IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B39 of 2013

BETWEEN:

EDWARD POLLENTINE
First Plaintiff

ERROL GEORGE RADAN
Second Plaintiff

and

THE HONOURABLE JARROD PIETER BLEIJIE, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
First Defendant

JOHN FRANCIS SOSSO, DIRECTOR-GENERAL, THE DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
Second Defendant

THE CHIEF JUDGE AND JUDGES OF THE DISTRICT COURT OF QUEENSLAND
Third Defendant

PLAINTIFFS' SUBMISSIONS

FILED ON BEHALF OF THE FIRST AND SECOND PLAINTIFFS
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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. Section 18 of the *Criminal Law Amendment Act 1945* (Qld) (the ***CLAA***) empowered the District Court of Queensland to declare that a person convicted of a sexual offence against a child under 17 years of age is incapable of exercising proper control over his sexual instincts and to direct that the offender be detained during His Majesty's pleasure. No power was conferred on the court to review the offender's detention or to revoke an order made under s 18. Rather, s 18 provided that the offender could not be released until the Governor In Council is satisfied on the report of two medical practitioners that it is "expedient" to release him or her.

3. Is s 18 contrary to Chapter III of the *Constitution*, by way of infringing the principle identified in *Kable v Director of Public Prosecutions (NSW)*,[1] or otherwise?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903*

4. The plaintiffs have given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATIONS

5. There are no relevant judgments below.

PART V: FACTS

Edward Pollentine

6. On 24 July 1984, in the District Court of Queensland, the first plaintiff pleaded guilty to two counts of attempted rape, four counts of carnal knowledge against the order of nature, two counts of indecently dealing with a girl under the age of 14 years, two counts of abduction and four counts of indecently dealing with a boy

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[1] (1996) 189 CLR 51.

under the age of 14 years. Each offence to which he pleaded guilty was contained in the *Criminal Code* (Qld).[2]

7. On 24 July 1984, pursuant to s 18(1)(a) of the *CLAA*, the District Court directed that two medical practitioners inquire as to the mental condition of the second plaintiff, and in particular, whether his mental condition was such that he was incapable of exercising proper control over his sexual instincts. [3]

8. On the same day, pursuant to s 18(3)(a) of the *CLAA*, the District Court declared that the first plaintiff was incapable of exercising proper control over his sexual instincts and directed that he be detained in an institution during Her Majesty's pleasure.[4]

9. The first plaintiff remains detained at Her Majesty's pleasure under the orders made by the District Court on 24 July 1984 pursuant to s 18(3)(a) of the *CLAA*.[5]

10. In 1994 the question of Mr Pollentine's release was taken to the Governor in Council by the Minister for Justice and the Attorney-General and on 21 July 1994 that body determined that he not be released.[6] Mr Pollentine sought judicial review of that decision. Thomas J set aside the decision on the basis of a denial of procedural fairness.[7] However, upon reconsideration by the Governor in Council Mr Pollentine was not released.

11. In 1996 the Governor in Council again decided not to release Mr Pollentine. He sought judicial review of that decision but was unsuccessful.[8]

Errol George Radan

12. On 4 May 1984, in the District Court of Queensland, the second plaintiff pleaded guilty to seven counts of unlawfully and indecently dealing with a girl under the

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2 Case Stated at [11] and Exhibit 6 at pp 1-3.

3 Case Stated at [12] and Exhibit 6 at pp 14, Exhibit 7.

4 Case Stated at [13].

5 Case Stated at [14].

6 *Pollentine v Attorney-General* [1995] 2 Qd R 412 (***Pollentine No 1***) at 413 (Thomas J).

7 *Pollentine No 1* [1995] 2 Qd R 412 at 419-20.

8 *Pollentine v Attorney-General* [1996] QCA 463 (***Pollentine No 2***).

age of 14 years and one count of carnal knowledge against the order of nature.[9] Each offence to which he pleaded guilty was contained in the *Criminal Code* (Qld).

13. On 4 May 1984, pursuant to s 18(1)(a) of the *CLAA*, the District Court directed that two medical practitioners inquire as to the mental condition of the second plaintiff, and in particular, whether his mental condition was such that he was incapable of exercising proper control over his sexual instincts.[10]

14. On 31 May 1984 the District Court:

(a) sentenced the second plaintiff to seven concurrent terms of three years' imprisonment with hard labour, and a term of nine years' imprisonment with hard labour, to be served cumulatively on the other terms of imprisonment, making a total of 12 years' imprisonment with hard labour;[11] ***and***

(b) declared, pursuant to s 18(3)(a), that the second plaintiff was incapable of exercising proper control over his sexual instincts and directed that he be detained in an institution during Her Majesty's pleasure at the expiration of his combined sentence of 12 years' imprisonment with hard labour.[12]

15. On 28 August 1984, the Queensland Court of Criminal Appeal allowed an appeal brought by the second plaintiff against the sentences imposed upon him and varied his sentences to three years' imprisonment with hard labour on all eight charges, to be served concurrently.[13]

16. The Court of Criminal Appeal did not disturb the declaration made by the District Court on 31 May 1984 that the second plaintiff should be detained at an institution during Her Majesty's pleasure. However, it ordered that such detention commence upon the expiration of the sentence of three years' imprisonment with hard labour.[14]

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9 Case Stated at [4] and Exhibit 1 at pp 1-2.

10 Case Stated at [5] and Exhibit 2.

11 Case Stated at [6] and Exhibit 4 at p 2.

12 Case Stated at [7] and Exhibit 4 at p 2.

13 Case Stated at [8] and Exhibit 5.

14 Case Stated at [9] and Exhibit 5.

17. The second plaintiff remains detained at Her Majesty's pleasure under the orders made by the District Court on 31 May 1984 pursuant to s 18(3)(a) of the *CLAA*.[15]

PART VI: ARGUMENT

The legislative scheme

18. The scheme of s 18 of the *CLAA* in 1984 (when the plaintiffs were made the subject of Orders pursuant to s 18) and at present is as follows.

19. Under s 18(1)(a), where a person "*has been found guilty on indictment of an offence of a sexual nature committed upon or in relation to a child*" under the age of 17/16 years,[16] the judge may direct that two or more medical practitioners named by the judge "*inquire as to the mental condition of the offender, and in particular whether his mental condition is such that he is incapable of exercising proper control over his sexual instincts*".

20. Under s 18(3)(a), "*if the medical practitioners report to the judge that the offender is incapable of exercising proper control over his sexual instincts the judge may, either in addition to or in lieu of imposing any other sentence where the offender was convicted on indictment, ... declare that the offender is so incapable and direct that he be detained in an institution during His Majesty's pleasure*". The expression "*during Her Majesty's pleasure*" has the same substantive meaning as "*the Governor in Council*" which is used in s 18(5) and (6). It means that the decision-maker is His or Her Excellency, the Governor of the State of Queensland, acting on the advice of Her Majesty's Ministers of State for the State of Queensland. In practical terms, this means the Governor formally approves a recommendation made to the Governor by the responsible minister[17] — in this case, the Attorney-General and Minister for Justice.[18]

21. Section 18(3)(a) provided, and s 18(3A) presently provides, that the offender is entitled "*to cross-examine the medical practitioners in relation to and call*

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15 Case State at [10].

16 In 1984 the age specifiedin the *CLAA* was 17 years; at present the age specified is 16 years.

17 See s 27, *Constitution of Queensland 2001* (Qld), see also *R v Home Secretary; ex parte Venables* [1998] AC 407 at 491-492 (Lord Browne-Wilkinson), in relation to the practical meaning of "during Her Majesty's pleasure" in British legislation.

18 Pursuant to the *Administrative Arrangements Order (No 2) 2013*.

evidence in rebuttal of such report, and no such order shall be made unless the judge shall consider the matters reported to be proved".

22. Under s 18(8) a person detained under s 18 shall be examined at least once in every three months by the Director of Mental Hygiene/Health[19] or by some legally qualified medical practitioner appointed by the Director of Mental Hygiene/Health to conduct examinations under s 18(8).

23. Under s 18(5) a person in respect of whom a direction is given under s 18(3)(a) shall be detained and "*shall not be released until the Governor in Council is satisfied on the report of two medical practitioners that it is expedient to release*" the person.[20] However, As Thomas J observed in *Pollentine v Attorney-General*:[21]

> It is plain that s 18 is seriously defective in regard to any procedure through which this important decision-making power is to be accessed ... In the absence of any prescribed procedure ... it is difficult to envisage the means by which the Governor in Council is to be called upon to exercise the power. How often and on what occasions? Is it envisaged that it must consider the three-monthly reports under s 18(8)? If so, how is it to be ensured that there will be reports from two medical practitioners when the statutory obligation requires only one? Is the review to be confined to that type of material? Is it a statutory scheme that excludes other forms of access, such as a request from the prisoner himself?

The constitutional principle

24. It is now well established that State legislatures cannot confer upon State courts a function which substantially impairs, or which is incompatible with or repugnant to, the institutional integrity of the court and its role under Ch III of the *Constitution* as a repository of federal jurisdiction and as part of the integrated Australian court system.[22]

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19 "*Director of Mental Hygiene*" in the *CLAA* as at 1984, "*Director of Mental Health*" in the *CLAA* as at present.

20 Under s 18(5) as it stood in 1984, there was a requirement that the two medical practitioners be "legally qualified". That requirement is not present in s 18(5) as it presently stands.

21 [1995] 2 Qd R 412 at 415.

22 *Attorney-General for the Northern Territory v Emmerson* [2014] HCA 13 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 477 [67] (French CJ), 487 [123]-[124] (Hayne, Crennan, Kiefel and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1 at 47 [69] (French CJ), 82 [205], 83 [212] (Hayne J), 157 [426](Crennan and Bell JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44]-[45] (French CJ and Kiefel J), 228-229 [105] (Gummow, Hayne, Crennan and Bell JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] (Gleeson CJ); *Kable v Director of Public*

25. This principle prevents a State legislature from:

(a) directly enlisting State courts capable of exercising the judicial power of the Commonwealth in the implementation of the legislative or executive policies of the State:[23] and

(b) requiring a court capable of exercising federal jurisdiction to depart to a significant degree from the methods and standards which have historically characterized the exercise of judicial power,[24]

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because to do so would impair a State court's institutional integrity in the relevant sense.

26. As explained in *Mistretta v United States*,[25] in a passage cited with approval in this Court[26] in relation to the relationship between the political branches and the judicial branch at State level:[27]

> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

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27. An important indication, though not the touchstone of, whether particular legislation "undermines the integrity of the judicial process" is whether "the exercise of the power or function in question is ... apt or likely, to undermine public confidence in the courts exercising that power or function".[28]

Prosecutions (NSW) (1996) 189 CLR 51 at 96 (Toohey J), 106 (Gaudron J), 116-199 (McHugh J).

23 *Totani* (2010) 242 CLR 1 at 52 [82] (French CJ), 67 [149] (Gummow J), 92 [236] (Hayne J), 173 [481] (Kiefel J).

24 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 353 [52] (French CJ); *Totani* (2010) 242 CLR at 62-63 [131] (Gummow J), 157 [42] (Crennan and Bell JJ).

25 488 US 361 (1989).

26 *Emmerson* [2014] HCA 13 at [41]; *Totani* (2010) 242 CLR 1 at 172 [479], (Kiefel J); *Fardon* (2004) 223 CLR 575 at 602 [44] (McHugh J), 614 [91] (Gummow J); *Kable* (1996) 189 CLR 51 at 133 (Gummow J); *Gypsy Jokers v Commissioner of Police* (2008) 234 CLR 532 at 563 [51] (Kirby J), 593 [168] (Crennan J)

27 488 US 361 at 407 (1989).

28 *Fardon* (2004) 223 CLR 575 at 617 [102] (Gummow J).

Section 18 substantially impairs the institutional integrity of State courts

28. Although preventative detention does not necessarily offend against Ch III of the Constitution, it is necessary to pay close attention to the particular regime whereby such detention is authorised.[29]

29. The Plaintiffs contend that various aspects of s 18 of the *CLAA*, individually or as a result of their cumulative operation, were in 1984 and remain incompatible with and repugnant to the institutional integrity of the courts of Queensland.

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30. In particular, the Plaintiffs contend that s 18 of the *CLAA* stands in marked contradistinction to the regime considered and upheld by this Court in *Fardon*. In that case, the following features of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (***DP(SO)A***) were considered significant by members of the majority:

(a) The matter of which the court had to be satisfied in order to make an order was that the prisoner was a "*serious danger to the community*",[30] which was defined to mean that "*there is an unacceptable risk that the prisoner will commit a serious sexual offence*" if the person is released from custody.[31]

20 (b) In determining that issue, the legislation required the court to have regard to various matters in deciding whether a prisoner was "*a serious danger to the community*" including, as Callinan and Heydon JJ observed:[32]

> the psychiatrists' reports; the cooperation or otherwise of the prisoner with the psychiatrists; other relevant reports; the prisoner's propensities; any pattern of offending by the prisoner; the prisoner's participation in rehabilitative programmes and the results of them; the prisoner's efforts to address the cause of his behaviour; the prisoner's antecedents and criminal history; "the risk that the prisoner will commit another serious sexual offence if released into the community"(s.13(4)(h)); and the need to protect the community against that
30 risk and any other relevant matter.

(c) The court was required to be satisfied "*by acceptable, cogent evidence*" and to "*a high degree of probability*".[33]

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29 *Fardon* (2004) 223 CLR 575 at 614 [90] (Gummow J).

30 *DP(SO)A*, s.13(1).

31 *DP(SO)A*, s.13(2).

32 *Fardon* (2004) 223 CLR 575 at 656 [224]; and see 616 [98] (Gummow J).

(d) The rules of evidence were applicable.[34]

(e) The Attorney-General bore the onus of proof.[35]

(f) The court had a discretion as to the kind of order it should make.[36] That is, even if the court was satisfied that there was an unacceptable risk that the prisoner would commit a serious sexual offence if released from custody, the court was not required to order the prisoner's continued detention because a more limited form of order was available (namely a supervision order).[37]

(g) The *DP(SO)A* required the court to give detailed reasons for its decision;[38]

(h) The *DP(SO)A* contained a right of appeal for both the A-G and the prisoner,
10 which right could be exercised without the need to obtain prior leave and was available in respect of any decision under the *DP(SO)A*.[39]

(i) The legislation ensured that a person's continual detention was reviewed annually by the court that made the continuing detention order;[40] and in exceptional circumstances a prisoner could seek leave to apply for a review.[41] On a review, the decision to affirm the decision could only be made if, once again, the court was satisfied, by acceptable, cogent evidence and to a high degree of probability, that the evidence was of sufficient weight to affirm the decision.[42] These provisions ensured a fair process.[43] It

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33 *DP(SO)A*, s.13(3)(b); *Fardon* (2004) 223 CLR 575 at 597 [34] and 602 [44] (McHugh J), at 656 [223] and 658 [231] (Callinan and Heydon JJ), and at 621 [114] (Gummow J, with whom Hayne J agreed on this point).

34 *DP(SO)A*, s.13(3); *Fardon* (2004) 223 CLR 575 at 596 [34] and 602 [44] (McHugh J).

35 *Fardon* (2004) 223 CLR 575 at 597 [34] (McHugh J).

36 *DP(SO)A*, s.13(5); *Fardon* (2004) 223 CLR 575 at 597 [34] (McHugh J) and at 657 [227] (Callinan and Heydon JJ).

37 *Fardon* (2004) 223 CLR 575 at 619 [109] (Gummow J, with whom Hayne J agreed on this point). Gummow J assumed that "'may' is used here in a sense that requires one or the other outcome, without the possibility of declining to make either order". Cf 592 [19] (Gleeson CJ), 596 [34] (McHugh J).

38 *DP(SO)A*, s.17; *Fardon* (2004) 223 CLR 575 at 602 [44] (McHugh J), at 658 [230] (Callinan and Heydon JJ).

39 *DP(SO)A*, s.31; *Fardon* (2004) 223 CLR 575 at 658 [232] (Callinan and Heydon JJ).

40 *DP(SO)A*, ss.26 and 27; *Fardon* (2004) 223 CLR 575 at 620 [110] and 620-621 [113] (Gummow J, with whom Hayne J agreed on this point), at 654 [216] and 658 [231] (Callinan and Heydon JJ).

41 *DP(SO)A*, s.28; *Fardon* (2004) 223 CLR 575 at 658 [231] (Callinan and Heydon JJ).

42 *DP(SO)A*, s.30.

also ensured that the continuing detention of the prisoner remained a decision for the judicial branch, not the executive branch.

31. The regime in s 18 of the CLAA is quite different. Certain critical aspects that were significant in upholding the validity of the *DP(SO)A* are absent.

(a) Section 18 uses the criterion of "*incapable of exercising proper control over his sexual instincts*" as the jurisdictional fact necessary for the making of an order. That criterion is quite different from that in *Fardon.*

(i) It is devoid of content or, in the alternative, not a test suitable for application by a court; and

(ii) it does not identify the criteria to be considered in determining whether to exercise the power to indefinitely detain a person.

(b) Section 18(3)(a) required in 1984, and continues to require, the court to be satisfied that the relevant matters are merely "***proved***", thereby setting the standard of proof for an order authorizing the indefinite detention of a person at an insufficiently low level.

(c) Neither s 18, nor any other provision of the *CLAA,* provides for regular supervision by the court of an order made pursuant to s 18. Nor does s 18, or any other provision of the *CLAA,* provide the court with a power to set aside an order made pursuant to s 18 in circumstances where there is a subsequent absence of, or change in, the relevant jurisdictional facts that enabled the order to be originally made.

(d) Rather, once the order has been made, the revocation of the order rests, in a practical sense, with the executive. This deprives the court of its decisional independence by requiring it to exercise its jurisdiction under the *CLAA* in conjunction with, and not independently of, the executive government.

(e) Finally, because of the conferral of the power of release on the Governor in Council, s 18 permits the indefinite detention of the prisoner in circumstances where the continued detention is in practical terms

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[43] *DP(SO)A*, Pt 3; *Fardon* (2004) 223 CLR 575 at 658 [231] (Callinan and Heydon JJ).

unreviewable and so creates an "*island of power immune from supervision and restraint*".[44]

32. Other features that were significant in *Fardon* and that were expressly dealt with in the *DO(SO)A* are simply not dealt with by s 18 at all. Thus s 18 is silent as to the onus of proof, the application of the rules of evidence, the right to appeal and the duty on the court to give reasons. It may be accepted that by conferring the power to make an order on a court, and by not making express provision to the contrary, the Parliament intended that the ordinary incidents of the judicial process would apply to the manner in which the court exercises the power conferred.[45] However, one cannot say, as Callinan and Heydon JJ said in *Fardon*, that "*careful attention has been paid in the drafting of the Act to a need for full and proper legal process in the making of decisions under it*".[46]

33. As a consequence of the above features, s 18 permits the executive government to "*cloak*" an executive decision, and the decision-making process, that results in continued detention of the prisoner "*with the neutral colours of judicial power*". A reasonable observer is likely to conclude that the prisoner remains detained as a result of an order of the court. Legally this is the case, as the order authorizes the initial detention. Yet the court has no ability to supervise or revoke its order, and so the continued detention of the person results is in truth a consequence of an executive decision. The appearance of judicial independence is thus undermined.

34. These features of s 18 are dealt with in more detail below.

Inappropriate criterion for judicial determination

35. As observed in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[47] and referred to with approval in *Thomas v Mowbray*,[48] the judicial power is characterised by the application of legal standards or criteria. In *Fardon*, in the context of preventative detention, Gummow J viewed as significant the

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44 *Kirk* (2010) 239 CLR 531 at 581 [99].

45 *Thomas v Mowbray* (2007) 233 CLR 307 at 335 [30] (Gleeson CJ). However, in relation to the onus of proof, there is no application for a direction under s 18(3)(a) and thus it may be inapposite to speak of an onus proof.

46 *Fardon* (2004) 223 CLR 575 at 658 [233] (Callinan and Heydon JJ).

47 (1996) 189 CLR 1.

48 *Thomas v Mowbray* (2007) 233 CLR 307 at 344 [71] (Gummow and Crennan JJ).

presence of specified criteria that the court was to consider in determining whether a person was a "*serious danger to the community*". In concluding that the *DP(SO)A* was valid Gummow J said:[49]

> "... if the exercise in which the court was involved had been permitted by the legislation to lose its requirement for deeply serious consideration upon **specified criteria** and to a high degree of satisfaction, then invalidly of such legislation may well result." [emphasis added]

36. The *CLAA* provides for the judge to make a declaration if s/he is satisfied that the person is "*incapable of exercising proper control over his sexual instincts*".[50] This test is devoid of a legal standard capable of judicial application. Nor does s 18 provide criteria by which the court is to reach a conclusion. The assessment required by s 18 does not admit of criteria the court could apply to established facts, which is a hallmark of the judicial process described in *Bass*.[51] There is no indication in s 18 of what is meant by "*proper control*" or "*sexual instincts*" or by what criteria a court might decide that these matters are satisfied.

37. Section 18 is quite different from the measures considered in other recent cases.

(a) In *Fardon* the question was whether the person posed an unacceptable risk of further offending, and s 13(4) of the *DP(SO)A* set out specified criteria that the court was to consider in making the order.

(b) In *Thomas v Mowbray*[52] s 104.4 of the *Criminal Code* required an assessment of whether the order sought would substantially assist in preventing a "*a terrorist act*" and directed the court to consider whether the proposed orders were "*reasonably necessary*" and "*appropriate and adapted*" to the protection of the public.

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49 (2004) 223 CLR 575 at 621 [113].

50 *CLAA*, s 18(3)(a) as at 1984 (in s 18(3) as it presently stands "*the offender's*" has replaced "*his*"). Section 18 may be understood as conferring not a discretion, but an obligation that must be performed if the court is satisfied that the person is incapable of properly controlling his or her sexual instincts. See *Samad v District Court of New South Wales* (2002) 209 CLR 140 at 152-154 [31]- [38], 160-163 [66]-[76]; *Leach v R* (2007) 232 ALR 325 at [38]. However, the impact of an order under s 18(3) on common law rights would suggest that "may" ought to be understood in this context as conferring a discretion, rather than an obligation. In any event, this feature of s 18 is not decisive.

51 (1999) 198 CLR 334 at 359 [56].

52 *Thomas v Mowbray* (2007) 233 CLR 307.

(c) In *Pompano*[53] the legislation was directed to whether the organisation in question was an "*unacceptable risk to the safety, welfare or order of the community*".

38. Each of these regimes utilized tests traditionally applied by the courts; and neither *Thomas* nor *Pompano* involved the detention of a person.

Degree of satisfaction

39. The *CLAA* provided in 1984, and continues to provide, that the judge could not make an order pursuant to s 18 unless the judge considered the matters reported by two medical practitioners to be "*proved*".[54] In the absence of provision that the matters reported by the medical practitioners are to be proved beyond a reasonable doubt, or according to some other standard, the use of the term "*proved*" is to be understood as referring to proof on the balance of probabilities.[55]

40. However, where a court order will result in the indefinite detention of a person it is necessary for the jurisdictional fact that enlivens the power to detain to be proved to a high degree of probability. In *Fardon*:

(a) Gummow J spoke of the potential for the legislation to be invalid unless there was a requirement for "*a high degree of satisfaction*";[56]

(b) McHugh J observed that the *DP(SO)A* was different from the legislation considered in *Kable* because, *inter alia*, the court had to be satisfied that the Attorney-General had discharged the onus of establishing the "*unacceptable risk*" standard "*to a high degree of probability*";[57] and

(c) Callinan and Heydon JJ also placed some significance upon the need for the degree of satisfaction to be reached is of "*a high degree of probability*".[58]

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53 (2013) 87 ALJR 458.

54 *CLAA*, Section 18(3)(a) of the as at 1984 and *CLAA*, s 18(3A) at present.

55 A direction under s 18(3)(a) is not a sentence for a criminal offence; rather, it is imposed in addition to or in lieu of a sentence and is a form of preventative detention. Thus *R v Olbrich* (1999) 199 CLR 270 may be distinguished. Further, it may be that "standard of proof is not a concept that is apposite to the resolution of a contested question of judgment of the kind required" by s 18(3)(a): see *Leach v R* (2007) 232 ALR 325 at 340 [47] (Gummow, Hayne, Heydon and Crennan JJ).

56 (2004) 223 CLR 575 at 621 [113].

57 (2004) 223 CLR 575 at 597 [34].

58 (2004) 223 CLR 575 at 656 [223].

41. By merely requiring that the matters be "*proved*", the *CLAA* has set the standard of satisfaction required for the making of an order for indefinite detention of a person at an impermissibly low level. *Thomas v Mowbray* may be distinguished because, as Gummow and Crennan JJ observed in that case, "*detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order*".[59]

Lack of curial supervision

10 42. As Crennan and Bell JJ observed in *Totani*, one of the matters in *Thomas v Mowbray*[60] that enabled this Court to conclude that the power to make an interim control order "*involved following ordinary judicial processes, which countered any suggestion that the court making the order was to act as a mere instrument of government policy*" was that the court "*had a discretion* ***whether to revoke or vary*** *or confirm the interim order*".[61]

43. The *CLAA* does not contain any provision permitting the court to set aside an order made pursuant to s 18 of the *CLAA* as a result of there being further medical evidence which contradicts the earlier medical evidence which supported the
20 making of an order. Nor does the *CLAA* provide for curial supervision or review of the order. It is clear from s 18(5) that no power to set aside or otherwise supervise an order is to be implied. Rather, the person must remain in detention until released pursuant to executive decision.

44. While s 18(8) mandates that a person detained under s 18 must be examined at least once in every three months by the Director Of Mental Health or by a medical practitioner appointed by the director, the *CLAA* does not provide a mechanism for the report of the Director or the medical practitioner to be brought to the attention of the court to allow the court to supervise the continued force of the order made
30 pursuant to s 18 of the *CLAA*.

45. This feature of the *CLAA* is to be contrasted with the legislative scheme established pursuant to the *DP(SO)A* which this Court in *Fardon* concluded provided sufficient curial supervision of the order. In that case Gummow J

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59 (2007) 233 CLR 307 at 356 [116].

60 (2007) 233 CLR 307 at 335 [30] (Gleeson CJ).

61 *Totani* (2010) 242 CLR 1 at 158-159 [430] (Crennan and Bell JJ).

referred to the obligation imposed upon the Attorney-General to cause an annual review to be carried out as being a matter of significance which, when taken together with other matters, supported the validity of that legislation.[62] His Honour spoke of the need for there to be regular review thus:[63]

> what is vital for Pt 3 [the scheme under that legislation], and thus to the validity of the CLAA, is the requirement that the regular "review" does not, with the passage of time, become no more than a periodic formality ...

46. Under the *CLAA* no curial supervision is possible. Thus if there are any such changed circumstances, the court is required to trust that the executive government will identify and consider those changed circumstances and act upon them accordingly.

47. However, even if the circumstances are such that the test under s 18(3)(a) is no longer satisfied, the executive is not required to release the person. Rather, the Governor in Council may release the person if it satisfied that it is "***expedient***" to do so. This test is different from the test for the initial direction for detention during Her Majesty's pleasure and invokes political factors alien to the judicial function.[64] By in substance subjecting the court's decision to review by the executive on political grounds, s 18 impairs the institutional integrity of the court.

Lack of effective judicial review

48. Furthermore, the decision of the executive government that results in the continuing detention of the person is effectively unexaminable by the courts. By vesting the power to release a person from detention pursuant to an order made pursuant to s 18 of the *CLAA* in the Governor in Council, the *CLAA* makes it very difficult for the courts to supervise the exercise (or non-exercise) of that power. The absence of a requirement to give reasons for a decision by the Governor in Council, the inherently opaque nature of the political process of ministers deciding what advice to give the Governor, together with the nature of the test to be applied upon release (namely whether release is "*expedient*") means that there is, in

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62 *Fardon* (2004) 223 CLR 575 at 612-620 [108] and [110].

63 *Fardon* (2004) 223 CLR 575 at 620 [113].

64 It is akin to "the conferral on the executive of a power of determination of when the public interest permitted the release of the prisoner", against which Gummow J cautioned in *Fardon* (2004) 223 CLR 575 at 608 [65].

substance if not in form, an "*island of power*" in the executive government's decision-making.[65]

49. While it may be accepted that review for breach of procedural fairness is possible,[66] the opaque nature of the decision-making by the Governor in Council makes an attack on a decision on any other ground (such as jurisdictional error) very difficult. This was recognized in *Wainohu v New South Wales,*[67] where this Court considered a regime that provided for a ministerial declaration as the precondition to the making of a control order by a State court.

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(a) French CJ and Kiefel J spoke of the absence of reasons thus:[68]

> The declaration which may result from an application is a necessary foundation for an application in the Supreme Court for a control order under Pt 3 of the Act. Subject to the limited scope for judicial review on the grounds of jurisdictional error, significantly narrowed by the absence of reasons for decision (if they are not provided), the declaration itself would be **effectively unexaminable** in the proceedings in the Supreme Court. A critical element of the court's power to make an interim control order or a control order would necessarily be unexplained and unable to be explained by the court. [emphasis added]

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(b) Gummow, Hayne, Crennan and Bell JJ stated that the opaque nature of the decision-making "*makes more difficult any collateral attack on the decision, and any application for judicial review for jurisdictional error*".[69]

50. This Court has warned against the establishment of "*islands of power*" that are shielded from judicial review. In *Kirk* six members of this Court said:[70]

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of state executive and judicial power by persons and bodies other than that court would be to create islands of power immune from
30 supervision and restraint. ... it would remove from the relevant State Supreme Court one of its defining characteristics.

51. Although a decision of the Governor in Council under s 18(5) is, as a matter or form, subject to judicial review, the repository of the power, the absence of a

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65 *Kirk* (2010) 239 CLR 531 at 581 [99].

66 See *Pollentine No 1* [1995] 2 Qd R 412.

67 (2011) 243 CLR 181.

68 *Wainohu* (2011) 243 CLR 181 at 219-220 [69].

69 *Wainohu* (2011) 243 CLR 181 at 230 [109].

70 239 CLR 531 at 581 [99].

requirement to give reasons, and the standard of what is "*expedient*", means that the decision is, in substance, an island of power that is "*effectively unexaminable*". This unexaminable power may leave in place a judicial order under s 18(3) in circumstances in which the jurisdictional facts that underpinned that order no longer exist.[71] This undermines the institutional integrity of the State courts.

52. Section 18 also distorts the operation of *habeas corpus*, a constitutionally entrenched writ that is a defining characteristic of a State Supreme Court.[72] Since the early seventeenth century, the writ of *habeas corpus* has required that the detainer produce the body and the reason for the arrest, and the reason for the detention.[73] The writ was couched in terms of "*a demand for the cause of the arrest as well as the cause of detention*".[74] The need for the return to the writ to include the cause of arrest, and the cause of continued detention can be traced to the *Five Knights' Case*[75] where the "*primary cause*" and the "*subsequent cause*" of detention was required. The Privy Council held that the return, which stated that the knights had been detained simply "*by his majesty's special commandment*", was insufficient.[76] The assertion that a person is detained "*by the King's command*" has never been satisfactory for the purposes of the writ of habeas corpus in Australia.[77] As Sir Frederick Darley said in 1888: "*No lawyer of this day would venture to say that the return to a writ of* habeas corpus *that a person was held in custody by the special command of His Majesty, was a proper return to such a writ*".[78]

53. Section 18 of the *CLAA* places the *continued* detention in the remit of the Governor-in-Council. The Governor-in-Council acts on ministerial advice. Even when the jurisdictional fact that authorised the making of the initial detention no longer exists, the offender is to remain in detention until the Governor in Council

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71 In *Pollentine No 2* [1996] QCA 463 at 9, Fitzgerald P observed that the Attorney-General submitted that "it might be considered 'expedient' not to release the appellant even if he was 'fit' for release".

72 *Kirk* (2010) 239 CLR 531 at 581 [98].

73 3 How. St. Tr 1 (K.B. 1627), also known as *Sir Thomas Darnell's Case*.

74 P Halliday, *Habeas Corpus, From England to Empire* (2010) at 49-50.

75 3 How. St. Tr 1 (K.B. 1627).

76 3 How. St. Tr 1 (K.B. 1627) at 51; Halliday, *Habeas Corpus* at 50.

77 *Ex parte Lo Pak* (1888) 9 LR (NSW) 221 at 230, 235 per Darley CJ. See also D Clark and G McCoy, *Habeas Corpus, Australia, New Zealand, The South Pacific* (2000) at 220-221.

78 *Lo Pak* (1888) 9 LR (NSW) 221 at 235, citing the *Five Knights' Case*.

determines that it is "*expedient*" that he or she be released. In essence, the *continued* detention of the person is "by the King's command". This denies the availability of *habeas corpus* in circumstances where it would otherwise lie.

Independence from the executive government

54. The institutional integrity of a court is distorted if it no longer exhibits the defining characteristics that mark a court apart from other decision-making bodies.[79] These defining characteristics include independence and impartiality.[80] That is, a dimension of the judicial power concerns the overriding necessity for the function always to be compatible with the essential character of a court as an institution that is, ***and is seen to be***, both impartial between the parties and independent of the parties and of other branches of government in the exercise of the decision-making functions conferred on it.[81] Judicial independence mandates independence from the legislature and the executive.[82]

55. Thus although there is no strict separation of powers at State level, the requirements of independence and impartiality connote separation from the other branches of government, at least in the sense that the state courts must be and remain free from external influence.[83] *Totani*, *Wainohu*, and *Gypsy Jokers* were cases where the decisional independence of the court was compromised by a decision of the executive taken *prior to* the judicial decision in question. In this case, the decisional independence of the Queensland courts is compromised by the *subsequent* decisions of the executive government.

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79 *Forge* (2006) 228 CLR 45 at 76 [63]-[64] (Gummow, Hayne and Crennan JJ); *Wainohu* (2011) 243 CLR 181 at 208-9 [44] (French CJ and Kiefel J).

80 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ) and 363 [81] (Gaudron J); *North Australian Aboriginal Legal Aid Service* (2004) 218 CLR 146 at 152 [3] (Gleeson CJ) and 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45 at 67 [41] (Gleeson CJ), 76-7 [64]-[66] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers* (2008) 243 CLR 532 at 552-3 [10] (Gummow, Hayn, Heydon and Kiefel JJ).

81 *Totani* (2010) 242 CLR 1 at 43 [62] (French CJ); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 per French CJ at 420 [27].

82 *TLC Air Conditioner* (2013) 87 ALJR 410 at 431-2 [105] (Hayne, Crennan, Kiefel and Bell JJ).

83 *Kable* (1996) 189 CLR 51 at 98 (Toohey J), at 119 (McHugh J) and 133-134 (Gummow J); *North Australian Aboriginal Legal Aid Service* (2004) 218 CLR 146 at 163 [30].

56. The text and structure of s 18 of the *CLAA* establishes a statutory mechanism for the court to be the decision-maker as to whether to make an order for the indefinite detention of a person "*during Her Majesty's pleasure*" should be made. Then, s 18 vests the power to release the offender or prisoner in the executive government, acting through the Governor in Council, when it is "*expedient*" to do so. Consequently, s 18 results in "*the executive working in conjunction with*" the court "*to continue the detention of*" the plaintiffs.[84] Judicial decision-making is entangled with, and is not independent of, executive decision-making. The process for lawfully detaining a person at the expiration of his or her term of imprisonment is shared by the judiciary and the executive government.

57. This is not a case like *Crump v New South Wales*, where the legislative regime empowered the executive to decide whether some remaining part of a sentence (which the court had already imposed as a result of a finding of criminal guilt) ought to be served in prison or at large. Rather, under s 18 the *period* of detention is "*determined not in the exercise of judicial power, but by the executive branch of government*".[85] Section 18 displays the vice referred to by Gummow J in *Fardon:* "*the intrusion of ... executive power into what should be the role of the courts in determining the lawfulness of detention*".[86]

58. A constitutional system that maintains the independence of the judiciary does not permit the executive to be invested with the power effectively to determine the severity of the sentence imposed. Speaking for the majority of the Judicial Committee of the Privy Council in *Hinds v The Queen,* Lord Diplock said:[87]

> In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offence — as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments ... **What parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body ... a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders.** [emphasis added]

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84 Contrast the regime under the DP(SO)A: see *Fardon* (2004) 233 CLR 575 at 602 [44] (McHugh J).

85 [2012] HCA 20 at [42] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

86 (2004) 223 CLR 575 at 608 [66], referring to Art 5(4) of the *European Convention on Human Rights* and *R (Giles) v Parole Board* [2004] 1 AC 1.

87 [1977] AC 195 at 225-226. His Lordship was speaking in the context of the Constitution of Jamaica, which gave effect to the separation of powers. See also *Browne v The Queen* [2000] 1 AC 45 at 48, cited with approval in *Crump* [2012] HCA 20 at [42].

59. Although he was speaking of the separation of powers, Lord Diplock's words are equally apposite to the requirement of judicial independence that stems from Ch III of the Constitution. This constitutes an essential characteristic of a court, and is fundamental to a court's institutional integrity in terms of its decisional independence. As French CJ said in *Totani*:[88]

> It is a requirement of the Constitution that judicial independence be maintained in reality and appearance for the courts created by the Commonwealth and for the courts of the States and Territories. Observance of that requirement is never more important than when decisions affecting personal liberty and liability to criminal penalties are to be made.

60. The delegation to the executive to determine the severity of the punishment to be inflicted on a person interferes with the independence and the institutional integrity of State courts capable of exercising the judicial power of the Commonwealth and is thus invalid.

Cloaking decisions of the executive in the neutral colours of judicial action

61. The ultimate effect of s 18 is that it cloaks a decision of the executive that results in continued detention of the prisoner with the "*neutral colours of judicial action*".

62. As explained in *Mistretta* in a passage approved by this Court,[89] the legislative and executive branches are not permitted to "*cloak*" their actions with the neutral colors of judicial action.

63. In relation to the operation of s 18 of the *CLAA*, a reasonable observer could conclude that the executive is able to cloak its work in the neutral colours of judicial action by enlisting the good reputation of the judiciary in the process of ensuring that a person be detained after the expiration of his sentence. Having conferred the decision to detain on the courts, thus invoking the reputation of the judiciary, the conferral of the decision as to release on the executive government is thereby cloaked with the neutral colours of the judicial process.

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88 *Totani* (2010) 242 CLR 1 at 20 [1] (footnotes omitted).

89 *Emmerson* [2014] HCA 13 at [41]; *Totani* (2010) 242 CLR 1 at 172 [479], (Kiefel J); *Gypsy Jokers* (2008) 234 CLR 532 at 563 [51] (Kirby J), and at 593 [168] (Crennan J); *Fardon* (2004) 223 CLR 575 at 602 [44] (McHugh J), 614 [91] (Gummow J); *Kable* (1996) 189 CLR 51 at 133 (Gummow J).

64. A reasonable observer is likely to conclude that the prisoner remains detained solely as a result of an order of the court, rather than, as is the situation in fact, by reason of the decision-making of the executive government. The reputation of the judicial branch of government has been borrowed to justify what is, in substance if not form, a continuing decision of the executive government. This is because continued detention of the person is in fact authorized by the court's order. Yet if the relevant jurisdictional facts no longer remain, that detention is in truth continued by reason of the inaction of the executive government.

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PART VII: LEGISLATION

65. The applicable statutory provisions as they existed at the relevant time and as they exist now are attached and marked **"A"**.

PART VIII: ORDERS SOUGHT

66. The plaintiffs contend that the questions posed in the Case Stated at [15] should be answered as follows:

20 (a) yes; and

(b) the defendants.

PART IX: ORAL ARGUMENT

67. The Plaintiffs estimate that 1½ to 2 hours will be required for presentation of their oral argument.

Dated: 17 April 2014

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ANNEXURE A

APPLICABLE STATUTORY PROVISIONS

Section 18 of the *Criminal Law Amendment Act 1945* (Qld), as in force when the plaintiffs were ordered to be detained in 1984.

18. Detention of Persons incapable of Controlling Sexual Instincts

(1) In any case where a person has been found guilty of an offence of a sexual nature committed on upon or in relation to a child under the age of seventeen years:–

(a) If such person was found so guilty on indictment, the judge presiding at the trial of such person for that offence may at his discretion direct that two or more legally qualified medical practitioners named by the judge (of whom one shall be a person specially qualified in psychiatry where the judge is of opinion that the services of such a person are reasonably available), inquire as to the mental condition of the offender, and in particular whether his mental condition is such that he is incapable of exercising proper control over his sexual instincts; or

(b) If such person was found so guilty on summary conviction, the court of petty sessions before which the charge was heard, in addition to or before sentencing such person to any lawful punishment, may order that such person be brought before a judge of the Supreme Court with a view to such person being dealt with by such judge as prescribed by paragraph (a) of this subsection.

In the case of an order made under paragraph (b) of this subsection before sentence, the court of petty sessions shall make such adjournments as are necessary and shall commit the convicted person to a prison of police gaol as defined in "*The Prison Act*, 1890," until such person has been dealt with by a judge as hereinafter prescribed in this section and thereafter may (in the cases provided for in paragraph (b) of subsection three or in paragraph (d) of subsection six of this section or in cases where the judge refuses to direct detention under either of the said subsections), sentence such person to any lawful punishment.

If and when a psychiatric clinic is established under "*The Backward Persons Act of* 1938," the judge may direct two or more legally qualified medical practitioners each of whom is either a member or officer of such clinic and one whom is specially qualified in psychiatry to make such inquiry.

(2) The medical practitioners shall conduct the inquiry by means of personal examination and observation of the offender and by reference to the depositions and such other records relating to him as they think necessary, and shall give their report on oath to the judge.

(3) (a) If the medical practitioners report to the judge that the offender is incapable of exercising proper control over his sexual instincts the judge may, either in addition to or in lieu of imposing any other sentence where the offender was convicted on indictment, or in addition to the punishment, of any, imposed or to be imposed by the court of petty sessions where the offender was summarily convicted, declare that the offender is so incapable and direct that he be detained in an institution during His Majesty's pleasure:

Provided that the offender shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report, and no such order shall be made unless the judge shall consider the matters reported to be proved.

(b) When an offender whom a judge directs under this subsection to be detained was summarily convicted and the decision with respect to the lawful punishment to be awarded was reserved, such offender shall, unless the judge when so directing otherwise orders (which order is hereby authorised to be made by the judge) again be brought before the court of petty sessions in terms of the adjournment made by that court for sentence.

(4) In any case where two medical practitioners, one of whom is specially qualified in psychiatry, report to the Attorney-General that any person who is serving a sentence of imprisonment imposed upon him for an offence of a sexual nature (whether committed upon or in relation to a child under the age of seventeen years or upon or in relation to a person over that age)–

(i) Is incapable of exercising proper control over his sexual instincts; and

(ii) That such incapacity is capable of being cured by continued treatment; and

(iii) That for the purposes of such treatment it is desirable that such person be detained in an institution after the expiration of his sentence of imprisonment,

the Attorney-General may cause an application to be made to a judge of the Supreme Court for a declaration and direction in respect of such person as prescribed by subsection three of this section.

Upon such application the medical practitioners shall report to the judge upon oath and the prisoner shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report, and no such order shall be made unless the judge shall consider the matters reported to be proved.

(5) Every offender or prisoner in respect of whom a direction is given under subsection three or subsection four of this section–

(a) Shall be detained in such institution as the Governor in Council directs, and until the Governor in Council gives a direction as to such institution, in any prison or police gaol as defined in "*The Prisons Act*, 1890"; and

(b) Shall not be released until the Governor in Council is satisfied on the report of two legally qualified medical practitioners that it is expedient to release him.

(6) If the medical practitioners report to the judge that the offender or, in the case of an application made under subsection four of this section the judge is of the opinion that the prisoner is not incapable of exercising proper control over his sexual instincts, but that his mental condition is subnormal to such a degree that he requires care, supervision and control in an institution either in his own interests or for the protection of others, and the judge after considering the report and any evidence submitted in rebuttal thereof is of opinion that the offender requires such care, supervision, and control, the judge may–

(a) Direct that the offender or prisoner be detained in an institution either for such period as the judge directs or during His Majesty's pleasure; or

(b) Where the offender was convicted on indictment, pass sentence on the offender and in addition direct as mentioned in paragraph (a) of this subsection; or

(c) Where the offender was summarily convicted and lawful punishment imposed by a court of petty sessions in addition direct as mentioned in paragraph (a) of this subsection; or

(d) Where the offender was summarily convicted and the decision reserved, direct, as mentioned in paragraph (a) of this subsection, but in such case the prisoner shall, unless the judge when so directing otherwise orders (which order is hereby authorised to be made by the judge), again be brought before the court of petty sessions in terms of the adjournment made by that court for sentence.

Every offender or prisoner in respect of whom such a direction is given–

(i) Shall be detained in such institution as the Governor in Council directs, and, until the Governor in Council gives a direction as to such institution, in any prison or police gaol as aforesaid; and

(ii) Where the detention order is during His Majesty's pleasure shall not be released until the Governor in Council is satisfied, on the report of two legally qualified medical practitioners (or of the psychiatric clinic hereinbefore in this section referred to), that he is fit to be at liberty.

(7) Where the judge orders detention during His Majesty's pleasure in addition to imprisonment or in the case of a prisoner the detention shall commence forthwith upon the expiration of the term of imprisonment. In all other cases it shall commence forthwith upon the making of such order.

(8) An offender or prisoner detained under this section shall be examined at least once in every three months by the Director of Mental Hygiene or by some legally qualified medical practitioner appointed by the Director of Mental Hygiene (who is hereby authorised to make such appointment) to conduct examinations under this subsection, either generally or of a particular offender or prisoner.

Any legally qualified medical practitioner making an examination under this subsection shall forthwith furnish a report of the examination to the Director-General of Health and Medical Services.

(9) An offender or prisoner detained in an institution pursuant to this section may be removed at any time to another institution by order of the Secretary for Health and Home Affairs.

Moreover, the provisions of section fifty-two of "*The Prisons Act*, 1890," shall, subject to all necessary modifications, apply to and in respect of any such offender or prisoner.

(10) In this section "Institution" means–

(a) Any prison or police gaol as defined in "*The Prisons Act*, 1890"; or

(b) Any other institution proclaimed by the Governor in Council for the purpose of this section.

(11) The provisions of this section may by order of a judge made on the application of a Crown Law Officer be applied in any and/or every respect to any offender who, before the passing of this section was found guilty either on summary conviction or on indictment, of an offence of a sexual nature committed upon or in relation to a child under the age of seventeen years and who, at the passing of this section is undergoing, or subject to be sentenced to, imprisonment for such offence.

(12) The Governor in Council may from time to time make all such regulations as appear necessary for giving effect to this section and particularly for giving effect to the provisions of this section as respects orders made under this section by courts of petty sessions.

(13) For the purposes of Chapter LXVII of "*The Criminal Code*"–

(a) An offender or prisoner directed to be detained in an institution pursuant to this section shall be deemed to be a person convicted on indictment and such direction shall be deemed to be a sentence; and

(b) A refusal by a Judge of the Supreme Court to direct any offender or prisoner to be detained in an institution pursuant to this section shall, as respects the right of appeal had by the Attorney-General under the said Chapter LXVII, be deemed to be a sentence.

Section 18 of the *Criminal Law Amendment Act 1945* (Qld), as in force on the date this proceeding was referred to the Full Court.

18 Detention of persons incapable of controlling sexual instincts

(1) In any case where a person has been found guilty of an offence of a sexual nature committed upon or in relation to a child under the age of 16 years—

(a) if such person was found so guilty on indictment—the judge presiding at the trial of such person for that offence may at the judge's discretion direct that 2 or more medical practitioners named by the judge (of whom 1 shall be a person registered under the Health Practitioner Regulation National Law as a specialist registrant in the specialty of psychiatry where the judge is of opinion that the services of such a person are reasonably available), inquire as to the mental condition of the offender, and in particular whether the offender's mental condition is such that the offender is incapable of exercising proper control over the offender's sexual instincts; or

(b) if such person was found so guilty on summary conviction—the Magistrates Court before which the charge was heard, in addition to or before sentencing such person to any lawful punishment, may order that such person be brought before a judge of the Supreme Court with a view to such person being dealt with by such judge as prescribed by paragraph (a).

(1A) In the case of an order made under subsection (1)(b) before sentence, the Magistrates Court shall make such adjournments as are necessary and shall commit

the convicted person to a corrective services facility or watch-house, until such person has been dealt with by a judge as hereinafter prescribed in this section and thereafter may (in the cases provided for in subsection (3B) or (6)(d) or in cases where the judge refuses to direct detention under either of the subsections), sentence such person to any lawful punishment.

(2) The medical practitioners shall conduct the inquiry by means of personal examination and observation of the offender and by reference to the depositions and such other records relating to the offender as they think necessary, and shall give their report on oath to the judge.

(3) If the medical practitioners report to the judge that the offender is incapable of exercising proper control over the offender's sexual instincts the judge may, either in addition to or in lieu of imposing any other sentence where the offender was convicted on indictment, or in addition to the punishment (if any) imposed or to be imposed by the Magistrates Court where the offender was summarily convicted, declare that the offender is so incapable and direct that the offender be detained in an institution during Her Majesty's pleasure.

(3A) However, the offender shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report, and no such order shall be made unless the judge shall consider the matters reported to be proved.

(3B) When an offender whom a judge directs under subsection (3) to be detained was summarily convicted and the decision with respect to the lawful punishment to be awarded was reserved, such offender shall, unless the judge when so directing otherwise orders (which order is hereby authorised to be made by the judge) again be brought before the Magistrates Court in terms of the adjournment made by that court for sentence.

(4) In any case where 2 medical practitioners, 1 of whom is registered under the Health Practitioner Regulation National Law as a specialist registrant in the specialty of psychiatry, report to the Attorney-General that any person who is serving a sentence of imprisonment imposed upon the person for an offence of a sexual nature (whether committed upon or in relation to a child under the age of 16 years or upon or in relation to a person over that age)—

(a) is incapable of exercising proper control over the person's sexual instincts; and

(b) that such incapacity is capable of being cured by continued treatment; and

(c) that for the purposes of such treatment it is desirable that such person be detained in an institution after the expiration of the person's sentence of imprisonment;

the Attorney-General may cause an application to be made to a judge of the Supreme Court for a declaration and direction in respect of such person as prescribed by subsection (3).

(4A) Upon such application the medical practitioners shall report to the judge upon oath and the prisoner shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report, and no such order shall be made unless the judge shall consider the matters reported to be proved.

(5) Every offender or prisoner in respect of whom a direction is given under subsection (3) or (4)—

(a) shall be detained in such institution as the Governor in Council directs, and until the Governor in Council gives a direction as to such institution, in a corrective services facility or watch-house; and

(b) shall not be released until the Governor in Council is satisfied on the report of 2 medical practitioners that it is expedient to release the offender or prisoner.

(6) If the medical practitioners report to the judge that the offender or, in the case of an application made under subsection (4) the judge is of the opinion that the prisoner, is not incapable of exercising proper control over his or her sexual instincts, but that his or her mental condition is subnormal to such a degree that he or she requires care, supervision and control in an institution either in his or her own interests or for the protection of others, and the judge after considering the report and any evidence submitted in rebuttal thereof is of opinion that the offender requires such care, supervision, and control, the judge may—

(a) direct that the offender or prisoner be detained in an institution either for such period as the judge directs or during Her Majesty's pleasure; or

(b) where the offender was convicted on indictment—pass sentence on the offender and in addition direct as mentioned in paragraph (a); or

(c) where the offender was summarily convicted and lawful punishment imposed by a Magistrates Court in addition direct as mentioned in paragraph (a); or

(d) where the offender was summarily convicted and the decision with respect to the lawful punishment to be awarded was reserved—direct, as mentioned in paragraph (a), but in such case the prisoner shall, unless the judge when so directing otherwise orders (which order is hereby authorised to be made by the judge), again be brought before the Magistrates Court in terms of the adjournment made by that court for sentence.

(6A) Every offender or prisoner in respect of whom such a direction is given—

(a) shall be detained in such institution as the Governor in Council directs, and, until the Governor in Council gives a direction as to such institution, in a corrective services facility or watch-house; and

(b) where the detention ordered is during Her Majesty's pleasure—shall not be released until the Governor in Council is satisfied, on the report of 2 medical practitioners, that the offender or prisoner is fit to be at liberty.

(7) Where the judge orders detention during Her Majesty's pleasure in addition to imprisonment or in the case of a prisoner the detention shall commence forthwith upon the expiration of the term of imprisonment.

(7A) In all other cases it shall commence forthwith upon the making of such order.

(8) An offender or prisoner detained under this section, other than a detainee released under part 3A, must be examined at least once in every 3 months by the director of mental health or by a medical practitioner appointed by the director of mental health

(who is hereby authorised to make such appointment) to conduct examinations under this subsection, either generally or of a particular offender or prisoner.

(8A) A medical practitioner making an examination under subsection (8) shall forthwith furnish a report of the examination to the director of mental health.

(9) An offender or prisoner detained in an institution pursuant to this section may be removed at any time to another institution by order of the chief executive of the department in which the *Hospital and Health Boards Act 2011* is administered.

(9A) Moreover, the provisions of the *Corrective Services Act 2006*, section 68, shall, subject to all necessary modifications, apply to and in respect of any such offender or prisoner.

(11) The provisions of this section may by order of a judge made on the application of a Crown law officer be applied in any or every respect to any offender who, before the passing of this section, was found guilty either on summary conviction or on indictment, of an offence of a sexual nature committed upon or in relation to a child under the age of 16 years and who, at the passing of this section, is undergoing, or subject to be sentenced to, imprisonment for such offence.

(12) The Governor in Council may from time to time make all such regulations as appear necessary for giving effect to this section and particularly for giving effect to the provisions of this section as respects orders made under this section by Magistrates Courts.

(13) For the purposes of the Criminal Code, chapter 67—

(a) an offender or prisoner directed to be detained in an institution pursuant to this section shall be deemed to be a person convicted on indictment and such direction shall be deemed to be a sentence; and

(b) a refusal by a judge of the Supreme Court to direct any offender or prisoner to be detained in an institution pursuant to this section shall, as respects the right of appeal had by the Attorney-General under chapter 67, be deemed to be a sentence.

(14) In this section—

director of mental health means the person appointed as Director of Mental Health under the *Mental Health Act 2000*, section 488.

institution means—

(a) a corrective services facility or watch-house; or

(b) another institution prescribed under a regulation to be an institution for this section.

release means unconditional release and does not include release under part 3A.