section 23 of the *Repealed Act* (n 9) was the predecessor to s 57 of the *Sentencing Act* (n 5).

33 Under the *Child Sex Offenders Registration Act 2006* (SA).

34 *Hore* (n 28) 162 [11].

35 Ibid.

36 Ibid 162 [12].

37 Ibid.

38 *Sentencing Act* (n 5) sch 1 cl 3(2)(c); *Hore* (n 28) 166 [30].

39 *Wichen*: Supreme Court (n 24) [126]; *Hore*: Supreme Court (n 25) 118 [124].

40 *Wichen*: Supreme Court (n 24) [112]–[113], quoting *R v Iwanczenko* [2019] SASC 140 [112] (Parker J) (emphasis added).

41 *Wichen*: Supreme Court (n 24) [110].

that although the definitions in s 57(1) applied to s 57 only, an order for detention is unlikely to be made under s 57 unless a person was determined to be 'incapable … or unwilling', and under s 59 persons can only be released on licence once it is established that they are capable and willing.[42] His Honour also determined that the Supreme Court could not consider any conditions to be imposed on the licence upon release in deciding whether to make an order under s 59.[43] This was held despite the fact that his Honour was 'confident' that if Wichen were to be released and appropriate conditions were imposed upon him, there would be no significant risk of him reoffending.[44] Instead, Kourakis CJ observed willingness must be demonstrated 'from within the artificial constraints of prison'[45] — a construction recognised by his Honour that would result in Wichen being 'trapped in a paradox' as it was impossible for Wichen to demonstrate such willingness outside of prison without first being released.[46]

Justice Hughes denied Hore's application for the same reasons as those of Kourakis CJ.[47] Her Honour similarly resolved that the imposition of conditions could only be considered after already determining that a person was willing to mitigate any remaining risk.[48] Her Honour recognised this would place a significant, and in some cases impossible, burden on the person.[49]

D *Court of Appeal Decisions*

Hore and Wichen appealed the respective decisions in the Court of Appeal. Both appeals were dismissed in separate judgments delivered on the same day.[50] The Court of Appeal noted the appellant's argument that the principle of legality presumed that 'willing', in s 59(1a)(a), should be given its ordinary meaning.[51] However, their Honours concluded that the presumption was displaced when considering the text, structure and purpose of pt 3 div 5 of the *Sentencing Act*.[52] For this reason, it was a 'necessary conclusion' that 'willing' has the opposite meaning of 'unwilling'.[53] Their Honours placed particular weight on the incoherence that would result if the

42 Ibid [107]–[108].

43 Ibid [124].

44 Ibid.

45 Ibid.

46 Ibid.

47 *Hore*: Supreme Court (n 25) 112–13 [91]–[93], 114–15 [99]–[101].

48 Ibid 114 [99].

49 Ibid.

50 *Wichen*: Court of Appeal (n 26) 145 [43]; *Hore*: Court of Appeal (n 26) 222 [27], with the reasons in *Wichen*: Court of Appeal being substantially adopted in *Hore*: Court of Appeal: at 217 [1], 221 [24], 222 [26].

51 *Wichen*: Court of Appeal (n 26) 140–1 [24].

52 Ibid 142 [28].

53 Ibid.

ordinary meaning of willing was used,[54] emphasising that it would be 'capricious' and 'nonsensical' for persons to be detained under one test in s 57 and released under a different test in ss 58 or 59.[55] The Court of Appeal agreed with Hughes J that the conditions of release on licence may only be considered after determining that the criteria in ss 59(1a)(a) or (b) are satisfied and the power to release on licence is enlivened.[56]

III High Court Decision

Hore and Wichen appealed the Court of Appeal's decisions to the High Court on two grounds:

(1) 'willing' in s 59(1a)(a) should be given its ordinary meaning, consequently Hore and Wichen were so willing;[57] and

(2) alternatively, the Supreme Court may consider the licence conditions to be imposed when determining whether persons are 'willing' for the purpose of s 59(1a)(a)[58] (which we will refer to as the step-down approach).

Hore and Wichen's cases were heard together, and in a joint judgment the High Court, comprising of Keane, Gordon, Edelman, Steward and Gleeson JJ unanimously allowed the appeals on the second ground,[59] setting aside the Court of Appeal's orders.[60] Their Honours remitted both applications to the Supreme Court to be properly determined according to the law.[61]

A *Meaning of 'Willing'*

Hore and Wichen argued that the term 'willing' should be given its ordinary meaning of 'a subjective state of mind … being open or prepared to make [a] choice'.[62] Hore and Wichen invoked the principle of legality and argued that the meaning of 'unwilling' should be confined to its use and operation in s 57 — namely, the practical content of the reports of medical practitioners in s 57(6), and thus, should not inform the definition of willing which goes beyond that limited purpose.[63]

54 Ibid 144 [37]–[38].

55 Ibid 143 [31].

56 Ibid 144–5 [41]–[42].

57 *Hore* (n 28) 161 [6].

58 Ibid.

59 Ibid 175–6 [67]–[68].

60 Ibid 175 [68].

61 Ibid.

62 Ibid 169–70 [45].

63 Ibid 170 [46].

On this ground, the High Court held that the inferior courts were correct to construe 'willing' as having the converse meaning of 'unwilling' for the purposes of s 59(1a)(a) — rejecting Hore and Wichen's submission that the principle of legality required 'willing' to be given its ordinary meaning.[64] The High Court considered the meaning of 'unwilling' and determined that it was 'not correct' to say that it was defined in s 57(1) — instead s 57(1) deems certain persons to which s 57 applies to be unwilling.[65] Importantly, their Honours noted that a 'person seeking discharge under s 58 or release on licence under s 59 is, and can only be, a person to whom s 57 applies'[66] — which is a person who is deemed to be unwilling. This seemingly indicates their meanings are related. The High Court then considered the medical reports that s 57(6), as well as ss 58(2) and 59(2) require the Supreme Court to obtain and act upon.[67] Their Honours observed the reports focussed on whether the person is: (1) incapable of controlling their sexual instincts; or (2) at significant risk of failing to control such instincts — the latter being the deemed meaning of 'unwilling'.[68] Accordingly, their Honours opined it would be pointless to obtain and act on the reports if they were not directed to helping the Supreme Court determine whether a person should be released under ss 58(1a) or 59(1a).[69] Critically, this requires a determination of a person's willingness. Their Honours considered that willingness falls on a 'spectrum',[70] and that '[i]t requires no leap of imagination to appreciate' that the requirement in s 59(1a)(a) means that there must be a determination that the person falls within the part of the spectrum where they would not pose a significant risk of harm to the community, should the person's self-control be tested.[71] Their Honours noted that 'significant risk' established the 'level of risk by reference to which the regime is engaged in s 57 or relaxed under s 58 or s 59'.[72] Consequently, their Honours held that the Court of Appeal was correct to reject the invocation of the principle of legality and construe 'willing' as the opposite to 'unwilling'.[73]

The High Court also rejected Hore and Wichen's submission that the meaning of 'willing' related to the subjective state of mind of the person.[74] Their Honours considered that willingness was not established exclusively by the subjective views of the person seeking release, and instead evaluation of their actual willingness

64 Ibid 171 [50]–[51].

65 Ibid 170 [47].

66 Ibid.

67 Ibid 170–1 [49]. See also *Sentencing Act* (n 5) ss 58(4)(a), 59(4)(a).

68 *Hore* (n 28) 170–1 [49].

69 Ibid 170 [48].

70 Ibid.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid 171 [50].

was required.[75] It was held that the 'unmistakable intention of the [*Sentencing Act*]' was to determine whether the person is likely to have 'reliable commitment' to controlling their sexual instincts once released, rather than making determinations of willingness based on 'uncritical acceptance' of 'assertions by the person that may reflect subjective wishful thinking, if not feigned commitment'.[76] Therefore, the High Court concluded that the Court of Appeal correctly held that 'willing' in s 59(1a)(a) should be determined by reference to an evaluation of the definition of 'unwilling' in s 57(1), which is a person's actual willingness when presented with an opportunity to exercise control of their sexual instincts and when there is a significant risk of harm present.[77]

B *Relevance of Conditions of Release on Licence*

On the second ground of appeal, the High Court unanimously found that the Supreme Court can consider the likely effect of the conditions of release on licence when determining whether persons are 'willing' for the purposes of s 59(1a)(a).[78] Rejecting the approach of the lower courts, the High Court held that the appellants' contention on this step-down approach must be accepted for three reasons.

First, their Honours stated that the text of s 59(1) undoubtedly empowers the Supreme Court to make only *one* determination — whether a person should be released on licence.[79] Resultingly, willingness is not required to be established as 'an exercise separate from, and carried out without regard to' the likely impact of the conditions of the licence on 'the person's commitment to exercising appropriate self-control'.[80] Important to this finding was their Honours' view that, for the purposes of s 59(1a)(a), evaluating a person's capability and willingness is not exclusively concerned with their capability and willingness at the time the application for release is determined.[81] Instead, it is 'vitally concerned' with the ongoing capability and willingness of the person 'when any occasion for the exercise of self-control arises'.[82] That is, the evaluation of the person's capability and willingness to control their sexual instincts must proceed on the assumption or hypothetical occasion where the conditions of the licence are in place. The rationale of this step-down approach acknowledges the effect of the conditions on the person's willingness and is integral in determining whether there is an 'appreciable risk'.[83] Therefore, when determining whether a person will exercise appropriate control it must be assumed that the conditions of licence, required by ss 59(7) and (8), are in place. Otherwise,

75 Ibid.

76 Ibid.

77 Ibid 172 [51].

78 Ibid 175–6 [67].

79 Ibid 172 [55].

80 Ibid 172 [56].

81 Ibid 172–3 [57].

82 Ibid.

83 Ibid 173 [58]; *Sentencing Act* (n 5) ss 58(1a)(a)–(b).

willingness would be, absurdly, evaluated based on a 'state of affairs that could never arise under s 59' — being 'release on licence without conditions'.[84]

To bolster their reasoning, the High Court noted the specific wording of s 59 regarding 'release *on licence*'[85] refutes the suggestion that the effect of the conditions may be disregarded when assessing willingness.[86] Their Honours emphasised that although consideration of conditions was 'integral' to determining willingness, consideration did not require the Supreme Court to assume the conditions would be complied with or disregard the possibility they would be ineffective.[87] Their Honours reasoned that the arid exercise of construing s 59 as if it required a determination to be made for release on licence without considering the conditions imposed would 'substantially reduce the utility of s 59',[88] and thus, 'cannot be discerned in the legislation'.[89] That approach would result in the regime in s 58 being the 'only practical avenue' for release of a person detained pursuant to s 57.[90] Their Honours could not perceive how a person would fail to be released under s 58 but satisfy the test in s 59 without consideration of licence conditions.[91] Consequently, '[f]or all practical purposes' on the lower courts approach 's 59 would be rendered a dead letter'.[92]

Second, the High Court turned to consider the context of s 59(1a)(a), particularly, s 59(4) which outlines matters the Supreme Court must take into account when making a determination under s 59.[93] These matters include a report by the Parole Board which, among other things, notably includes 'a report as to the probable circumstances of the person if the person is released on licence'.[94] In the opinion of the High Court, this confirms the relevance of the conditions to making determinations pursuant to s 59(1a)(a).[95] Therefore, their Honours contended that nothing in s 59 suggests consideration of conditions, and in particular the reports referred to in s 59(4)(c), is limited to addressing any residual risk posed by the release of a person, rather than whether they should be released.[96]

84 *Hore* (n 28) 172–3 [57].

85 Ibid 173 [58] (emphasis in original).

86 Ibid.

87 Ibid.

88 Ibid 173 [59].

89 Ibid 172–3 [57].

90 Ibid 173 [59].

91 Ibid.

92 Ibid.

93 Ibid 173–4 [60].

94 Ibid, quoting *Sentencing A*ct (n 5) ss 59(4)(c)(i)–(ii).

95 *Hore* (n 28) 174 [61].

96 Ibid 174 [62].

Third, the step-down approach was 'not inconsistent' with the the purpose of s 59(1a)(a), as reflected in the second reading speech for the *Amendment Act*.[97] The purpose of s 59(1a)(a) is to ensure that the Supreme Court does not order the release of a person on licence where the safety of the community is absolutely reliant upon the 'efficacy of external controls such as monitoring, supervision and pro-social support', and where, even with such external constraints, the Supreme Court is unable to be satisfied of the person's willingness.[98] The High Court referred to *Humphrys*, where Humphrys — despite the fact he was likely to thwart his licence conditions by 'deceitful manipulation' and pose a risk to the safety of the community[99] — was released on licence with conditions, as the Supreme Court believed the community could be adequately protected through steps taken by government agencies to manage the risks.[100] The High Court acknowledged that the consideration of licence conditions in s 59(1a) was not introduced to prevent persons who are determined to possess 'a firm commitment to the exercise of appropriate self-control', which is bolstered by external controls, from being found to be 'willing'.[101] Nevertheless, the High Court, in considering *Humphrys*, emphasised that it does not always mean a person's exercise of self-control would be bolstered by external controls so as to 'warrant an affirmative finding of willingness' or that 'significant risk' would be absent.[102] However, the High Court recognised the rationale that s 59(1a) was not to preclude consideration of external constraints upon behaviour provided by licence conditions.[103]

IV Comment

The High Court's decision in *Hore* accentuates the proverbial elephant(s) in the room — namely: (1) making predicative judgments based on potentially unreliable psychiatric assessments; and (2) the practicality and effectiveness of indefinite detention of sex offenders.

A *Assessing Capability and Willingness*

Section 59(4)(a) of the *Sentencing Act* demonstrates the invaluable and active role medical practitioners have within the court system. After considering reports from two legally qualified medical practitioners, the judge may sentence that person to be detained at Her Majesty's pleasure.[104] Although neither report is determinative

97 Ibid 174 [63].

98 Ibid 174–5 [64].

99 Ibid 175 [65], citing *Humphrys Appeal* (n 10) 355–60 [29]–[44].

100 *Hore* (n 28) 175 [65], citing *Humphrys* (n 9) [57].

101 *Hore* (n 28) 175 [65]–[66].

102 Ibid.

103 Ibid.

104 Piggott (n 6) 126. This is now 'at His Majesty's Pleasure' following the death of Queen Elizabeth II on 8 September 2022.

of the court's decision, their influence is significant. This was seen when a psychiatrist recognised that Hore's willingness to control his instincts would depend on the environment, 'normal stresses and strains of everyday life'[105] and hence, conditions into which he was released[106] — the foundation that formed the step-down approach accepted in *Hore*. Despite the growth of assessment techniques to classify the risk of future harm for management and prediction purposes, this is no menial task.[107] This then leads to the question of whether medical practitioners are being placed in an untenable position by the legislature and how reliable the predictions of their reports are. It is difficult for medical practitioners to assess the 'appreciable risk'[108] to the safety of the community if an indefinite sentence is not imposed.[109] In *McGarry v The Queen*,[110] Kirby J acknowledged the 'limitations experienced by judicial officers, parole officers and everyone else in … estimating what people will do in the future'.[111] The only important types of evidence would be drawn from the prisoner's criminal history and prison records, essentially listing the offender's past behaviour before imprisonment.[112] In regard to principles of propensities and similar facts, if judging mere past conduct is deemed to be prejudicial, then it is even more so in assessing future behaviour.[113] This is because propensity is determined simply by analysing an offender's past actions and using that conduct to stereotypically label the offender.[114] While it may seem that the strongest indicator of future offending is past offending, heavy reliance upon evidence of past behaviour to predict future conduct effectively reverses the burden of proof and lacks logically probative conclusions.[115] Psychiatric assessments are speculative and lack the scientific validity to provide a definitive basis.[116] How great then must the risk be before the offender enters into the category of 'appreciable risk' and be indefinitely detainable? How does one decide who is incapable and unwilling to control their sexual instincts, in the sense that would justify indefinite detention?[117] The line drawn between upholding the safety of the community and ensuring that the offender be supported

105 *Hore*: Supreme Court (n 25) 106–7 [63].

106 Ibid.

107 Bernadette McSherry, 'The Preventive Detention of "Dangerous" People' [2012] (112) *Precedent* 4, 7 ('Preventive Detention of Dangerous People').

108 *Sentencing Act* (n 5) s 58(1a)(b).

109 McSherry, 'Preventive Detention of Dangerous People' (n 107) 7.

110 (2001) 207 CLR 121 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

111 Ibid 141–2 [61].

112 Michelle Edgely, 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia' (2007) 33(2) *University of Western Australia Law Review* 351, 373.

113 Ibid 383.

114 Ibid.

115 Ibid 373, 386.

116 Ibid 386.

117 See Michael Louis Corrado, 'Sex Offenders, Unlawful Combatants, and Preventive Detention' (2005) 84(1) *North Carolina Law Review* 77, 107.

so that their risk may continue to decrease becomes blurred.[118] This was identified by Jim Parke and Brett Mason:

> It must be hoped that in endeavouring to identify what that 'duty' is, the [reports] will accord due weight to doing justice and not simply endeavour to fulfil an ill perceived desire to 'protect' the system from criticisms.[119]

At least Gleeson CJ acknowledged this issue (albeit quickly dismissing it), observing that '[n]o doubt, predictions of future danger may be unreliable, but … they may also be right'.[120] However, are we then confident and at ease in indefinitely depriving an offender of their freedom based on predictive models that do not guarantee accuracy? Evidently, the *Sentencing Act* seems to think so.

B *The Practicality and Effectiveness of Section 57(7)*

This case note does not attempt to challenge the constitutional validity of s 57(7), but aims to highlight the practicality of its application. As the opening epigraph by TS Eliot illustrates, dreaming up what might be done is easy, but in contrast, getting it done can be hard.[121] The *shadow* lies in the difference between the concept and what is actually done or created. That is, the idea may be realised, and the motion may result in an act, but between one and the other, it is not clear what the result will be. Think of Eliot's quotation in the context of the practicality of s 57(7) — and the gap between its aims and executions.[122] For instance, Hazel Kemshall notes that '[p]rotection and prevention have become increasingly meshed, so the former can be delivered only through ever-increasing levels of the latter'.[123] This case note respectfully disagrees. Although locking up sex offenders and throwing away the key may be an instinctive reaction, its application is not always realistic. Ordering an offender to remain in prison indefinitely for the safety of the community would hardly change their perception that they are being punished.[124] As French philosopher, Michel Foucault says:

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118 Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface' (2013) 2(1) *International Journal of Criminology and Sociology* 296, 301.

119 Jim Parke and Brett Mason, 'The Queen of Hearts in Queensland: A Critique of Part 10 of the Penalties and Sentences Act 1992 (Qld)' (1995) 19(6) *Criminal Law Journal* 312, 325.

120 *Fardon* (n 12) 589–90 [12].

121 Brown, 'Preventive Detention and the Control of Sex Crime' (n 1) 15.

122 *Sentencing Act* (n 5) s 3.

123 Hazel Kemshall, 'The Historical Evolution of Sex Offender Risk Management' in Kieran McCartan and Hazel Kemshall (eds), *Contemporary Sex Offender Risk Management: Perceptions* (Palgrave Macmillan, 2017) vol 1, 1, 20.

124 Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29(12) *Criminal Law Journal* 94, 109–110.

> what use would it be if it had to be permanent? A penalty that had no end would be contradictory … and the effort made to reform him would be so much trouble and expense lost by society … But, for all the others, punishment can function only if it comes to end.[125]

Indefinite detention is often 'symbolic, nominal or rhetorical, and only rarely … contribute[s] substantially to the safety of the children they purport to protect'.[126] David Garland described this statutory response as 'expressive, cathartic actions, undertaken to denounce the crime and reassure the public', instead of providing an actual ability or capacity to control future crimes and reoffending if the offender is to one day be released.[127] Accordingly, whilst the practice of indefinite detention is not of a retributive character, it is unjust and ineffective in preparing sex offenders to reintegrate into the community. The emphasis on indefinite detention as a means of creating a safer society diverts attention away from the development of more constructive, equitable and efficient methods to manage convicted sex offenders living in the community.[128] Thus, there is a contrast in the practicality between conceiving an idea of upholding the safety of the community and acting upon it. Risk can never be wholly dispensed, but it can be managed. Arguably the best approach lies in emphasising appropriate rehabilitative mechanisms rather than maintaining a sole focus on restraint.

C *The Effect of the Decision in* Hore

The High Court's decision in *Hore* clarified the test for releasing persons on licence under s 59 by defining 'willing', which was not defined in the *Sentencing Act*, as the opposite of 'unwilling' in s 57(1). The definition of 'willing' will assist the Supreme Court in the future in determining whether to order release on licence, particularly, by clarifying that licence conditions may be considered — where conditions had been previously disregarded to the detriment of Hore and Wichen in the lower courts.[129] This decision also likely clarifies the test for discharging detention orders in s 58 as the word 'willing' appears in s 58(1a)(a) which is identical to s 59(1a)(a), hence it would likely be interpreted the same.[130]

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125 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Vintage Books, 1995) 107 [trans of: *Surveiller et Punir: Naissance de la prison* (1975)].

126 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015) 12.

127 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 133.

128 Peter Marshall, 'An Analysis of Preventive Detention for Serious Offenders' (2007) 13(1) *Auckland University Law Review* 116, 142–3.

129 *Hore*: Supreme Court (n 25) 115 [101]; *Wichen*: Supreme Court (n 24) [124].

130 *Wichen*: Supreme Court (n 24) [110].

The High Court's rejection of the invocation of the principle of legality — which would have required the ordinary meaning be applied — was sensible. The definition of 'willing' that their Honours adopted from the lower courts promotes a 'coherent regime' for detention and release,[131] while also endorsing Parliament's paramount intention for s 59(1a) — to protect the community.[132] Their Honours' interpretation of 'willing' arguably creates a higher threshold than the ordinary meaning.[133]

While their Honours correctly held that licence conditions may be a consideration when determining willingness, *Hore* does not permit future applications under s 59 to be granted where a person does not meet the requisite standard of willingness even with the licence conditions in place.[134] An actual determination of willingness, in their Honours opinion, is still required rather than 'uncritical acceptance'[135] that the licence conditions will be effective or be complied with.[136] The High Court's interpretation, therefore, is consistent with Parliament's intention to protect the community while avoiding the 'harsh, and some may say cruel' outcome as noted by Kourakis CJ,[137] and, in some cases, the 'impossible' burden placed on the offender as noted by Hughes J,[138] which their Honours stated would result if conditions could not be considered.[139] Additionally, the High Court's decision does not thwart the intention of s 59(1a) which was one of the provisions that Parliament introduced to prevent the approach that was taken in *Humphrys* from reoccurring.[140] This is because in *Humphrys*, the Supreme Court released Humphrys on licence relying on the fact that external controls were in place even though there was no evidence that those controls would be effective, and in fact evidence suggested that the external controls would be circumvented by 'deceitful manipulation'.[141] Such approach is not endorsed by the High Court in *Hore*.[142]

Finally, their Honours' interpretation ensures that s 59 has utility and is more than a 'dead letter' in practice.[143] This approach is logical as it is unclear why Parliament would introduce both ss 58 and 59 if the test in s 59 could never be satisfied. Such interpretation will ensure persons who are at 'significant risk' of reoffending

131 Ibid.

132 *Parliamentary Debates*, House of Assembly (n 8) 581.

133 See *Hore* (n 28) 168–9 [41].

134 Ibid 173 [58].

135 Ibid 171 [50].

136 Ibid 173 [58].

137 *Wichen*: Supreme Court (n 24) [124].

138 *Hore*: Supreme Court (n 25) 114 [99].

139 *Wichen*: Supreme Court (n 24) [124]; *Hore*: Supreme Court (n 25) 114 [99].

140 *Parliamentary Debates*, House of Assembly (n 8) 586.

141 *Humphrys Appeal* (n 10) 346 [3], 355–60 [29]–[44].

142 *Hore* (n 28) 174–5 [64]–[65].

143 Ibid 173 [59].

are detained,[144] while those who may not pose a 'significant risk', if appropriate conditions are imposed, are not unnecessarily subject to the severe imposition of indefinite detention.

V Conclusion

The primary focus of the *Sentencing Act* is to uphold the safety of the community. However, in trying to apply the law, the Court is tasked with a heavy burden of balancing community protection with an individual's right to freedom. The High Court in *Hore* correctly determined that 'willing' for the purposes of s 59(1a) should have the converse meaning of 'unwilling' in s 57(1) and that licence conditions may be considered when determining willingness. This construction provides greater clarity for the Supreme Court when determining whether to release persons under s 59, as well as increasing clarity for those applying for release in the future. It also, importantly, promotes the very clear intention of s 59(1a) which is to protect the community by ensuring that persons are not found to be 'willing' unless they are not at 'significant risk' of failing to control their sexual instincts, while also not leaving the safety of the community solely reliant on external controls which may not protect it adequately. This arguably strikes the right balance between the rights of individuals and the community.

Although substantial criticism of and practical concerns with indefinite detention are highlighted, they should not invalidate the entire practice or render it into disuse. Rather, there needs to be a shift in rationales underlying psychiatric assessment, while redirecting the interpretation to a more retributive approach. To effectively ensure that risks are mitigated, terms and conditions of the offender's release should be devised. The allocation and deployment of adequate resources must occur to facilitate such conditions and to ensure appropriate monitoring of the offender. Should the courts be more cautious in ordering indefinite detention and loosen the threshold of release on licence? *Hore* has done so by drawing a metaphorical red line on the powers of s 57(7). The High Court's conclusion in *Hore* — that a person's conditions of release may help strengthen their willingness to self-control — directs attention to an important issue for the future of indefinite detention and release on licence in South Australia and in Australia. Its decision not only provides an imperative clarification, but implies a permissively construed interpretation of s 59(9) — one that steers toward a rehabilitative justice system that provides for an offender's reintegration into society, with conditions imposed. This case note sheds light and scrutiny on the ambiguity of this scheme in the hope that the courts and community alike might be ready to examine indefinite detention regimes more closely.

144 Ibid 170–1 [49].