HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

ALLAN BAKER APPELLANT

AND

THE QUEEN RESPONDENT

Baker v The Queen [2004] HCA 45
1 October 2004
S395/2003

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with A P Cook for the appellant (instructed by Legal Aid Commission of New South Wales)

M G Sexton SC, Solicitor-General for the State of New South Wales with R D Cogswell SC and J G Renwick for the respondent and intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

Interveners:

H C Burmester QC with N L Sharp intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with K H Glancy intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor's Office for Western Australia)

C J Kourakis QC, Solicitor-General for the State of South Australia with C D Bleby intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office for South Australia)

CATCHWORDS

Baker v The Queen

Constitutional law (Cth) – Judicial power of Commonwealth – Vesting of federal jurisdiction in State courts – Act empowering State court to determine a minimum term and an additional term for persons serving an existing sentence of life imprisonment – Act prohibiting such determination in respect of prisoners the subject of a non-release recommendation by the original sentencing judge unless "special reasons" justified making the determination – Whether incompatible with State court being a suitable repository of judicial power of the Commonwealth.

Constitutional law (NSW) – Separation of powers – Power of State Parliament to confer function incompatible with exercise by State court of judicial power of the Commonwealth – Where class of affected persons closed and known – Whether judicial discretion preserved – Whether judicial function prescribed by Act compatible with State court being a suitable repository of judicial power of the Commonwealth.

Words and phrases – "special reasons".

Constitution, Ch III.
Sentencing Act 1989 (NSW), s 13A.
Sentencing Legislation Further Amendment Act 1997 (NSW).

1 GLEESON CJ. This is an appeal from a decision of the Court of Criminal Appeal of New South Wales[1] (Ipp AJA, Dunford and Bergin JJ) which dismissed an appeal from a decision of Greg James J of the Supreme Court of New South Wales declaring that the appellant was not eligible for a determination under s 13A of the *Sentencing Act* 1989 (NSW) as it stood at the relevant time. The legislation has since been changed in various respects, but nothing turns on that. In reaching his conclusion, the primary judge applied the provisions of sub-s (3A) of s 13A. Section 13A dealt with persons serving existing life sentences, that is to say, sentences of imprisonment for life imposed before or after the commencement of the section. The appellant was such a person. How that came about is explained in the reasons of other members of the Court. The primary judge referred to "the appalling nature of the [appellant's] crimes and their surrounding circumstances". In view of the issue argued on this appeal, it is unnecessary to elaborate on that. Sub-section (2) of s 13A entitled a person serving an existing life sentence to apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence. In effect, such a determination, when made, would alter an indeterminate to a determinate sentence, and would fix a minimum period as the least period which the prisoner would have to serve before being eligible for release on parole. Sub-section (9) of s 13A set out matters to which the Supreme Court, in exercising its functions under s 13A, was to have regard.

2 Section 13A distinguished between the general class of persons serving an existing life sentence and a particular class to which the appellant belonged, that is to say, persons who were the subject of a non-release recommendation. A non-release recommendation was defined by sub-s (1) as a recommendation or observation, or an expression of opinion, by the original sentencing court that the person should never be released from imprisonment. Sub-section (9)(a) threw further light on that by referring to "the knowledge of the original sentencing court that a person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the *Crimes Act 1900* and of the practice relating to the issue of such licences". In some cases, including the case of the appellant, sentencing judges had recommended against the possibility of release on licence. There was no statutory basis for such recommendations, and they had no legal effect beyond the significance that any other judicial observation about an offender in the course of sentencing might have had where a question of release on licence came to be considered by the Executive. Sub-section (3) provided that, if a person was the subject of a non-release recommendation, he or she could not make an application under s 13A for 20 years from the commencement of the sentence.

3 Of particular relevance to this appeal is sub-s (3A), which provided:

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1 *Baker* (2002) 130 A Crim R 417.

> "A person who is the subject of a non-release recommendation is not eligible for the determination of a minimum term and an additional term under this section, unless the Supreme Court, when considering the person's application under this section, is satisfied that special reasons exist that justify making the determination."

4 The primary judge was not satisfied that special reasons existed within the meaning of sub-s (3A). The merits of that conclusion were argued in the Court of Criminal Appeal, but are not before this Court. It may be noted, however, that the argument before the primary judge and the Court of Criminal Appeal on that issue proceeded upon the assumption that the requirements of sub-s (3A) were not devoid of content, even though they may have been difficult for the appellant to satisfy. The ground of appeal to this Court is that the 1997 legislation which amended s 13A to introduce special provisions about people who were the subject of non-release recommendations was invalid. The sole ground of invalidity, which was also considered and rejected by the Court of Criminal Appeal, was expressed in the appellant's notice under s 78B of the *Judiciary Act* 1903 (Cth) as follows:

> "The appellant seeks to raise an argument that the requirement in the legislation that he show that there are 'special reasons' to justify a determination of his life sentence [sic] is invalid as being inconsistent with the exercise by the Supreme Court of federal judicial power."

5 The kind of inconsistency relied upon is that identified in *Kable v Director of Public Prosecutions (NSW)*[2]. The principle for which that case stands as authority is that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.

6 The strength of that principle lies in its constitutional legitimacy. It was not an invention of a method by which judges may wash their hands of the responsibility of applying laws of which they disapprove. In some of the judgments in *Kable*, references were made to public confidence in the courts. Confidence is not something that exists in the abstract. It is related to some quality or qualities which one person believes to exist in another. The most basic quality of courts in which the public should have confidence is that they will administer justice according to law. As Brennan CJ said in *Nicholas v The Queen*[3]:

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2 (1996) 189 CLR 51.

3 (1998) 193 CLR 173 at 197 [37].

> "It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice."

7 Senior counsel for the appellant expressly disclaimed any suggestion that the retrospective operation of the law was relevant to his argument. He was right to do so. Retrospectivity is a slippery concept, especially in its application to laws affecting the sentencing and custodial regimes which apply to prisoners already serving sentences. Such regimes are almost always affected in various ways by legislative, judicial, and administrative decision-making. To take the most obvious example, conditions of incarceration alter from time to time with changes in executive policy. In New South Wales, the system of release on parole historically involved both judicial and administrative decisions, and the interaction of that system with administrative procedures concerning remission of sentence gave rise to the problems that were addressed by the *Sentencing Act* 1989 (NSW). The history of those problems, and an explanation of the legislative solution, may be seen in *R v Maclay*[4]. As the judgment in that case makes clear, and as should in any event be obvious, legislative and administrative changes to systems of parole and remissions usually affect people serving existing sentences. The longer the original sentence, the more likely it is that an offender will be affected by subsequent changes in penal policy. It is unnecessary to go into the history of legislation in New South Wales concerning sentencing in cases where imprisonment for life is fixed as the penalty, whether that be mandatory or the maximum. There have been a number of such changes in recent years. Some of the history before 1997 was set out by Hunt CJ at CL in *Kalajzich*[5]. An important practical matter was the administrative practice of release on licence, which was referred to in s 13A(9)(a). It was the knowledge by sentencing judges of that practice that gave rise to non-release recommendations of the kind referred to in s 13A(1), (3), and (3A). I expressed my concerns about such a recommendation in *Jamieson, Elliott and Blessington*[6]. Nevertheless, there were widely known cases in which judges made such recommendations. Other judges, without making non-release recommendations, made denunciatory remarks on sentencing, or pointed references to particular features of a case, which might have indicated a view that a sentence of life imprisonment should continue until death. It is to be remembered that prisoners who were released on licence continued to serve their sentences in the

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4 (1990) 19 NSWLR 112.

5 (1997) 94 A Crim R 41 at 47-49.

6 (1992) 60 A Crim R 68 at 80.

community. The licences were often subject to stringent conditions, breach of which could result in return to prison. Furthermore, release did not always mean release into the community; it might mean release into a psychiatric institution, sometimes without any realistic expectation of recovery. Statistical information about the average time spent in prison by persons sentenced to life imprisonment is of little assistance unless it is broken down in a manner that deals with the most heinous crimes. The expectations of the appellant at the time of his sentencing would have to be related, not to the "average" case, but to the worst cases and, in particular, to cases where non-release recommendations were made. In 1990, the *Crimes Act* 1900 (NSW) was amended by the introduction of s 19A, which provided that a person sentenced to penal servitude for life for the crime of murder was to serve that sentence for the term of the person's natural life. One offender sentenced under that provision was a man unrelated to the appellant but also named Baker. He had been convicted of the murders of six people and of wounding another with intent to murder[7]. Information about averages means little for cases of that kind.

8 When the 1997 amendments to s 13A, the subject of the present constitutional challenge, were made, there was a limited number of prisoners serving life sentences who had been the subject of non-release recommendations. Their identities, and the circumstances of their crimes, were widely known. The New South Wales Parliament decided that, in the scheme of s 13A, they should be treated as exceptional cases. It made special, and different, provision for them. As a matter of legislative power, the Parliament was entitled to do so. Senior counsel for the appellant acknowledged in the course of argument that, if Parliament had simply named the persons in question and excluded them from the operation of s 13A, then his *Kable* argument would not have arisen. It might be argued, as a matter of legislative policy, that it was unreasonable of Parliament to single out for special, and disadvantageous, treatment those prisoners who had been sentenced by judges who were willing to make non-release recommendations when others who had also committed heinous crimes might have escaped such recommendations because of the inclinations of a particular sentencing judge. As a matter of policy, I see the force of that argument, but its significance in terms of legislative power is another matter. Parliament may have taken the view that at least those people in the position of the appellant should be subject to a special regime, and if others whose crimes were just as serious were given the benefit of more favourable treatment then that would have to be accepted. It is evident from the parliamentary material referred to in argument that the view was taken that public opinion demanded some form of legislative recognition of the fact that, included amongst prisoners serving life sentences, there were people whose crimes were so extreme that sentencing

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7 *R v Baker* unreported, Court of Criminal Appeal of New South Wales, 20 September 1995.

judges had been moved to recommend that they should never be released. As a matter of legislative power, it was open to the New South Wales Parliament to enact legislation reflecting such opinion. The distinction drawn by the legislature was not arbitrary. If, for any reason, one wanted to identify prisoners who had committed the most heinous crimes, searching for those who had been the subject of a non-release recommendation would be at least a good start. In the view of some people, it would be unreasonable to stop there, and unfair to discriminate solely on that ground. Choices of that kind, however, are generally within legislative competence.

9 Persons who were the subject of a non-release recommendation had one thing in common: the legislature knew that the judges who sentenced them thought that their crimes were so serious that, in their cases, imprisonment for life should mean exactly that. There may have been other cases where sentencing judges held the same opinion, but did not express it. Even so, the fact that a particular judge expressed such an opinion is, as a matter of fact, indicative of the gravity of the conduct of an offender. It was within the power of the Parliament to select such an expression of opinion as an indication that the offending was of the most serious kind. The Parliament was entitled to create a special regime for the most serious offenders, and to select as the criterion for distinguishing the most serious offenders the making of a non-release recommendation. The selection was not arbitrary, and the criterion was not irrelevant. If it was unfair, its unfairness could have been thought to lie in the consequence that some other offenders of a most serious kind received more favourable treatment.

10 There is a further consideration that Parliament is entitled to take into account when legislating about crime and punishment. Parliament is not functioning in a hermetically sealed environment. The public are aware that there are some prisoners whose crimes have attracted judicial condemnation of the utmost severity, and that such condemnation, at least in the past, has sometimes taken the form of an expression of opinion that a particular prisoner should remain in custody for life. The complex legal and political issues that surrounded the 1989 "truth-in-sentencing" legislation in New South Wales resulted from a notorious difference between the appearance and the reality of some sentences. When Parliament decided to permit prisoners who had been sentenced for "life" to apply for determinate sentences, which to the public would almost certainly appear to be lower than their original sentences, it was foreseeable that it would want to address, and perhaps reserve for special treatment, the most extreme cases, however those cases were to be identified.

11 The weight of the appellant's *Kable* argument was put upon the requirement of "special reasons" in s 13A(3A). In the context of s 13A, that requirement was said to be devoid of content, and illusory. On that premise, in its application to people the subject of non-release recommendations, s 13A involved the Supreme Court in a charade. The legislature was using the forms of

judicial procedure to mask the reality of the legislative decree, which was that these people were never to be released. On that premise, as a matter of principle, the case would be very close to *Kable*. It is the premise that is in contest.

12 Both in form and in substance, sub-s (3A) was a qualification upon the power of the Supreme Court to make a determination of a minimum term and an additional term in the case of a person serving an existing life sentence. Before s 13A was first introduced, sentences of life imprisonment were indeterminate. Section 13A empowered the Supreme Court to re-determine existing life sentences, make a determination of a minimum term and an additional term, and open the way to the possibility of parole. The additional term could have been for the remainder of a person's natural life (s 13A(4)). In its application to persons other than persons the subject of a non-release recommendation, the section (in sub-s (9)) required the Supreme Court to have regard to the practice of release on licence earlier mentioned, to certain kinds of post-sentence report on the offender, to the need to preserve the safety of the community, to the offender's age, and to "any other relevant matter". In the case of a person the subject of a non-release recommendation, sub-s (3A) provided that such a person was not eligible for a determination absent "special reasons ... that justify making the determination". In addition, sub-s (10A) required the Supreme Court to have regard to and give substantial weight to any relevant recommendations, observations and comments made by the original sentencing court.

13 There is nothing unusual about legislation that requires courts to find "special reasons" or "special circumstances" as a condition of the exercise of a power[8]. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.

14 It is the duty of a court to give meaning to the requirement of "special reasons" in sub-s (3A) unless that is impossible. That elementary principle of statutory interpretation cannot be ignored. Section 31 of the *Interpretation Act* 1987 (NSW) provides that an Act shall be construed so as not to exceed legislative power. In *Residual Assco Group Ltd v Spalvins*[9], Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said:

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8 eg *United Mexican States v Cabal* (2001) 209 CLR 165.

9 (2000) 202 CLR 629 at 644 [28].

> "If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open. Courts in a federation should approach issues of statutory construction on the basis that it is a fundamental rule of construction that the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid."

As Bowen LJ said in *Curtis v Stovin*[10], "if it is possible, the words of a statute must be construed so as to give a sensible meaning to them".

15 It is inappropriate and impermissible to use speeches made in Parliament to seek to evade the statutory command in s 31 of the *Interpretation Act*, or fundamental principles of statutory interpretation. The use that can be made of such extrinsic material is governed by s 34 of the *Interpretation Act*. Where a dispute about the meaning of a statutory provision, such as that involved in the present case, arises the Court is not entitled to treat what was said by a member of Parliament in the course of political debate as some kind of evidence of legislative bad faith. The duty of the Court, reinforced by the *Interpretation Act*, in the light of which all New South Wales legislation is enacted, is to give meaning to the whole of s 13A unless it is impossible to do so.

16 The only issue of statutory interpretation that was raised in argument, and that arises for decision, is whether the expression "special reasons" is devoid of content, so that it is impossible for any case to satisfy the requirement. It is not to be overlooked that, now that the appellant is left only with his *Kable* argument, it suits his purposes to contend that he can never make out a case of "special reasons". That was not his primary argument in the Supreme Court, where his counsel was strongly contending that the requirements of sub-s (3A) could be, and were, satisfied. Furthermore, if Australia's obligations under international instruments are to be invoked as an aid to statutory interpretation, it is difficult to see the reasoning by which those obligations can support an interpretation of sub-s (3A) that deprives it of meaning and practical effect. If anything, those obligations should support, rather than oppose, a view that sub-s (3A) has a meaning. Senior counsel for the appellant did not invoke international norms or treaties in support of his argument that "special reasons" is an expression devoid of content. Had he done so, he would have been confronted with an obvious logical problem. On the other hand, if he were right on his construction point, and if sub-s (3A) were a meaningless charade, *Kable* would take him directly to his intended destination.

17 The structure of s 13A is to distinguish between ordinary cases for the application of the section and a special class of case, being the cases referred to

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10 (1889) 22 QBD 513 at 517.

in sub-ss (3)(b) and (3A). In the special cases, it is necessary for there to be "special reasons" to justify the making of a determination. By hypothesis, the occasion for a search for "special reasons" is that which makes the cases special, that is to say, the non-release recommendation. Bearing in mind sub-s (10A), the justification for making the determination must take account of the recommendation and the reasons that were given for it. In the ordinary case, the Supreme Court is directed by sub-s (9) to have regard to all relevant matters. Its attention is also directed specifically to certain matters. It would be absurd to construe "special reasons" in sub-s (3A) as excluding from consideration any matter covered by sub-s (9), because sub-s (9) covers all relevant matters. That would leave for consideration only irrelevant matters. The legislation does not require such a construction, and the principles of statutory interpretation referred to earlier argue strongly against it. Questions of weight and degree may arise. To take one specific example, sub-s (9) directs attention to the age of an offender at the time of the commission of the offence as a relevant matter in the ordinary case. In a particular case, the offender may have been a juvenile at the time of the offence. (This example, it should be added, is not purely hypothetical. One of the persons the subject of a non-release recommendation was 14 at the time of the offence.) It would be open to a judge to treat that as a special reason for the purposes of sub-s (3A). By reason of sub-s (9), age is always relevant, although in some cases its significance may be small. In a particular case, it may have a special significance. It would not necessarily be conclusive, but it would be open for consideration. To take another example, mentioned in the Court of Criminal Appeal, assistance given to the authorities in the detection of crime, sometimes involving extreme danger, could be a relevant matter in the ordinary case. There may also be particular circumstances in which, either alone or in combination with other factors, it could amount to a special reason in one of the special cases.

18 Examples of this kind cannot be dismissed as fanciful. We are not dealing with an argument that it is difficult to satisfy the requirements of sub-s (3A). We are dealing with an argument that it is impossible to satisfy the requirements because the statutory phrase "special reasons" is, in this context, devoid of content. We are dealing with a legal argument aimed at demonstrating invalidity, not a political argument aimed at demonstrating the desirability of legislative amendment.

19 The appellant's submission, that it will always be impossible to establish "special reasons" under sub-s (3A), was not simply a rhetorical overstatement of a complaint about unfairness. It was the basis for the contention that, in its application to persons the subject of non-release recommendations, the legislative scheme was a charade, and the Supreme Court's judicial process was being used merely to implement a legislative intention that such persons would never be released. In order to make that argument good, it is not sufficient to show that it is difficult to establish special reasons, or that successful applications are likely to be rare. It is necessary to show that it is impossible to establish special reasons, and that no application could succeed. That has not been shown.

20 The appeal should be dismissed.

21 McHUGH, GUMMOW, HAYNE AND HEYDON JJ. The sole ground in this appeal from the New South Wales Court of Criminal Appeal[11] is error by that Court in holding that the *Sentencing Legislation Further Amendment Act* 1997 (NSW) ("the 1997 Act") was valid and did not purport to vest in the Supreme Court functions incompatible with the exercise by the Supreme Court of the judicial power of the Commonwealth. The reference to incompatibility is to the reasoning in *Kable v Director of Public Prosecutions (NSW)*[12]. In that case, it was held that the *Community Protection Act* 1994 (NSW) was invalid on the ground that the exercise of the jurisdiction conferred by it upon the Supreme Court was incompatible with the integrity, independence and impartiality of the Supreme Court as a court in which federal jurisdiction also had been invested by laws made under s 77(iii) of the Constitution.

22 Subsequently, in *HA Bachrach Pty Ltd v Queensland*[13], in the course of upholding the validity of certain Queensland legislation and deciding that there was no incompatibility of the nature identified in *Kable*, the following was said in the joint judgment of five members of the Court[14]:

> "It will be apparent that the Queensland Supreme Court (including the Court of Appeal) is not a federal court created by the Parliament within the meaning of s 71 of the Constitution, and that the litigation pending in the Court of Appeal did not involve the exercise by it of federal jurisdiction invested pursuant to a law made by the Parliament under s 77(iii) of the Constitution. Hence the reliance by the plaintiff upon the decision with respect to the Supreme Court of New South Wales in *Kable v Director of Public Prosecutions (NSW)*.
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> However, *Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise. The submissions for the first and third defendants and for the interveners correctly proceeded on that footing."

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11 *Baker* (2002) 130 A Crim R 417.

12 (1996) 189 CLR 51.

13 (1998) 195 CLR 547.

14 (1998) 195 CLR 547 at 561-562 [13]-[14] (footnote omitted).

23 That this passage indicated the appropriate approach in the present appeal was accepted by counsel for the appellant and supported by the New South Wales Solicitor-General, who appeared for the respondent and for the Attorney-General for that State, and by counsel for the Attorney-General of the Commonwealth who appeared in support of the opposition to the appeal.

24 If the provisions of the 1997 Act under challenge had been laws of the Commonwealth, they would have complied with the principles found in Ch III of the Constitution for the exercise of federal jurisdiction by federal courts and by State courts invested pursuant to a law made under s 77(iii) of the Constitution. That being so, the appellant's attack on validity cannot succeed.

The facts

25 The appellant was born on 16 January 1948. On 20 June 1974, after an eight day trial before Taylor J and a jury, the appellant and his co-accused were convicted on four counts, the first two of which were murder and conspiracy to murder. On the first two counts they were sentenced to life imprisonment. The sentences on the other two counts were concurrent with the life sentences and have expired. The appellant has been in custody since 13 November 1973 when he was arrested.

26 In his remarks on sentence, Taylor J detailed the circumstances of the offence and added:

> "I believe that you should spend the rest of your lives in gaol and there you should die.
>
> If ever there was a case where life imprisonment should mean what it says – the imprisonment for the whole of your lives – this is it."

It has been accepted that, in making these remarks, Taylor J was recommending that the appellant and his co-accused never be released.

27 At the time of these events, s 19 of the *Crimes Act* 1900 (NSW) ("the Crimes Act") stated:

> "Whosoever commits the crime of murder shall be liable to penal servitude for life."

There was then no stipulation for minimum or "non-parole" terms. However, s 463 of the Crimes Act made provision for what the side note identified as "tickets-of-leave". In particular, sub-s (1) stated:

> "The Governor may grant to any offender a written license to be at large, within limits specified in the license, but not elsewhere, during the unexpired portion of his sentence, subject to such conditions indorsed on the license as the Governor shall prescribe, and while such offender continues to reside within the limits specified, and to perform the conditions so prescribed, his sentence shall be suspended."

Section 463 had replaced a similar provision in s 409 of the *Criminal Law Amendment Act* 1883 (NSW)[15]. The grant by the executive government of "tickets-of-leave" had an earlier history in New South Wales as an adjunct to the transportation system, dating from the days of Governor Phillip[16].

28 Under the system continued by s 463 of the Crimes Act, there was always the prospect of release on licence. In *Kalajzich*, Hunt CJ at CL described this as "a prospect which almost universally became fact"[17]. However, s 463 was repealed in 1989, as was s 19[18]. The *Sentencing Act* 1989 NSW ("the 1989 Act") introduced a detailed system for the making of parole orders[19] and has been amended from time to time.

29 Whilst s 463 remained in force, the judicial power to impose sentence upon a person convicted of murder was confined: the only sentence that could be passed was that the offender suffer penal servitude for life. Upon passing that sentence the judicial power was exhausted. Whether the offender served the sentence in prison or at large was a matter which then was to be decided by the Executive, not a court. If the Executive exercised the power given by s 463, the offender obtained a mercy. But in no sense (whether as a matter of substance or as a matter of form) can later legislation, altering the circumstances in which

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15 46 Vict No 17.

16 Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*, (2002) at 126, 165-167; "Ticket of Leave", in *The Australian Encyclopaedia*, (1965), vol 8 at 497-498.

17 (1997) 94 A Crim R 41 at 48.

18 By, respectively, the *Prisons (Serious Offenders Review Board) Amendment Act* 1989 (NSW), s 5 and the *Crimes (Life Sentences) Amendment Act* 1989 (NSW), Sched 1, Item 3.

19 See *Bugmy v The Queen* (1990) 169 CLR 525 at 530-531, 536-537.

such mercy could or would be extended to a prisoner sentenced to life imprisonment, make that sentence of life imprisonment more punitive or burdensome to liberty. Whether the power to reduce the effect of a life sentence is given to a court (as the legislation now in question did) or is retained by the Executive, the original sentence passed on the offender could not be and was not extended or made heavier.

30 With respect to the operation of the 1989 Act upon sentences existing at the time of its commencement, such as those of the appellant, the term "retrospective" was used in some of the submissions. Some care is required in such usage. The point is made as follows by McHugh and Gummow JJ in *The Commonwealth v SCI Operations Pty Ltd*[20]:

> "However, in *Coleman v Shell Co of Australia*[21], Jordan CJ pointed out that 'there has been some ambiguity in the use of the word "retrospective"'. His Honour went on to distinguish between a statute which provided that as at a past date the law shall be taken to have been that which it was not, and the creation by statute of further particular rights or liabilities with respect to past matters or transactions[22]."

The 1989 Act falls in that second category identified by Jordan CJ.

31 This litigation turns upon the alleged invalidity of amendments made by the 1997 Act to the 1989 Act[23]. Before that amendment, s 13A of the 1989 Act provided in sub-s (2):

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20 (1998) 192 CLR 285 at 309 [57]. See also *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 282 [25]-[27].

21 (1943) 45 SR (NSW) 27 at 30. See also *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194; *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 564, 578; *Robertson v City of Nunawading* [1973] VR 819 at 823-824; *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23 at 26-27; *Rodway v The Queen* (1990) 169 CLR 515 at 518-519; Pearce and Geddes, *Statutory Interpretation in Australia*, 4th ed (1996), par [10.4]; and cf *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 89.

22 *Coleman* (1943) 45 SR (NSW) 27 at 31.

23 The 1989 Act has since been repealed by the *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW), Sched 1, and replaced by the *Crimes (Sentencing Procedure) Act* 1999 (NSW). The latter statute in turn has been amended by the *Crimes Legislation Amendment (Existing Life Sentences) Act* 2001 (NSW).

> "A person serving an existing life sentence may apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence."

On such an application, the Supreme Court had the power conferred by sub-s (4). This stated:

> "The Supreme Court may, on application duly made for the determination of a minimum term and an additional term for a sentence:
>
> (a) set both:
>
> (i) a minimum term of imprisonment that the person must serve for the offence for which the sentence was originally imposed; and
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> (ii) an additional term during which the person may be released on parole (being either an additional term for a specified period or for the remainder of the person's natural life); or
>
> (b) decline to determine a minimum term and an additional term."

32 Section 13A was an illustration of legislation which performed a double function of creating new rights and conferring jurisdiction to administer a remedy[24]. These rights and that remedy were subsequent to, and independent of, the determination of the criminal guilt of the appellant and the imposing of the sentences by Taylor J. Undoubtedly the earlier steps had appertained exclusively to the exercise of judicial power.

33 The effect of an order under s 13A, setting for an existing life sentence both a minimum term of imprisonment and an additional term during which the prisoner might, by the exercise of statutory authority given a non-judicial body, be released on parole, is to alter or vary the order of the sentencing judge. Accordingly, the new jurisdiction conferred by s 13A may readily be seen as attracting the exercise of judicial power. On a "functional analysis" of the separation of powers, the new jurisdiction takes its character from the nature of

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24 *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64-65 [22]-[24].

the institution to which it is entrusted[25]. Whilst accepting this may be so in appropriate contexts, the appellant denies that here there is such a context.

34 Section 13A(3) imposed a requirement upon those serving existing life sentences of eligibility to make an application. It stated:

> "Any such person is not eligible to make an application unless the person has served at least 8 years of the sentence concerned."

That sub-section was omitted by the 1997 Act and a provision inserted, the validity of which is under challenge. Item 2 of Sched 1 to the 1997 Act stated:

> "Omit section 13A(3). Insert instead:
>
> (3) A person is not eligible to make such an application unless the person has served:
>
> (a) at least 8 years of the sentence concerned, *except where paragraph (b) applies, or*
>
> *(b) at least 20 years of the sentence concerned, if the person was the subject of a non-release recommendation.*
>
> *(3A) A person who is the subject of a non-release recommendation is not eligible for the determination of a minimum term and an additional term under this section, unless the Supreme Court, when considering the person's application under this section, is satisfied that special reasons exist that justify making the determination.*" (emphasis added)

The appellant contends that the emphasised passages are invalid. The effect would be that Item 2 of Sched 1 omitted the previous s 13A(3) but replaced it by a provision with the same operation. It is unnecessary to deal with the questions of severance which would be involved[26]. This is because the primary submission

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25 *R v Davison* (1954) 90 CLR 353 at 368-369; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15]; *Sue v Hill* (1999) 199 CLR 462 at 516-517 [134]-[135]; *Luton v Lessels* (2002) 210 CLR 333 at 373-374 [123]-[125].

26 Discussed, for example, by Dixon J in *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 and by Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ

(Footnote continues on next page)

respecting the invalidity of the emphasised passages in Item 2 should not be accepted.

35 Item 1 of Sched 1 (the validity of which is not challenged) inserted a definition of the expression "non-release recommendation" into sub-s (1) of s 13A. The definition read:

> "***non-release recommendation***, in relation to a person serving an existing life sentence, means a recommendation or observation, or an expression of opinion, by the original sentencing court that (or to the effect that) the person should never be released from imprisonment."

It is common ground that the remarks by the sentencing judge in this case answered the description of "non-release recommendation" thereby attracting the disqualification in the new s 13A(3A).

36 Before considering the submissions on the question of invalidity, it is convenient to say more of the course to date of the present litigation.

37 The 1997 Act came into force on the date of assent, 9 May 1997[27]. Thereafter, on 1 August 1997, the appellant applied to the Supreme Court pursuant to s 13A for an order determining the minimum term and an additional term for the life sentence imposed on him on 20 June 1974. The application came before a judge of the Court who dismissed the application on the footing that the appellant was not eligible to make it. Section 13A(12)(b) provides that an appeal lies to the Court of Criminal Appeal in relation to a decision to decline to make a determination of a minimum term and an additional term. The sub-section also provides that the *Criminal Appeal Act* 1912 (NSW) applies to such an appeal in the same way as it applies to an appeal against sentence. An appeal was taken to the Court of Criminal Appeal[28], apparently in reliance upon par (b) of s 13A(12), against the declaration of non-eligibility. The appeal was dismissed.

38 In the course of its reasons, the Court of Criminal Appeal gave examples of what might conceivably be regarded as "special reasons" within the meaning

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in *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 501-503.

27 s 2.

28 Ipp AJA, Dunford and Bergin JJ.

of s 13A(3A)[29]. The Court differed from the interpretation given that requirement by the primary judge. However, it concluded that none of the four reasons advanced for the appellant as constituting special reasons answered the statutory description. In the course of dealing with the question of statutory construction, the Court referred to authority indicating that the words "special reasons" appear in numerous statutory provisions and, as words of indeterminate reference, will always take their colour from their surroundings[30].

39 It is unnecessary and beyond the grant of special leave to appeal for this Court to embark upon an examination of the question whether the Court of Criminal Appeal erred in its consideration of the phrase and of its application to the particular facts of the case. This is because the submission by the appellant is that it is impossible to give any kind of practical content to the qualification for the entertainment by the Supreme Court of an application under s 13A.

40 Counsel for the appellant accepted that his argument depended upon the proposition that the qualification to s 13A(3A), requiring the Supreme Court to be satisfied that "special reasons" exist that justify making the determination, was a criterion devoid of meaning. Because the qualification was devoid of meaning, it followed, so the appellant's argument proceeded, that the Supreme Court would be engaged in "a charade" in seeking to identify the reasons said to be "special". All the matters that could constitute "special reasons" were matters that would necessarily be taken into account in the task of making a determination.

41 The premise for the appellant's argument is incorrect. The qualification to s 13A(3A) may be attended by difficult questions of construction. Whether or not that is so, it is a qualification to which meaning not only can, but must, be given in the context of the facts advanced in any particular case as warranting the description "special reasons". The fact that reasons identified as "special" may (indeed almost certainly would) be relevant to the exercise of the power of determination does not strip the expression "special reasons" of meaning.

42 It is important, as Gaudron J stressed in *Sue v Hill*[31], in construing such a broadly expressed conferral of authority that it is to be exercised by a court, not by an administrator. There are numerous authorities rejecting submissions that

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29 *Baker* (2002) 130 A Crim R 417 at 428.

30 *R v Simpson* (2001) 53 NSWLR 704 at 717.

31 (1999) 199 CLR 462 at 520-521 [148]-[149].

the conferral of powers and discretions for exercise by imprecisely expressed criteria do deny the character of judicial power and involve the exercise of authority by recourse to non-legal norms. A well-known example is the upholding in *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section*[32] of the conferral upon a federal court of a power of disallowance of rules of industrial organisations for imposing upon members conditions that were "oppressive, unreasonable or unjust". Subsequently, in *R v Joske; Ex parte Shop Distributive and Allied Employees' Association*[33], Mason and Murphy JJ observed:

> "[T]here are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised – nevertheless they have been accepted as involving the exercise of judicial power."

43 The appellant also challenged selection as the "trigger" to s 13A(3A) of the criterion that the applicant be the subject of a non-release recommendation. It was not entirely apparent whether this objection was independent of or an element in the primary complaint respecting the expression "special reasons". In any event, there is no substance in the point. Counsel for the Attorney-General of the Commonwealth correctly submitted that the selection of this "trigger" was but an instance of the proposition that, in general, a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence[34].

44 It may be observed that the appellant did not challenge that specification of eligibility concerned with the period for which the sentence has been served; the appellant met the criterion of 20 years. The objection appeared to fix upon the circumstance that those persons serving an existing life sentence where there had been no non-release recommendation would be treated under the legislation without the additional requirement of special reasons imposed upon persons such as the appellant. It was submitted by the appellant, in substance, that s 13A, as a result of the changes made by the 1997 Act, operated differentially between those serving existing life sentences and that the members of that class were

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32 (1960) 103 CLR 368.

33 (1976) 135 CLR 194 at 215-216. See also *Sue v Hill* (1999) 199 CLR 462 at 486 [45].

34 See, for example, *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [25], 187-188 [59]-[60], 200 [107], 232-233 [208], 280 [347].

subdivided by the criterion of non-release recommendation. In some respects, notably s 92 and s 117, the Constitution restrains the exercise of State legislative power by reference to notions of disability or discrimination. But it was not submitted that the present case falls within any of these categories.

45 Nor was an attempt made to imply a restriction upon State legislative power akin to the express provision proscribing denial of "the equal protection of the laws" found in s 1 of the Fourteenth Amendment to the United States Constitution. Such an attempt, at a federal level, respecting the powers of the Parliament, would have to overcome the reasoning of the majority in *Leeth v The Commonwealth*[35]. That reasoning gives no encouragement to the implication of a constitutional restriction upon State legislative power.

46 The appellant relied in this connection upon remarks made by the New South Wales Court of Criminal Appeal in *Jamieson, Elliott and Blessington*[36]. The Court there expressed the view that it had been inappropriate for the trial judge to recommend, as part of his remarks on sentence, that the appellants should never be released, especially where two of the offenders were young persons and there were so many different possibilities as to what might happen in the future. The Court pointed out that there appeared to be no statutory basis for making such a recommendation and none for appealing against it.

47 The present appellant fixes upon *Jamieson* as stating all that might be said upon the subject. However, the matter is more complex. There is a long history, both in England and Australia, of recommendations by trial judges to the Executive respecting the carrying out of mandatory sentences. In an age of draconian penal systems and before the establishment of courts of criminal appeal, these procedures to engage the attention of the Executive were "an indispensable element in the administration of criminal justice"[37]. The statements by the judges under this system recommended both for and against the exercise of clemency by the Executive[38]. Juries also might ask the trial judge to recommend a defendant for clemency[39]. The celebrated trial in the New South

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35 (1992) 174 CLR 455.

36 (1992) 60 A Crim R 68 at 80.

37 Radzinowicz, *A History of English Criminal Law*, (1948), vol 1 at 114. See also Langbein, *The Origins of Adversary Criminal Trial*, (2003) at 60-61, 324-325.

38 Radzinowicz, *A History of English Criminal Law*, (1948), vol 1 at 114.

39 Langbein, *The Origins of Adversary Criminal Trial*, (2003) at 324.

Wales Supreme Court of *R v Dean* includes a striking instance of this practice[40]. Indeed, it is possible that the trial judge might invite the jury to recommend mercy[41].

48 It is true that that exercise of judicial power identified in the expression "trial and conviction on indictment" ordinarily is exhausted by a finding of guilt or acceptance of a plea of guilty followed by sentence[42]. However, the practices described above would have been understood when the Constitution was adopted as encompassed in the requirement in s 80 of certain trials to be "by jury". To the extent that they might not otherwise involve the exercise of judicial power as generally understood, they nevertheless were properly to be supported as one of the historical instances identified in *R v Davison*[43].

49 It follows that there is nothing repugnant to the notion of judicial power in the taking of such a past recommendation as a legislative criterion for the operation of a subsequent regime such as that provided for the Supreme Court by s 13A.

50 Reference also was made in argument to what was said to be the small class of persons (apparently 10 in number) who, at the enactment of the 1997 Act, were serving existing life sentences in respect of whom there were non-release recommendations. It did not appear that any independent submission respecting invalidity was based upon that circumstance. In any event, what was said in *Nicholas v The Queen*[44] respecting *Liyanage v The Queen*[45] and the limited application of the federal law in question in *Nicholas* to identifiable cases would answer such a submission. In the circumstances of the present case, it could not be said that the appellant was the sole and direct "target" of the 1997

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40 Woods, *A History of Criminal Law in New South Wales*, (2002) at 410-411.

41 During the trial in *R v Adams*, Devlin J, at least, contemplated as a legitimate course "an invitation to the jury to recommend mercy if they thought it deserved": Devlin, *Easing the Passing: The Trial of Dr John Bodkin Adams*, (1985) at 125.

42 *Putland v The Queen* (2004) 78 ALJR 440 at 447 [32]; 204 ALR 455 at 464.

43 (1954) 90 CLR 353 at 369.

44 (1998) 193 CLR 173 at 191-193 [27]-[29], 203 [57], 211-212 [83]-[84], 238-239 [163]-[167], 276-279 [246]-[255].

45 [1967] 1 AC 259.

Act, so it is unnecessary to determine what would have been the consequences of such a conclusion.

51 The doctrine in *Kable* is expressed to be protective of the institutional integrity of the State courts as recipients and potential recipients of federal jurisdiction[46]. If the State law in question confers jurisdiction of a nature which would meet the more stringent requirements for the exercise by the Supreme Court of judicial power under investment by federal law, there is no occasion to enter upon the question of whether the less stringent requirements of *Kable* are met. Counsel for the Attorney-General of the Commonwealth encapsulated the point in his submissions that, if a law satisfied the stricter tests required with respect to the judicial power of the Commonwealth, then the Court did not have to go on to ask whether it satisfied the lesser hurdle presented by the reasoning in *Kable*.

52 The appeal should be dismissed.

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46 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 78 ALJR 977 at 985 [29]; 206 ALR 315 at 326.

53 KIRBY J. This appeal, from orders of the New South Wales Court of Criminal Appeal[47], involves another instance[48] of the invocation of the constitutional doctrine expressed in *Kable v Director of Public Prosecutions (NSW)*[49].

54 Although that doctrine has been referred to on numerous occasions before intermediate courts[50], so far it has only once been held applicable[51]. This might demonstrate scrupulous observance by State legislatures of the constitutional strictures in *Kable*. Or it might suggest an unduly narrow appreciation of the doctrine, in effect treating *Kable* as a constitutional guard-dog that would bark but once.

55 In this appeal, no party or intervener challenged the majority reasoning in *Kable*. Nor, for that matter, did the appellant seek to rely upon a second potential constitutional implication. This would defend an implied right to due process based upon suggested assumptions of equal treatment of persons before the Judicature referred to in the Constitution[52]. I can reach my conclusions without considering any such constitutional implications.

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47 *Baker* (2002) 130 A Crim R 417.

48 See *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; *Silbert v Director of Public Prosecutions (WA)* (2004) 78 ALJR 464; 205 ALR 43; *Silbert v Director of Public Prosecutions (WA)* (2002) 25 WAR 330; *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 78 ALJR 977; 206 ALR 315; *Fardon v Attorney-General (Q)* [2004] HCA 46.

49 (1996) 189 CLR 51.

50 *R v Moffatt* [1998] 2 VR 229; *Felman v Law Institute of Victoria* [1998] 4 VR 324; *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 122 FCR 204; *A-G (Qld) v Fardon* [2003] QCA 416; *Director of Public Prosecutions (Cth) v Tan* [2003] NSWSC 717; *R v England* [2004] SASC 254.

51 *Re Criminal Proceeds Confiscation Act 2002 (Q)* [2003] QCA 249 per Williams JA; White and Wilson JJ concurring.

52 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 606-614; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-489, 501-503, cf 466-469; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 95, 112-113; see Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341 at 350-354.

56 Whilst the majority in *Kable* explained the "extraordinary"[53] features of the New South Wales legislation there considered[54], their reasons do not suggest that the case endorsed an *ad hoc* determination, devoid of general application. By propounding a principle grounded in notions of "incompatibility" with the language and purposes of Ch III of the Constitution[55] (or, as it has elsewhere been expressed, "repugnance"[56] with Ch III), a principle of general operation was stated. On the face of things, a constitutional rule, so expressed, requires a court to look at the legislation impugned from the standpoint of substance, not mere form[57]. Being a constitutional doctrine, the rule in *Kable* requires the measurement of the challenged legislation as it could operate in fact; not a narrow approach befitting consideration of the validity of regulations made under a *Dog Act*.

57 To apply *Kable*, it is essential to have a theory about the operation of courts in the integrated Judicature of the Australian Commonwealth. In particular, as relevant to the present case, it is necessary to have a conception of the operation of a Supreme Court of a State, whose continued existence is expressly provided for in, and so guaranteed by, the Constitution[58].

The facts and applicable legislation

58 *Background facts and law*: Most of the facts necessary for my opinion are contained in the reasons of the other members of the Court[59]. Also stated there is a history of the legislation resulting in the insertion of s 13A in the *Sentencing*

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53 *Kable* (1996) 189 CLR 51 at 98.

54 *Kable* (1996) 189 CLR 51 at 62-63, 102-106, referring to the *Community Protection Act* 1994 (NSW), ss 3, 5.

55 *Grollo v Palmer* (1995) 184 CLR 348 at 365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

56 *Kable* (1996) 189 CLR 51 at 103-104 per Gaudron J; *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 158 FLR 81 at 88 [43] per Spigelman CJ.

57 See *Ha v State of New South Wales* (1997) 189 CLR 465 at 498.

58 Constitution, s 73. See also covering cl 5, s 106.

59 Reasons of McHugh, Gummow, Hayne and Heydon JJ ("joint reasons") at [25]-[38]; reasons of Callinan J at [146]-[151].

Act 1989 (NSW) ("the Act")[60] and the later further amendments to that section. The section instituted a separate category for a limited subclass of prisoners in New South Wales serving a sentence of life imprisonment[61]. I incorporate the foregoing details by reference. I wish only to add some facts drawn from the record of parliamentary debates called to our notice and derived from the Court record.

59 *The parliamentary debates*: Without objection, this Court was taken to the record of debates in the New South Wales Parliament by which the former regime of indeterminate life sentences for persons convicted of the crime of murder[62], with subsequent review within the executive government, was modified by statute[63]. Relevantly, it was changed to take into account a parliamentary purpose to "ensure truth in sentencing"[64].

60 Part of the speech of the then State Minister for Police[65], who introduced the 1997 Bill to enact the provisions challenged in this appeal, is reproduced in

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60 By the *Sentencing Legislation Further Amendment Act* 1997 (NSW), with effect from 9 May 1997.

61 By reference to the making by the sentencing judge of a "non-release recommendation", as defined. See joint reasons at [33]-[35]; reasons of Callinan J at [151]-[152].

62 *Crimes Act* 1900 (NSW), s 19 amended by the *Crimes (Amendment) Act* 1955 (NSW), s 5(b).

63 Section 19 of the *Crimes Act* 1900 (NSW) was further amended by the *Crimes (Homicide) Amendment Act* 1982 (NSW), s 3, Sched 1(1) and by the *Miscellaneous Acts (Community Welfare) Repeal and Amendment Act* 1987 (NSW), s 7, Sched 3. Section 19 was repealed by the *Crimes (Life Sentences) Amendment Act* 1989 (NSW), s 3, Sched 1(3) and a new s 19A inserted by s 3, Sched 1(4).

64 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 November 1989 at 14052: Mr J Dowd (Attorney-General) speaking to the introduction of the Crimes (Life Sentences) Amendment Bill 1989 (NSW) which introduced the new s 19A into the *Crimes Act* 1900 (NSW). See also the speech of Mr J Hannaford (Attorney-General), New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 9 November 1993 at 4948, cited by McInerney J in *Application of Kevin Garry Crump* unreported, Supreme Court of New South Wales, 24 April 1997 at 5-7.

65 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8337.

the reasons of Callinan J[66]. The extract, in which the appellant and nine other life prisoners are identified by name, and repeatedly described as "animals"[67], helps to make clear the parliamentary objective of the added provisions thereby inserted into s 13A.

61 Sufficient certainly appears to indicate that the objective which the Minister urged on Parliament was to keep the appellant and the other named prisoners locked up forever – just as, in society, wild animals are permanently confined. It is also clear[68] that the legislation was introduced in response to a then recent decision in the Supreme Court of New South Wales by which, under s 13A in its earlier form, a judge had "redetermined" the life sentence of the appellant's co-accused, Mr Kevin Crump[69]. By virtue of this redetermination, Mr Crump was to be eligible for release on parole on 13 November 2003. Read in its entirety, the Minister's speech leaves no doubt that the purpose of the Bill introducing the impugned provisions was to ensure that, in its application to the appellant and the other named prisoners, there would be no repetition of the possibility opened up by the order made in the case of Mr Crump.

62 It is not a reflection on the right of members of the New South Wales Parliament to speak in the chamber as they please[70] to draw attention to some of the further indications of the Minister and other members concerning the purpose of the legislation. So much has been done by virtually all of the judges who have had to consider these unusual statutory provisions. Doing so is compatible with legislation enacted by the New South Wales Parliament governing the ascertainment of the meaning and purpose of a statute of that Parliament.

63 This Court is entitled to take the Minister's Second Reading Speech at face value[71]. The speech contains numerous criticisms of the previous government which had enacted the legislation that, applied to Mr Crump, had resulted in a redetermination of his life sentence, presenting a possibility of his future release

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66 See reasons of Callinan J at [165].

67 The reference to "animals" is repeated elsewhere in the Minister's speech.

68 See passage cited by Callinan J at [165].

69 *Application of Kevin Garry Crump* unreported, Supreme Court of New South Wales, 24 April 1997 per McInerney J.

70 See *Egan v Willis* (1998) 195 CLR 424 at 493-494 [134] with reference to the *Bill of Rights* 1688, Art 9.

71 *Interpretation Act* 1987 (NSW), s 34(2)(f).

on parole. Addressing the 1997 provisions amending s 13A, the Minister could not have been clearer[72]:

> "I now turn to the amendments in the bill. They are designed to do five things. First, the bill tells judges that we, the Parliament and the community, do not expect these most serious offenders *ever to be released*."

64 Whilst the Minister goes on to explain the provisions of s 13A(3A) and the need for "special reasons" why the sentence should be "redetermined at all"[73], the ultimate objective of the impugned provisions is made plain from an earlier explanation that the Minister gave[74]:

> "The Kable experience has shown this Parliament the invalidity of individual-specific legislation. … And so the Government is proposing real change. Proposing legislation that is constitutionally sound is the Government's *primary objective so as not to give Crump and these nine other animals any hope for the future*. The public expects nothing less. It expects real change not insane responses that will not work. … This bill is effectively the toughest sentencing legislation ever introduced into this Parliament. It will provide the bleakest possible futures for these men – amongst the most dangerous in custody in this State."

65 The Opposition speaker who immediately followed the Minister quoted the Premier in the afternoon edition of a newspaper as saying, "The legislation now before the House will ensure Kevin Crump will never be released."[75] To guarantee this objective, the Opposition speaker proposed an amendment "to

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72 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8338 (emphasis added).

73 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8338.

74 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8337 (emphasis added).

75 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8339.

make it very clear … that Mr Crump will spend the rest of his days in gaol."[76] He continued[77]:

> "Problems existed in regard to life sentences being served by those who had been convicted and sentenced before truth in sentencing legislation was introduced. Some difficulties involving retrospectivity are still being unravelled. That is why this legislation is before the House. *No-one could possibly quibble with the proposition that … Baker and others of that extreme ilk should remain in gaol for the rest of their lives.*"

66 In the Legislative Council, the speech of the Attorney-General was free of most of the rhetoric just quoted. But the ensuing debate indicated the bidding contest in extreme punishments in which the members of Parliament had become involved. This feature of recent sentencing legislation has attracted commentary[78]. Subject to the Constitution, only the courts of this country stand as guardians of proportionality and the avoidance of serious excesses and departures from the international law of human rights to which Australia has subscribed. *Kable* was a case where this Court responded.

67 *The appellant's case*: In order to measure the assertions made about the appellant in Parliament against the established evidence, it is relevant to have regard, as well, to the findings of the primary judge[79] (G R James J).

68 Applying the amended terms of s 13A of the Act, without benefit of any argument suggesting the invalidity of the added provisions, his Honour felt obliged by its terms to reject the submission that "special reasons exist[ed] that justify making the determination [that the life sentence be replaced by a minimum term and additional term]."[80] The limited grant of special leave in the present appeal confines this Court to the *Kable* point. It excludes this Court from reconsidering, as such, the challenges relating to the primary determination that

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76 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8339-8340.

77 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8340 (emphasis added).

78 Gleeson, "Who Do Judges Think They Are?", (1998) 22 *Criminal Law Journal* 10 at 15; Morgan, "Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002", (2002) 26 *Criminal Law Journal* 293; Cowdery, *Getting Justice Wrong*, (2001) at 18-19.

79 *R v Baker* [2001] NSWSC 412.

80 The Act, s 13A(3A).

the appellant was ineligible for sentence redetermination for want of "special reasons" under the Act. However, it is pertinent to note the findings which the primary judge made about the appellant in order to evaluate the actual impact of the impugned provisions. Those findings appear in stark contrast to many of the statements made in Parliament about the appellant and the legislation designed to keep him in prison for the rest of his life.

69 The primary judge concluded that, in the case of the appellant, "the statistical risk of recidivism is very low and … the particular prospect of the [appellant's] achieving rehabilitation ... is very high"[81]. His Honour said that the "evidence as to rehabilitation prospects was ... very powerful"[82]. Indeed, he said that it "was not, to any real extent, challenged"[83]. He quoted evidence describing the appellant's conduct in prison as "absolutely exemplary, with no suggestion of any conduct as would pose a risk to the community."[84] He referred to corroborated evidence that the appellant had "tried as best he could to behave as a peacemaker in the prison system even when assaulted."[85] He noted the appellant's own acknowledgment that he would take time to adjust to being in the community after nearly three decades of incarceration[86]. He quoted expert medical evidence deposing that the appellant "has accepted his sentence uncomplainingly and has shown, for many years, a consistent attitude of remorse and insight."[87] This evidence, in the opinion of the primary judge, supported the view that the appellant "could go into the community without re-offending violently."[88]

70 A forensic psychologist was quoted by G R James J, with apparent approval, to the effect that the appellant's behaviour within the prison system was "exemplary", his work performance "excellent" and that he had achieved "a great deal"[89] by way of rehabilitation. The report of the Serious Offenders Review

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81 [2001] NSWSC 412 at [105].

82 [2001] NSWSC 412 at [108].

83 [2001] NSWSC 412 at [108].

84 [2001] NSWSC 412 at [109].

85 [2001] NSWSC 412 at [110].

86 [2001] NSWSC 412 at [110].

87 [2001] NSWSC 412 at [111].

88 [2001] NSWSC 412 at [111].

89 [2001] NSWSC 412 at [112].

Council, also quoted and apparently accepted, indicated that if the appellant's indeterminate sentence were redetermined, a progressive plan would be put in place to reduce his security classification in preparation for his eventual return to the community. The Council noted that "[the appellant] has endeavoured to use his time constructively and has demonstrated personal development throughout his period of incarceration."[90] The primary judge concluded that there was nothing in the material before him that had "any adverse effect on the application."[91]

71 In short, the appellant's crimes were committed when he was 25 years of age. At that time, he had a very poor criminal record and an alcohol problem. The crimes were terrible. However, the prison record spoke with a single voice. It did not support the conclusion that the appellant was now "dangerous" or a wild "animal". To the contrary, he had become a model worker and prisoner whom the judge concluded presented a "very low" risk of future dangerousness or recidivism and "very good" prospects of rehabilitation[92].

72 It is necessary to make reference to this uncontested evidence in order to measure the practical effect of the impugned provisions of s 13A of the Act and its constitutional validity viewed in this light. If the legislation is valid, it effectively closes the door to the release of the person so described. According to the parliamentary debates, it does so deliberately in the case of this appellant and nine other prisoners identified by name. The question is whether, viewing the legislation in terms of substance and not form, the function which the amended s 13A of the Act caused the primary judge and the Court of Criminal Appeal to perform is one that may validly be imposed upon judges of a State Supreme Court of this country.

73 If the issue is not presented in the foregoing way, there is a real danger that it will be answered by a disembodied analysis, devoid of the quality of constitutional principle deriving from Ch III of the Constitution. That is not the way that invocation of the incompatibility (or "repugnance") doctrine expressed in *Kable* should be decided.

The *Kable* principle

74 *The essence of the principle*: The decision in *Kable* does not yield a clear, single statement of principle. There are differences in the way the judges in the

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90 [2001] NSWSC 412 at [115].

91 [2001] NSWSC 412 at [117].

92 [2001] NSWSC 412 at [122].

majority express the implication of incompatibility (or repugnance) that led them severally to the conclusion that the *Community Protection Act* 1994 (NSW), in contest there, was constitutionally invalid.

75 Thus, in his reasons, Toohey J drew an analogy to the then recent decision of this Court in *Grollo v Palmer*[93]. That was a case in which the Court considered the limitations on the ability of the Federal Parliament to confer non-judicial powers upon federal judges acting in their personal capacity[94]. In *Kable*, Toohey J stated that no function could be conferred that was "incompatible … with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power."[95] He concluded that the principle applied to the Supreme Court of a State because the imposition of non-judicial functions of such a nature diminished public confidence in the integrity of the judiciary as an institution[96].

76 In her reasons, Gaudron J also derived from Ch III of the Constitution the duty of this Court to protect the "integrity of the judicial process" and the "integrity of the courts"[97]. Her Honour explained this obligation in terms of the maintenance of public confidence in the courts, a quality that would be lost if courts did not "act consistently ... [with] proceedings … conducted according to rules of general application."[98]

77 In his reasons, McHugh J held that a law which would compromise the "institutional impartiality" of a Supreme Court, and which "undermined the ordinary safeguards of the judicial process", was incompatible with the exercise by such a court of the federal judicial power[99]. His Honour also explained this consequence in terms of the danger, if State courts were not, or not seen to be, independent of State legislatures and executives[100], that they would lose the confidence of the "ordinary reasonable member of the public". It would

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93 (1995) 184 CLR 348. See *Kable* (1996) 189 CLR 51 at 96.

94 See also *Wilson* (1996) 189 CLR 1.

95 (1996) 189 CLR 51 at 96.

96 (1996) 189 CLR 51 at 98.

97 (1996) 189 CLR 51 at 104.

98 (1996) 189 CLR 51 at 107.

99 (1996) 189 CLR 51 at 121.

100 (1996) 189 CLR 51 at 116-117.

compromise the essential institutional impartiality of a Supreme Court if a law made it the "instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person."[101]

78 In his reasons, Gummow J said that laws that sapped both a Supreme Court's appearance of "institutional impartiality" and the maintenance of public confidence in the judiciary[102] would be incompatible with Ch III of the Constitution. Particularly would this be so where the judiciary was apt to be seen as "but an arm of the executive which implements the will of the legislature."[103]

79 *The fiction of public confidence*: Although a common element in the reasoning of the majority in *Kable* was the reference to the danger of losing public confidence in the integrated Judicature of Australia, I do not consider that this amounts to a separate, or sufficient, criterion for invalidating a State law[104]. A court is not well placed to estimate with precision the impact, if any, of particular legislation upon public opinion. At most, the reference to this consideration constitutes a legal fiction, constructed by judges in an attempt to explain and objectify their conclusions[105].

80 In this country, judges do not enjoy an "uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power."[106] Public responses to an impugned law mostly arise, if at all, well after the enactment. They cannot therefore be grounded in the text and structure of the Constitution that predate the law[107]. It follows that I do not regard the impact on public estimation of courts, if any, or of provisions such as those impugned in these

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101 (1996) 189 CLR 51 at 122; see also at 117-119.

102 (1996) 189 CLR 51 at 133.

103 (1996) 189 CLR 51 at 134.

104 See my reasons in *Fardon* [2004] HCA 46 at [144].

105 See *Silbert* (2004) 78 ALJR 464 at 468-469 [26] of my own reasons; 205 ALR 43 at 49-50.

106 *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37] per Brennan CJ. See also at 275-276 [242] per Hayne J and at 257 [201]-[203] of my own reasons.

107 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567.

proceedings, as a necessary test for invalidity under the *Kable* principle[108]. Such reactions, if they happen, are a response to the invalidating feature of the law, not the definition of that feature. Thus, the reference to "public confidence" in the reasoning of the majority in *Kable* is simply an explanation of a consequence over time, if a law were to be upheld imposing functions on a State Supreme Court incompatible with ("repugnant to") the exercise by such a court of federal jurisdiction[109]. Obviously, such outcomes are to be prevented, and avoided, if the Constitution permits that result.

81 *A principle of general operation*: Necessarily, the *Kable* principle so explained, and grounded as it must be in the text and structure of Ch III of the Constitution, tenders for decision a consideration that is somewhat "elusive"[110]. In relation to it, it is impossible to frame criteria that are "at once exclusive and exhaustive"[111]. About the compliance of a particular law with the requirements of Ch III, informed minds will sometimes differ[112]. Nevertheless, the history of invasions of the judicial power in other countries[113], and even of the more modest incursions attempted in Australia, justify an approach on the part of the judiciary that is vigilant to defend the integrity of the branch of government which the Constitution places in their charge[114].

82 The principle expounded in *Kable* was one of general operation, derived from the Constitution; from the integrated character of the Judicature, federal and State; from the peculiar arrangement for the vesting of federal jurisdiction in State courts; and from the role of this Court at the apex of the entire system[115].

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108 Handsley, "Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power", (1998) 20 *Sydney Law Review* 183 at 195.

109 See *Silbert* (2004) 78 ALJR 464 at 468-469 [26] of my own reasons; 205 ALR 43 at 49-50.

110 See *Nicholas* (1998) 193 CLR 173 at 256 [201] of my own reasons.

111 See *Nicholas* (1998) 193 CLR 173 at 256 [201] of my own reasons.

112 As they do in this case and in *Fardon* [2004] HCA 46 and as they did in *Kable* (1996) 189 CLR 51 and in *Nicholas* (1998) 193 CLR 173. See also the dissenting opinion of Wallwork J in the Western Australian Court of Criminal Appeal in *Silbert* (2002) 25 WAR 330, and of McMurdo P in *Fardon* [2003] QCA 416.

113 See *Fardon* [2004] HCA 46 at [188]-[189] of my own reasons.

114 *Nicholas* (1998) 193 CLR 173 at 257 [201].

115 *Kable* (1996) 189 CLR 51 at 111.

From these constitutional characteristics of the Australian Judicature, this Court derived the conclusion that a State Parliament may confer jurisdiction upon a State Supreme Court as it chooses, but only so far as that jurisdiction is not incompatible with the exercise of federal jurisdiction by such a court[116]. As I said in *Silbert v Director of Public Prosecutions (WA)*[117]:

> "*Kable* holds that Ch III of the Constitution limits the power of State Parliaments to confer non-judicial functions or non-judicial characteristics on State courts that are incompatible with, or repugnant to, the core requirements of such courts as potential recipients of federal jurisdiction, as provided for in the Constitution. The core requirements referred to include those of the manifest independence and impartiality of the judiciary in the discharge of their functions. This includes independence from legislative directions over individual judicial decisions and in the findings of fact and law that are necessary to them."

83 Initial commentators on *Kable* described the propounded principle as "far-reaching"[118]. For them, it represented a significant modification of the former doctrine that the Federal Parliament, when investing federal jurisdiction in State courts, was bound to accept those courts exactly as it found them[119]. After *Kable*, that earlier doctrine must be taken to be qualified. The implication that State courts, notably the Supreme Courts mentioned in the Constitution, must remain suitable receptacles for the vesting of federal jurisdiction imposes constraints not previously appreciated upon State legislation affecting the State jurisdiction of such courts.

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116 *Kable* (1996) 189 CLR 51 at 106.

117 (2004) 78 ALJR 464 at 468 [25] of my own reasons (footnotes omitted); 205 ALR 43 at 49.

118 Campbell, "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review* 397 at 408; Miller, "Criminal Cases in the High Court of Australia", (1997) 21 *Criminal Law Journal* 92 at 100; Walker, "Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?", (1997) 20 *University of NSW Law Journal* 257 at 271; Bagaric and Lakic, "Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after *Kable*", (1999) 23 *Criminal Law Journal* 145 at 158.

119 A point made by Brennan CJ and Dawson J in dissent in *Kable* (1996) 189 CLR 51 at 67, 83 referring to *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 61. See also *Kable* (1996) 189 CLR 51 at 109-110 per McHugh J.

84 Having propounded this implication of the Constitution, this Court should not now unduly narrow its operation. It exists, not for the protection of the judiciary, as such, but for the protection of all people in the Commonwealth. Upholding the constitutional implication expressed in *Kable* is at least as important for the defence of the independence and integrity of the judiciary in this country as giving effect to a hitherto undiscovered constitutional implication limiting the imposition of federal taxes on some State judicial pension rights[120]. In defining constitutional implications affecting the judiciary, and in giving them operation, this Court should be even-handed in its approach. Particularly is this so in a case where no one suggested that *Kable* was wrongly decided or in need of reconsideration.

85 *The test of federal lawmaking*: It is true[121] that since *Kable*, in *H A Bachrach Pty Ltd v Queensland*[122] it was suggested by this Court that the principle stated in *Kable* could be tested by asking whether an impugned State law, if it were a federal law, would have offended the principles applicable to federal courts created pursuant to Ch III of the Constitution[123]. This, indeed, may sometimes be a useful step in the path of reasoning about *Kable* submissions.

86 However, because the approach described in *Bachrach* involves an hypothesis prone to artificiality (given the subject matters normal to federal and State legislation respectively), care must be taken to avoid unnecessary dependence on such fictions[124]. The safer course is to measure the State legislation by reference to the *Kable* standard, and not to become unduly diverted by considering what would have been the case if the State law were something it was not. *Bachrach* was a simple case requiring differentiation between a statute affecting rights in issue in pending litigation and an invasion of the judicial power[125]. The question presented by the State legislation in the present case is more complex, as I shall show.

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120 See *Austin v The Commonwealth* (2003) 77 ALJR 491; 195 ALR 321.

121 cf joint reasons at [22].

122 (1998) 195 CLR 547.

123 (1998) 195 CLR 547 at 561-562 [13]-[14].

124 *Silbert* (2004) 78 ALJR 464 at 470 [32]-[33] of my own reasons; 205 ALR 43 at 51; *Fardon* [2004] HCA 46 at [144] of my own reasons.

125 (1998) 195 CLR 547 at 562-563 [17], citing *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250.

87 *Evaluating particular challenges*: It is a serious step for a court to hold that legislation enacted by an elected Parliament is constitutionally invalid[126]. The Constitution gives expression to principles of parliamentary democracy, both federally[127] and in the States[128]. Normally, a law enacted by such a Parliament will be upheld by the courts. It is not their province to invalidate laws simply because such laws are regarded as bad, unjust, ill-advised or offensive to notions of human rights[129]. It may also be accepted that the legislation in question in the present case was not confined to the case of a single identified person, as was the *Community Protection Act* under consideration in *Kable*[130]. The parliamentary debates show that the drafter and the legislators were very conscious of the problem presented to them by *Kable*. They therefore took pains to express the impugned provisions in terms of apparent generality.

88 It must also be accepted that the reference to "special reasons"[131] in the Act is not unknown to Australian legislation. Provisions exist[132] in other legislation, federal and State, providing for the exercise of judicial power by reference to that criterion. In several cases, judges have given content to the expression without facing any suggestion that it is devoid of meaning or incompatible with the judicial function[133].

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126 *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 347, 356; cf *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252]; *Fardon* [2004] HCA 46 at [139] of my own reasons.

127 Constitution, ss 1, 7, 24.

128 Constitution, s 107. See also ss 41, 106.

129 *Nicholas* (1998) 193 CLR 173 at 239 [167] per Gummow J, 272 [233], 275-276 [242] per Hayne J; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 415-416 [30]-[31]; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 768 [171]; 206 ALR 130 at 173; cf *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 401-405.

130 *Community Protection Act* 1994 (NSW), s 3(1) and (3).

131 The Act, s 13A(3A).

132 See, for example, *Extradition Act* 1988 (Cth), s 15(6).

133 *United Mexican States v Cabal* (2001) 209 CLR 165 at 185-186 [52]-[53]; cf *Wentworth v Rogers [No 12]* (1987) 9 NSWLR 400 at 411.

89 These and other considerations demonstrate that this appeal does not present an incontestable case. In this Court, it is often thus. It remains, however, for the Court to consider the legislation as a whole against the criterion of incompatibility ("repugnance") with Ch III of the Constitution. The fact that there are arguments on both sides simply demands of this Court a closer attention to the principle in *Kable* and to its application in the present circumstances.

Reasons for incompatibility and repugnance

90 *The parliamentary purpose*: Mine is a minority opinion. I will state as briefly as I can the reasons that lead me to the conclusion that the impugned provisions of the Act are incompatible with ("repugnant to") the *Kable* principle.

91 The parliamentary record from which I have quoted makes it quite clear that the purpose of the impugned provisions[134] was to tell "judges that we, the Parliament and the community, do not expect these most serious offenders ever to be released."[135] To the extent that this Court, performing the task mandated by *Kable*, is in any doubt concerning the intended operation of the impugned provisions, such doubt is removed, as a matter of substance, by the Minister's repeated statements to the State Parliament to the foregoing effect.

92 It is also reinforced by the statements made for the Opposition which demanded an even more "ironclad guarantee" against release of the named prisoners, including the appellant[136]. This, then, was the objective of Parliament and the setting and atmosphere in which the amending Act[137] was adopted.

93 The 1997 debates suggest that the introduction of provisions in the Act, expressed in terms of apparent generality, was aimed at nothing more than overcoming the dangers of invalidity disclosed by the "Kable experience"[138]. Reading these passages should create a heightened vigilance on the part of a court such as this, whose duty is to protect the integrity of the judicial power and, relevantly, to repel attempts to "dress up" as a judicial function the making of

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134 Introduced by the *Sentencing Legislation Further Amendment Act* 1997 (NSW).

135 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8338.

136 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8341.

137 *Sentencing Legislation Further Amendment Act* 1997 (NSW).

138 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8337.

orders which, in truth, are designed to implement the clearly stated parliamentary objective that the named "animals", including the appellant, never "see the exit sign at the prison gate."[139]

94 *Identified subjects of the law*: It is true that the impugned provisions are not confined to the appellant as an individual (as was the case of the legislation in question in *Kable*). Further, the law is ostensibly expressed in terms of a law of general application[140]. However, in its operation it is clearly confined to the nominated prisoners, including the appellant. They were ten in number. To this extent, the legislation is *ad hominem* in nature. It is to be distinguished from the legislation upheld by the majority of this Court in *Nicholas v The Queen*[141]. There, although enacted in the knowledge of known cases immediately affected (said to have been five in number), the impugned provision of the *Customs Act* 1901 (Cth)[142] was stated in terms of general application, not speaking to a limited class[143]. In this way, it was held in *Nicholas* that the law in question avoided the invalidation principle explained by the Privy Council in *Liyanage v The Queen*[144].

95 In the appellant's case, by way of contrast, there could never be any addition to the class of prisoners serving existing life sentences against whom there was a judicial "non-release recommendation" made at the time they were originally sentenced. The class was known. It was closed by the defined circumstances. To that extent the amending law addressed a small, identifiable category of individuals who represented the remainder of a larger group of persons serving life sentences in the sentencing of whom no similar judicial observation about non-release had been made.

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139 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8337.

140 See also *Fardon* [2004] HCA 46 at [176], which concerned a law similarly expressed.

141 (1998) 193 CLR 173.

142 Section 15X.

143 (1998) 193 CLR 173 at 191-193 [27]-[28] per Brennan CJ, 238-239 [163] per Gummow J, 279 [255] per Hayne J.

144 [1967] 1 AC 259 at 290. In *Liyanage*, like the present case, the legislation was addressed not to one individual (as in *Kable*) but to a small group of prisoners held in custody who had allegedly been involved in an attempted *coup d'état*.

96 The nomination of the prisoners by the Minister in his Second Reading Speech makes clear what the legislation reveals on proper analysis of its text. This was an attempt to involve the judiciary in the performance of punitive decisions effectively already determined by Parliament itself. As such, it would be impermissible if attempted in federal legislation in respect of a federal court. It is equally impermissible in the case of a State court for the reasons expressed in *Kable*[145].

97 *Retroactive punishment*: The will of the Parliament of New South Wales, enacted in 1997 in terms of the impugned provisions, undoubtedly has the effect of altering the punishment which the appellant and other affected prisoners were to suffer under the judicial sentence imposed upon them at the time of their initial convictions[146].

98 Of course, it is possible to argue to the contrary by reference to the fact that the impugned law did not alter the life sentences being served by prisoners such as the appellant, but merely attached consequences to the prospective redetermination of such sentences, a normal incident of changes to correctional and parole systems[147]. Or that the judicial function was spent by the imposition of the life sentence[148]. A law of general application may indeed apply to facts that occurred before the enactment of the law and yet be valid, causing no offence to the exercise of the judicial power[149]. However, such an analysis, in the present case, would address only the *form* of the legislation. Where issues of constitutional inconsistency ("repugnance") are at stake, the applicable standard is concerned with the *substance* of the impugned law's operation, not just its *form*.

99 Reading the language of the impugned provisions and especially alongside the record of the Parliamentary debates, there can be no doubt that their substantive purpose was to impose upon the appellant, and the other named prisoners, special, personal and additional punishment that would not otherwise have applied to them under their original sentence, burdening their potential liberty.

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145 See *Nicholas* (1998) 193 CLR 173 at 260-264 [202]-[208].

146 See reasons of Gleeson CJ at [7].

147 See reasons of Gleeson CJ at [7]-[8].

148 See joint reasons at [29].

149 *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 503-504; *Humby* (1973) 129 CLR 231 at 250; *Polyukhovich* (1991) 172 CLR 501 at 533; *Nicholas* (1998) 193 CLR 173 at 259 [201].

100 In this sense, the impugned law is in *substance* one that has, and was designed to have, serious retroactive effects on the appellant's entitlement to liberty. By superimposing that consequence upon the operation of the life sentence imposed by the judge upon the appellant at his trial, Parliament has intruded, with retroactive effect, upon the operation of a judicial sentence. Moreover, it has recruited the State judiciary to play a particular part in that outcome.

101 In these respects, the impugned law crosses the boundary between permissible and impermissible legislation of retrospective effect[150]. It involves a legislative "usurpation of judicial power"[151]. It is one thing for a Parliament, by legislation of retrospective operation, to reduce or ameliorate a judicial sentence for identified reasons. In terms of constitutional principle, it is quite a different thing for a Parliament, by a law of retroactive operation, to render a judicial sentence effectively more punitive and more burdensome to liberty than that imposed by a judge in accordance with the law at the time of sentence. Yet that is clearly what the 1997 amendments, targeting the appellant, were intended to achieve and, if valid, would achieve. Were this to become a general, or even common rule, it would render the judiciary the mere agents of the demands by members of Parliament to add new burdens to the punishment of the appellant and other "animals".

102 *Indeterminate life sentences*: This last point is reinforced when it is appreciated that, at the time the appellant received his life sentence, that sentence did not, in New South Wales, literally commit a prisoner such as the appellant to prison for the term of his natural life.

103 At that time, life imprisonment was the only penalty imposed in respect of the appellant's conviction of murder[152]. In a case such as the appellant's, the sentencing judge had no discretion to do otherwise. It follows that, by way of contrast with other sentences for a fixed term, with or without a specified non-parole period, the appellant's life sentence was an "indeterminate sentence". In accordance with the statutory scheme then applicable in New South Wales, the appellant, under that sentence, had a reasonable expectation, after the passage of a substantial interval and on the making of an appropriate application, that he would be considered for release by the body with the statutory function of deciding such applications.

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150 See *Nicholas* (1998) 193 CLR 173 at 259 [201].

151 *Polyukhovich* (1991) 172 CLR 501 at 706 per Gaudron J. See also at 703-705.

152 *Crimes Act* 1900 (NSW), s 19 as it then stood.

104 A supervening change in the law that, in substance, removed such a right to apply for an exercise of a real discretionary power (or that increased substantially the period that prisoners serving life sentences would first expect to serve in custody) constituted a fundamental variation in the nature of the sentence and punishment that was judicially imposed. Only the most formalistic approach to the sentence passed on the appellant would produce a contrary conclusion. One of the established functions which, by its nature or because of historical considerations, has become established as *essentially* and *exclusively* judicial in character is the judgment and punishment of criminal guilt[153]. That rule requires special vigilance when a later attempt is made by a legislature to alter the effect of the earlier judicial order to make a sentence, in effect, more punitive and burdensome to liberty.

105 Against this background, it is misleading to treat the appellant's sentence to "penal servitude for life"[154], imposed on him in 1974, at face value. In law and fact it was, at that time, an indeterminate sentence. Typically it involved (in most cases) actual incarceration for an extended, but finite, period of years. As Professor Freiberg and Mr Biles explained in their 1975 work *The Meaning of 'Life': A Study of Life Sentences in Australia*, the sentence of life imprisonment by 1974 was "a misnomer … [R]arely will a person actually be kept in custody for the rest of his or her life". The authors went on[155]: "While there are some prisoners who die in custody and others who are supposedly incarcerated for the term of their natural life … for most there is a possibility of release at some date."

106 In the foregoing analysis of life sentences (which substantially coincided with the sentencing of the appellant), it is disclosed that the then current average term of commuted and life sentence prisoners in custody in New South Wales, of the age of the appellant at the time of their sentence, was 14 years and four

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153 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ; *Nicholas* (1998) 193 CLR 173 at 186-187 [16]; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203-204 [116], 234 [211], 266 [301]; *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1103 [10], 1128-1129 [153], 1147-1148 [265]-[267]; 208 ALR 124 at 128, 163, 190; *Fardon* [2004] HCA 46 at [151]-[152]. See also joint reasons at [31].

154 *Crimes Act* 1900 (NSW), s 19 as it then stood.

155 Freiberg and Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia*, (1975) at 22 (footnotes omitted).

months[156]. However, the analysis also has relevance to the life sentences imposed in the worst cases[157]. In the four decades prior to the appellant's convictions, the longest term served by a New South Wales prisoner upon release was one of 30 years, six months[158]. This corresponds closely with the time that the appellant has now spent in incarceration. At the time of the analysis, of those still imprisoned in New South Wales who had then served more than the above average, only one had served 44 years. Eight had served 20-30 years, and the rest had served an average term of 16 years and three months[159].

107 These figures in relation to New South Wales prisoners bear comparison with the time served by life prisoners in overseas jurisdictions to that time. Of course, there are dangers in averages and international comparisons, given relevant sentencing factors, deaths of some life prisoners in custody, separate statutory provisions for the criminally insane and so on. However, the average time of incarceration served by life prisoners around the world when Freiberg and Biles' report was written was remarkably similar. It was about 15 years[160]. Although there were exceptions, in New South Wales they were comparatively few.

108 It follows that this was the penal system into which the sentencing judge sent the appellant by the sentencing orders he pronounced in his decision in 1974. At the time of that sentence, the judge would have known this perfectly well. The appellant would also have been able to discover it if he had enjoyed access to proper advice. Thus, the reality is that the impugned legislation of 1997 was designed retroactively to alter this consequence of the appellant's indeterminate sentence as judicially imposed. This Court may ignore that reality as it pleases. But it cannot change it. The impugned law was intended to recruit later judges of the State Supreme Court to increase the true custodial burden of the former judicial sentence according to a new formula of punishment, not fixed by the judge at the time of sentence, but altered by Parliament 23 years later with retroactive operation.

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156 Freiberg and Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia*, (1975) at 77 (Table 17).

157 cf reasons of Gleeson CJ at [7].

158 Freiberg and Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia*, (1975) at 54 (Table 10).

159 Freiberg and Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia*, (1975) at 91 (Table 18).

160 Freiberg and Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia*, (1975) at 94 (Table 19).

109 The imposition of punishment, or added punishment, by the operation of a new law having retroactive effect is not only contrary to our legal tradition and offensive to its basic principles[161]. It is also incompatible with the fundamental rules of universal human rights forbidding retroactive criminal punishment[162]. In the European treaty system this is one of the comparatively few stated rights that is non-derogable – so crucial is it regarded[163]. Before the European Convention came into operation in England, Lord Reid expressed the revulsion of the common law to the retrospective imposition of penal liability. In *Waddington v Miah*[164], his Lordship said:

> "[I]t is hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation."

However, the incredible sometimes happens – and, in effect, the provision to enlarge the judicial punishment of the appellant and of the small group of "animals" in his class, is an instance against which Lord Reid warned.

110 *Co-accused's redetermination*: The impugned provisions were also clearly enacted as an immediate response to the redetermination of the life sentence imposed on the appellant's co-accused, Mr Crump. That redetermination, which had applied to Mr Crump the then applicable law, prompted the introduction of the amendments, applicable to the appellant's case, against which he complains.

111 There was no appeal by State authorities against the judicial redetermination order in Mr Crump's case[165]. Although the ordinary principle of

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161 See *Fardon* [2004] HCA 46 at [180]-[185].

162 See International Covenant on Civil and Political Rights done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23, Art 15.1; European Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950, *European Treaty Series* No 5, Art 7.1; *R (on the application of Uttley) v Secretary of State for the Home Department* [2003] 1 WLR 2590; [2003] 4 All ER 891. See also *Welch v United Kingdom* (1995) 20 EHRR 247; *Ibbotson v United Kingdom* [1999] Crim LR 153 (European Court of Human Rights).

163 Lester and Pannick, *Human Rights Law and Practice*, 2nd ed (2004) at 255 [4.7.1].

164 [1974] 1 WLR 683 at 694; [1974] 2 All ER 377 at 379.

165 See *Baker* [2001] NSWSC 412 at [58].

parity in sentencing[166] is not available to assist the appellant in his constitutional challenge (and although a further statute was later introduced in an endeavour to prevent or impede Mr Crump's release on parole after November 2003)[167], the resulting disparity is a vivid illustration of what can occur when a legislature, in response to earlier judicial sentencing orders, enacts new laws designed to prevent the operation of a true law of general application governing criminal punishment. It is a further reason for heightened vigilance on the part of this Court to the attempt to involve State Supreme Court judges in the implementation of such *ad hominem* laws.

112 *An arbitrary and discriminatory criterion*: An additional indication of the invalidity of the impugned law can be seen in its seriously arbitrary and discriminatory character.

113 By its superimposition of criteria, relevant to the completion of the initial custodial part of the appellant's life sentence, dependent upon the making of a "non-release recommendation"[168], the New South Wales Parliament chose as a "trigger" for the new legislation an earlier judicial act that, at the time it occurred, had no normative legal operation. Given that Parliament had earlier fixed the applicable sentence for conviction of murder[169], it was not part of the sentencing judge's legal function to attempt to change or re-express that sentence. Under the law at the time of the sentence, the actual duration of custody was left to administrative bodies. They, and not the sentencing judge, were responsible in law for determining any later release to the community of a prisoner in the position of the appellant so that he would serve the remainder of his sentence in the community.

114 The administrative authorities might take a sentencing judge's "recommendation" into account in performing their functions. They might not. They were not bound in law to do so. Such bodies would have been aware of the differing temperaments and inclinations of judges to venture such "recommendations". They would also be aware that, in particular cases, to attach serious custodial consequences to such "recommendations" could work a serious injustice.

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166 *Lowe v The Queen* (1984) 154 CLR 606 at 610-612.

167 *Crimes (Administration of Sentences) Act* 1999 (NSW), s 154A.

168 The Act, ss 13A(1) and 13A(3A), inserted by *Sentencing Legislation Further Amendment Act* 1997 (NSW), s 3, Sched 1(1), 1(2).

169 Relevantly, by the *Crimes Act* 1900 (NSW) as it then stood.

115 Present judges, obliged by the impugned provisions to attach the gravest punitive consequences to "non-release recommendations" made 30 years earlier by some judges, would also be aware of the differences of personality, temperament and emotion that often lay behind such recommendations. They would know that identified judges occasionally became more emotional than others in passing sentence. Particularly where an offence is shocking and disturbing, this Court has said that it is usually desirable that judicial emotions be kept in firm check when disposing of criminal sentences[170]. Indeed, this principle was stated by the Court precisely because of the need to caution against emotive utterances. However, not all judges have conformed to such an approach.

116 For Parliament to select non-normative, non-binding and possibly emotional remarks in one judge's reasons for sentence as the ground, decades later, to control the judicial orders of contemporary judges is to impose on the latter obligations of arbitrary conduct by reference to a discriminatory criterion. The arbitrary and discriminatory nature of the chosen criterion is demonstrated, first, by the fact that, although persons such as the appellant are now excluded (barring such "special reasons") from the possibility of a redetermination of sentence, redeterminations of life sentences *have* been made, both before the 1997 amendment and afterwards, in crimes of comparable gravity (including crimes by triple murderers)[171], without any requirement for "special reasons" as specified in the Act. In the latter case, such redetermination was possible under the Act, not because the offences were less serious[172], but only because the case was not burdened by a contemporaneous judicial "non-release recommendation" of no apparent legal effect when it was uttered.

117 Secondly, the criterion is discriminatory because the later judges will be aware that some sentencing judges 20 or 30 years earlier would *never* have made such a "non-release recommendation". They would not have done so, although the facts of the case before them might be as bad as, or even worse than, those now attracting the statutory consequence in the case under consideration. When,

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170 *Ryan v The Queen* (2001) 206 CLR 267 at 302 [119], 306 [134].

171 *Constantinou* (1999) 108 A Crim R 73; see also *R v McCafferty* unreported, Supreme Court of New South Wales, 15 October 1991 per Wood J; *R v Rees* unreported, Supreme Court of New South Wales, 12 August 1993 per Smart J (affirmed by *R v Rees* unreported, New South Wales Court of Criminal Appeal, 22 September 1995 per Gleeson CJ, Grove and Simpson JJ).

172 In *Constantinou* (1999) 108 A Crim R 73, the prisoner had been convicted of three charges of murder, four of robbery with striking and wounding, and one of robbery with striking.

for example, Roden J passed sentence upon John Ernest Cribb in the Supreme Court of New South Wales, his Honour remarked characteristically[173]:

> "I regard it as no part of my function to seek to express the horror and revulsion that is felt in the community when offences of this nature are committed. My task is simply to impose sentence according to law."

The more reticent judges would also have been aware that, of its character, an indeterminate sentence, especially with young offenders, would result in the close examination of the prisoner's case from time to time and commonly in the prisoner's release to serve the balance of the life sentence in the community. Thus, in sentencing Shirley Conlon to penal servitude for life for murder in December 1978, Slattery J, in the Supreme Court of New South Wales, declined to make any recommendation about her future release. He did this on the stated ground that it would "be of little value", although he indicated that the type of crime of which the prisoner had been convicted was one for which "the community would expect the wrong-doer to be incarcerated for a long time, if not forever."[174] When, in 1992, that prisoner sought redetermination of her life sentence under s 13A of the Act, as then providing, her case came again before Slattery J, who was still in office. A minimum term of 15 years with an additional term of 12 years was fixed by his Honour, notwithstanding his earlier comment. In the "redetermination", based on the detailed evidence then available, Slattery J pointed out that there had been little, if any, need for psychiatric and psychological evidence concerning the prisoner at the time of the original sentence. This was so because of the mandatory punishment fixed by law.

118 A later judge, obliged to consider the appellant's application under the impugned provisions, would know that, in the nature of things, the appellant had no facility at his sentencing proceedings to challenge the "recommendation" made by the sentencing judge in his case. Thus, it would not then have been competent for the appellant to tender evidence in rebuttal of the judge's conclusion, even if exceptionally or intuitively he had been warned that some such recommendation was likely to be expressed. The appellant could not appeal against the "recommendation". The sentencing judge himself could not have predicted that, a quarter of a century later, the State Parliament would attach consequences of great seriousness for the liberty of the appellant that would cut across the sentence imposed on him in accordance with the sentencing law and judicial process applicable in 1974.

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173 *R v Cribb* unreported, Supreme Court of New South Wales, 22 May 1979 at 2.

174 *R v Conlon* unreported, Supreme Court of New South Wales, 8 December 1978 at 3.

119 In 1992, the making of such judicial "recommendations" was expressly disapproved by the Court of Criminal Appeal of New South Wales[175]. As that Court then pointed out, "especially where the offender is a young person, and there are so many different possibilities as to what might happen in the future, it is normally not appropriate for a sentencing judge to seek to anticipate decisions that might fall to be made by other persons, and in other proceedings, or under other legislation, over the ensuing decades."[176] Every one of those words applies to the remarks of the judge sentencing the present appellant. Contemporary judges of the Supreme Court of New South Wales know, and act upon, the 1992 instruction. Yet, in a case such as the present, by the impugned provisions of the Act, they are obliged to attach to the "recommendation" the most serious consequences for the appellant's liberty in order to fulfil the stated purpose of Parliament.

120 *Indeterminate sentence and change*: The observations of the Court of Criminal Appeal in 1992, designed to discourage such "non-release recommendations", did no more than to acknowledge the fact that individuals, especially if young when sentenced, sometimes change over time. They are not the same person years and decades later as they were when originally sentenced. According to the evidence in this case, accepted by the primary judge, the appellant is a completely different person from the person sentenced for terrible crimes in 1974.

121 This was one of the reasons that lay behind the system of indeterminate sentences in force at that time: to acknowledge and promote the potential for individual change and reform; to encourage good conduct whilst serving the mandatory life sentence under an arduous prison classification; and to hold out hope for the prisoner's future, consistent with notions of individual redemption and human dignity.

122 The indeterminate sentence imposed on the appellant was duly served by him for more than two decades before the impugned law was enacted. The change adopted in 1997 represents a thinly veiled attempt to recruit contemporary judges of the Supreme Court of New South Wales into giving effect to the imposition of a sentence decided by the legislature, different in effect from that applicable at the time of the offence, conviction and original sentence. It is true that a sliver of a judicial function appears to be maintained by reference to the existence of "special reasons". I will deal with that argument

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175 *Jamieson, Elliott and Blessington* (1992) 60 A Crim R 68 at 80 per Gleeson CJ (Hope AJA and Lee AJ concurring).

176 (1992) 60 A Crim R 68 at 80.

shortly. However, the *real* purpose of the State Parliament can be seen not only in the terms of the law challenged in these proceedings and parliamentary statements about it. It also appeared in legislation later enacted amending the *Crimes (Administration of Sentences) Act* 1999 (NSW)[177]. That law curtails release of a prisoner such as the appellant, even if he were able to secure a redetermination of an existing life sentence. In effect, it prevents release unless the prisoner is moribund and has demonstrated that he or she does not pose a risk to the community.

123 *"Special reasons" in context*: I have already acknowledged that the reservation to judges of a discretionary determination by reference to the existence of "special reasons" may sometimes constitute a permissible, even orthodox, exercise of judicial power. However, that is not the present case. It is a mistake, in the construction of legislation, before considering issues of constitutional validity[178], to take a phrase such as "special reasons" out of context and then to conclude that the phrase is conformable with the judicial function. It is necessary to read that phrase in the context in which it appears[179].

124 So read, the true character of the "special reasons" reserved to judges of the Supreme Court by the impugned law becomes plain. It appears to be a law of general application allowing exceptions to draconian provisions for a special case. Yet, when examined, this is not really so. Certainly, this is the way "special reasons" are interpreted, if the opinion of the primary judge in the appellant's case (confirmed by the Court of Criminal Appeal) constitutes any indication.

125 The history of the legislation (not to say the record of the parliamentary debates) confirms the legislative object to keep the named prisoners from *ever* being released. On the face of things, in this context, "special reasons" for the redetermination of a life sentence cannot include the fact that the sentence is a very long one; that a long interval in custody has already been served; or that the

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177 By s 154A of that Act, Parliament has given directions to the Parole Board limiting release on parole in the case of prisoners subject to a "non-release recommendation" to cases where the offender is in imminent danger of dying or is incapacitated so as no longer to be able to do harm to any person and has demonstrated that he or she does not pose a risk to the community. The constitutional validity of that section is not before this Court in the appeal.

178 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *R v Hughes* (2000) 202 CLR 535 at 565-566 [66].

179 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397, approving *R v Brown* [1996] AC 543 at 561 per Lord Hoffmann.

life prisoner has behaved properly and has good prospects of rehabilitation[180]. These are "ordinary" reasons for making a redetermination. There is nothing really "special" about them, in the sense of unusual, exceptional, out of the ordinary or not to be expected[181]. This was the view taken by the Court of Criminal Appeal in this case[182]. For the purposes of this appeal, that construction of the legislation should be accepted.

126 What is involved here is not, as has been suggested, legislative *mala fides*[183]. Far from it. What is involved is a pursuit of doubtless sincere views that are, in my respectful opinion, happily incapable of having effect under the Constitution. The stated opinions of the Minister are on the public record. They relate to the intended operation of the impugned provisions of the Act by the Government proposing the provisions. Such parliamentary speeches are frequently examined now to assist in the construction of legislation[184]. Courts began to do this under the common law before the facultative provisions to that effect were added to the interpretation statutes[185]. We should not turn a blind eye to such statements because, in this instance, they are inconvenient and tend to manifest constitutional invalidity in the legislative product.

127 The specific issue of a wider interpretation of "special reasons"[186] is not before this Court, having regard to the finding of the courts below and the limited grant of special leave. I would reserve any final view on that question to a case in which it is squarely raised by the grounds of appeal. We are here dealing with the appellant's case. Despite the large body of virtually uncontested evidence supporting him, no "special reasons" were found. Thus, the manner in which the Act is presently being administered confirms the complaint made in this Court of *Kable* invalidity.

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180 See the limitations on judicial discretion in *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 503-504 [69]-[72].

181 *Cabal* (2001) 209 CLR 165 at 185-186 [52]; *B v Gould* (1993) 67 A Crim R 297 at 300.

182 *Baker* (2002) 130 A Crim R 417 at 428 [53].

183 cf reasons of Gleeson CJ at [15].

184 See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 517-518 per Mason CJ, Wilson and Dawson JJ; *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 440 at 450 of my own reasons.

185 See *Interpretation Act* 1987 (NSW), s 34(2)(f).

186 See reasons of Gleeson CJ at [16]-[17]; reasons of Callinan J at [175]-[176].

128 There are, in any case, a number of features in the surrounding provisions that appear to lend support to the construction of the Act adopted by the courts below. The references in s 13A(9) to the availability of early release under the former law, to prospects of rehabilitation, to safety of the community and to the age of the person at the relevant times and in s 13A(10A) to the reasons for the original sentence, all suggest that such considerations are not to be treated as "special". Likewise, the introduction of highly restrictive instructions to the Parole Board, even if the prisoner were miraculously to secure redetermination under s 13A, confirms (together with the increase in the prescribed minimum time for application[187]) that "special reasons" in this statutory context are, and are intended to involve, something far beyond the normal considerations ordinarily taken into account in relation to release decisions affecting life prisoners.

129 In this statutory context, it is therefore unsurprising that the primary judge could not envisage what future "special reasons" might exist[188]. I take this to be so because of the difficulty, in the given context, of imagining what such "special reasons" could possibly be. The Court of Criminal Appeal suggested, as now do other members of this Court[189], that meritorious service to prison authorities or to other prisoners or to the broader community might be regarded as "special"[190]. However, these are likewise so arbitrary and discriminatory, depending as they do on chance possibilities ordinarily out of the prisoner's own control, that they simply confirm that the apparent ray of hope for a real judicial function that was apparently left by Parliament was merely included to overcome what the Minister had described as "the Kable experience"[191]. They are not there to provide any true judicial role, apt to the circumstances serious for individual liberty with which the judge was confronted on a "redetermination" application.

130 In effect, such an "exception" was therefore included to permit the conscription of judges of the New South Wales Supreme Court into a charade pretending to the availability of discretion for fantastic possibilities of heroic

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187 *Crimes Legislation Amendment (Existing Life Sentences) Act* 2001 (NSW), s 3, Sched 1 cl 2 amending cl 2(2)(b) of Sched 1 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). This provision is to be read together with that purporting to permit a court to direct that a person may "never re-apply to the Court" or "not re-apply for a period exceeding 3 years". See the Act, ss 13A(8A), 13A(8C).

188 [2001] NSWSC 412 at [124].

189 See reasons of Gleeson CJ at [17]; reasons of Callinan J at [176].

190 (2002) 130 A Crim R 417 at 428 [55].

191 See above at [64].

prison rescues or intramural community service when in truth it was intended to ensure that the judges could never, in law or fact, order the eligibility for release of any of the named offenders.

131 I agree with the appellant's submission that to construct a judicial role of such minuscule proportions, operating by reference to irrational and discriminatory considerations, triggered by an arbitrary criterion such as the making (by some judges only) of a "non-release recommendation" decades earlier, imposes on the State judiciary a function incompatible with ("repugnant to") that implied by the Constitution as belonging to State courts that may be vested with federal jurisdiction.

132 It is true that a court must strive to interpret an Act of the State Parliament as conforming to legislative power[192]. However, for the reasons that I have explained, the recruitment of Supreme Court judges to take part in a system designed to have no real content and only to be applicable, as found, to instances of superhuman courage or saintly virtue does not save the validity of the impugned law. Nor can any State interpretation statute produce a contrary conclusion.

133 *International human rights law*: In considering the functions that may be imposed on Australian judges, conformably with Ch III of the Constitution, regard may also be had, in my view, to international law, particularly as such law expresses universal principles of human rights and human dignity[193].

134 Unless incorporated by domestic law, such international norms do not, as such, bind Australian courts[194]. Nevertheless, they are part of the contemporary context in which the Constitution, as a living body of law, falls to be construed by this Court. The Supreme Court of the United States of America, long resistant to the consideration of international law in the interpretation of the national constitution, has increasingly in recent times turned to derive assistance for this task from "the values shared with a wider civilisation"[195]. Those values too are

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192 *Interpretation Act* 1987 (NSW), s 31. See reasons of Gleeson CJ at [14].

193 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-658; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167]; *Austin* (2003) 77 ALJR 491 at 543-544 [257]; 195 ALR 321 at 392; *Al-Kateb* (2004) 78 ALJR 1099 at 1128-1131 [152]-[166]; 208 ALR 124 at 163-166.

194 *Re Kavanagh's Application* (2003) 78 ALJR 305 at 309 [22]-[23]; 204 ALR 1 at 6-7; *B* (2004) 78 ALJR 737 at 768 [171]; 206 ALR 130 at 173.

195 *Lawrence v Texas* 539 US 558 at 576 (2003) per Kennedy J (for the Court). See also *Atkins v Virginia* 536 US 304 at 316-317, fn 21 (2002) per Stevens J, with

(Footnote continues on next page)

not binding. But they are a helpful contextual consideration for the performance of this Court's constitutional functions[196]. Including in Australia.

135 The provisions of the impugned law, read against the background of the parliamentary purpose and in the context of cognate changes introduced to give effect to that purpose, offend the international law of human rights and fundamental freedoms. The most obvious offence appears in the case, not of the present appellant, but of another of the ten prisoners named by the Minister in his Second Reading Speech. I refer to Mr Blessington.

136 At the time of the offence for which Mr Blessington was convicted and sentenced, he was 14 years of age. He is now subject to the same legislation as that challenged in the appellant's case. He applied for leave from this Court to be heard as an intervener in the appellant's appeal, because of the direct relevance of the decision in the appellant's case to his legal entitlements which were pending. By majority, this Court refused that leave. As I indicated at the time of that refusal, I would have granted Mr Blessington the right to be heard. Principle, and an effective lifetime of actual incarceration, warranted our consideration of counsel's supplementary submission estimated to take less than an hour[197]. That submission bore on the extreme nature of the legislation under consideration in this case. It brought the appellant's arguments into even starker relief.

137 The application of the impugned provisions to Mr Blessington's sentence would appear to bring Australia into clear breach of the Convention on the Rights of the Child[198]. By Art 37 of that Convention, to which Australia is a party, it is provided, relevantly, that:

> "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age".

On a true construction of the impugned law, Mr Blessington's "possibility of release" is, in my view, a chimera, and deliberately so. If that is the case, the

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whom O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ joined. See *Al-Kateb* (2004) 78 ALJR 1099 at 1135 [188]; 208 ALR 124 at 172.

196 See Koh, "International Law as Part of Our Law", (2004) 98 *American Journal of International Law* 43.

197 cf *Levy v Victoria* (1997) 189 CLR 579 at 650-652; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 134-137 [102]-[109].

198 Done at New York on 20 November 1989, [1991] *Australian Treaty Series* No 4.

impugned law is in conflict with binding international obligations expressing universal human rights and fundamental freedoms.

138 Whilst the case of the appellant, Mr Baker, measured against international law, is not so clear, there do appear to be serious departures, in respect of the impugned law, from obligations accepted by Australia under the International Covenant on Civil and Political Rights ("ICCPR")[199].

139 In particular, it would appear that Arts 6.1, 7, 9.1, 14.1 and 15.1 may be engaged by the appellant's case. The last-mentioned article includes the obligation that no heavier penalty be imposed on a person held guilty of a criminal offence "than the one that was applicable at the time when the criminal offence was committed." It also provides that "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby." The course of the legislative history governing life sentences in New South Wales, described above, appears to have deprived the appellant of rights stated in this article of the ICCPR.

140 Australian courts regularly construe ordinary statutes, so far as possible, to ensure that they do not operate in breach of international law[200], or, as it used to be put, "the comity of nations"[201]. There is no reason why this Court should construe the Australian Constitution, a special statute, in a different, more restrictive and more parochial way[202]. On the contrary, because the ultimate source of the binding power of the Australian Constitution lies in the sovereign will of the people of Australia, it should be accepted that their Constitution will be construed in the same way as ordinary statutes are. No other approach would reflect that sovereign will. No other approach is compatible with the operation of

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199 Done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23.

200 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29]-[31] per Gleeson CJ. See also *Chu Kheng Lim* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Coco v The Queen* (1994) 179 CLR 427 at 437.

201 See O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; Mason, "The tension between legislative supremacy and judicial review", (2003) 77 *Australian Law Journal* 803 at 808-809.

202 *Al-Kateb* (2004) 78 ALJR 1099 at 1131-1136 [169]-[191]; 208 ALR 124 at 167-173.

national constitutions[203], or with the jurisprudence of other final courts[204], in the contemporary world.

141 *Conclusions: Kable applies*: To the extent that there are (as I would concede) certain ambiguities and uncertainties in the ambit of the *Kable* principle, as so far elucidated, this Court should apply the principle in a way that avoids needless disharmony with the universal obligations of international law[205]. In particular, it is offensive to those obligations to require State judges to go through the paces enacted by the impugned provisions when the clear purpose, and the manifest effect, of such provisions was to involve the judges in a function without real content for the liberty of a prisoner except to give effect to a law that deliberately prevents the named persons from having any real chance of redetermination of their life sentences as the Act pretends to provide them.

142 Insofar as they are applicable, I incorporate into these reasons, without repeating them, other reasons and arguments expressed by me in *Fardon v Attorney-General (Q)*[206], where some analogous issues arise. The two State enactments challenged in the present case and in *Fardon* are extreme examples of invasions of the real functions secured to the State judiciary by the Australian Constitution as stated in the decision in *Kable*. The fact that in neither instance does this Court find the principle in *Kable* applicable shows that that decision is a dead letter. At least it is so until a future time perceives its importance for the protection of fundamental rights in this country.

Conclusions and orders

143 The appellant has made good his challenge to ss 13A(3)(b) and 13A(3A) of the Act, by the operation of the constitutional principle expressed by this

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203 *Al-Kateb* (2004) 78 ALJR 1099 at 1134-1136 [184]-[190]; 208 ALR 124 at 170-173.

204 Van Ert, *Using International Law in Canadian Courts*, (2002); *Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 348-349; *Suresh v Canada* [2002] 1 SCR 3 at 38 [60]; *S v Makwanyane* 1995 (3) SA 391 at 412-415 [33]-[39] per Chaskalson P; *S v Williams* 1995 (3) SA 632; *Azanian Peoples Organisation v President, Republic of South Africa* 1996 (4) SA 671 at 688 [26]. See also Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", (1982) 4 *Supreme Court Law Review* 287.

205 See the reference of Gleeson CJ to international and regional human rights law in *North Australian Aboriginal Legal Aid Service* (2004) 78 ALJR 977 at 979 [3]; 206 ALR 315 at 317-318.

206 [2004] HCA 46.

Court in *Kable*. I agree with the appellant's submission that, notwithstanding the provisions of the *Interpretation Act* 1987 (NSW)[207], this Court should not leave in place portion of the offending law as amended, when it cannot be confident that such portion would have been enacted had the New South Wales Parliament appreciated the invalidity of the change that it attempted in 1997.

144 It follows that the appeal should be allowed. The judgment and orders of the Court of Criminal Appeal of New South Wales should be set aside. In their place it should be declared that ss 13A(3)(b) and 13A(3A) of the *Sentencing Act* 1989 (NSW), as in force on 1 August 1997, were invalid. It should be ordered that the appeal from the judgment and orders of G R James J to the Court of Criminal Appeal be upheld. The declaration made by his Honour should be set aside. The appellant's application should be remitted to the Supreme Court of New South Wales for determination according to law.

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207 Section 31(2).

145 CALLINAN J. The issue which this appeal raises is whether a New South Wales enactment which takes as criteria for its application, the prior making of a recommendation of a judge that a person sentenced to life imprisonment serve that sentence in full, in circumstances in which not all judges customarily made a recommendation of that kind, and the demonstration of special reasons for an earlier release, requires judges, impermissibly, to exercise non-judicial power.

Facts

146 In late 1973 the appellant was charged, together with another person, with murder, conspiracy to murder, and two counts of malicious wounding of a police officer with intent to prevent lawful apprehension. The circumstances of the crimes were horrendous. The appellant worked on a farm near Collarenebri, New South Wales, on which Mrs Morse lived with her husband and their three children. He had come to know the children and had been the beneficiary of kindnesses by Mrs Morse. After he had left the farm he and a man named Crump began surveillance of it to await an occasion when Mr Morse was absent from it. When that occasion arose they stole his car and other property, assaulted, bound, blindfolded and gagged Mrs Morse, abducted and twice raped her, self-evidently keeping her in a state of terror, and then murdered her. The appellant was convicted of all of the offences and on 20 June 1974 was sentenced to life imprisonment on his conviction for murder (a victim other than Mrs Morse) and conspiracy to murder Mrs Morse, and to 15 years hard labour for the other offences. The charges were laid and determined in New South Wales, where the conspiracy to murder Mrs Morse was made, and not in Queensland, where her murder was committed.

147 At the time of the convictions, life imprisonment was the mandatory sentence for murder and the maximum sentence for conspiracy to murder. In sentencing the appellant and his co-offender, the trial judge Taylor J said:

> "I believe you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says ... this is it."

148 There is no doubt that his Honour's statement amounts to a "non-release recommendation" within the statutory definition contained in s 13A(1) of the relevant enactment which I will set out later.

149 The appellant remains in custody where he has been held for the last 30 years. He has served the whole of the sentences imposed in relation to the wounding of a police officer and continues to serve the sentences of life imprisonment.

150 On 1 August 1997 the appellant applied, pursuant to s 13A of the *Sentencing Act* 1989 (NSW) ("the Sentencing Act"), to the Supreme Court of

New South Wales for an order determining a minimum term, and an additional term for the life sentences imposed upon him.

151 The Sentencing Act was repealed by the *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW) which came into force on 3 April 2000. It was common ground, however, that the appellant's application should be dealt with under s 13A of the repealed Act which was as follows:

> "(1) In this section:
>
> ***existing life sentence*** means a sentence of imprisonment for life imposed before or after the commencement of this section, but does not include a sentence for the term of a person's natural life under section 19A of the *Crimes Act* 1900 or section 33A of the *Drug Misuse and Trafficking Act* 1985.
>
> ***non-release recommendation***, in relation to a person serving an existing life sentence, means a recommendation or observation, or an expression of opinion, by the original sentencing court that (or to the effect that) the person should never be released from imprisonment.
>
> (2) A person serving an existing life sentence may apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence.
>
> (3) A person is not eligible to make such an application unless the person has served:
>
> (a) at least 8 years of the sentence concerned, except where paragraph (b) applies, or
>
> (b) at least 20 years of the sentence concerned, if the person was the subject of a non-release recommendation.
>
> (3A) A person who is the subject of a non-release recommendation is not eligible for the determination of a minimum term and an additional term under this section, unless the Supreme Court, when considering the person's application under this section, is satisfied that special reasons exist that justify making the determination.
>
> (4) The Supreme Court may, on application duly made for the determination of a minimum term and an additional term for a sentence:
>
> (a) set both:

(i) a minimum term of imprisonment that the person must serve for the offence for which the sentence was originally imposed, and

(ii) an additional term during which the person may be released on parole (being either an additional term for a specified period or for the remainder of the person's natural life), or

(b) decline to determine a minimum term and an additional term.

(4A) In considering such an application, the Supreme Court is to have regard to all the circumstances surrounding the offence for which the life sentence was imposed, and all offences, wherever committed, of which the person has been convicted at any time (so far as this information is reasonably available to the Supreme Court).

(5) A minimum term set under this section is to commence on the date on which the original sentence commenced or, if the person was remanded in custody for the offence, the date on which the first such remand commenced.

(6) If the Supreme Court sets a minimum term and an additional term under this section, the sentence comprising those terms replaces the original sentence of imprisonment for life.

(7) A minimum term and an additional term set under this section are to be taken to have been set under this Part but are not required to comply with the other provisions of this Part.

(8) If the Supreme Court declines to determine a minimum term and an additional term, the Court may (when making that decision) direct that the person who made the application:

(a) never re-apply to the Court under this section, or

(b) not re-apply to the Court under this section for a specified period.

(8A) If the Court gives a direction under subsection (8) that a person may never re-apply to the Court under this section, the person is to serve the existing life sentence for the term of the person's natural life.

(8B) If the Court does not give a direction under subsection (8), the person may not re-apply within the period of 3 years from the date

of the Court's decision to decline to determine a minimum term and an additional term.

(8C) A direction under subsection (8) that a person may never re-apply to the Court under this section or not re-apply for a period exceeding 3 years may be given only if:

(a) the person was sentenced for the crime of murder, and

(b) it is a most serious case of murder and it is in the public interest that the determination be made.

(9) The Supreme Court, in exercising its functions under this section, is to have regard to:

(a) the knowledge of the original sentencing court that a person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the *Crimes Act* 1900 and of the practice relating to the issue of such licences, and

(b) any report on the person made by the Review Council and any other relevant reports prepared after sentence (including, for example, reports on the person's rehabilitation), being in either case reports made available to the Supreme Court, and

(c) the need to preserve the safety of the community, and

(d) the age of the person (at the time the person committed the offence and also at the time the Supreme Court deals with the application),

and may have regard to any other relevant matter.

(10) The regulations may make provision for or with respect to reports referred to in subsection (9), including provisions relating to the matters to be dealt with in reports and the making of reports available to the Supreme Court.

(10A) The Supreme Court, in exercising its functions under this section:

(a) must have regard to and give substantial weight to any relevant recommendations, observations and comments made by the original sentencing court when imposing the sentence concerned, and

(b) must give consideration to adopting or giving effect to their substance and the intention of the original sentencing court when making them, and

(c) must, to the extent that it declines to adopt or give effect to those matters, state its reasons for doing so.

(11) The Supreme Court may make a determination for a minimum term and an additional term for a sentence even though the Court was not the sentencing court, or the Court is not constituted in the same way as it was when the applicant was sentenced.

(12) An appeal lies to the Court of Criminal Appeal in relation to:

(a) the determination of a minimum term and an additional term under this section, or

(b) a decision to decline to make such a determination, or

(c) a direction that a person may never re-apply for such a determination or not re-apply for a period exceeding 3 years.

The *Criminal Appeal Act* 1912 applies to such an appeal in the same way as it applies to an appeal against a sentence.

(13) The reference in subsection (4A) to an offence of which a person has been convicted:

(a) includes:

(i) a finding that an offence has been proved without proceeding to a conviction against the person, or

(ii) any offence taken into account when sentence was passed against the person, but

(b) does not include:

(i) an offence that has been quashed or set aside within the meaning of Part 4 of the *Criminal Records Act* 1991, or

(ii) an offence of a class or description prescribed by the regulations for the purposes of this paragraph."

The judgment at first instance

152 The application was heard in the Supreme Court of New South Wales, by Greg James J[208]. The appellant submitted that in the circumstances of his good conduct in gaol, and having regard to reports showing that he had strong prospects of rehabilitation, a minimum term should be applied to his life sentences so that in the future he could be considered for parole. The appellant also relied on the fact that his co-offender's sentence had been redetermined, and argued that in accordance with orthodox principles of sentencing his should be treated similarly.

153 The Crown submitted that s 13A prevented the appellant from making the application because no special reasons existed to support or justify it. The Crown also argued that the Court should direct that the appellant never re-apply under the section.

154 After examining the legislative history of the section, previous decisions in relation to it, and the recommendation of the sentencing judge, his Honour declared that the appellant was not eligible to make the application[209]. His Honour held that the appellant's case could be distinguished from his co-offender's because of subsequent amendments to the Sentencing Act effected by the *Sentencing Legislation Further Amendment Act* 1997 (NSW). That Act amended s 13A, by, among other things, inserting a new s 13A(3) and introducing s 13A(3A). He held that the appellant failed to meet the conditions imposed by s 13A(3A) of the Sentencing Act which his co-offender was not required to satisfy. His Honour was not convinced that "special reasons" existed to support the making of a determination[210].

155 His Honour declined, however, to make an order preventing the appellant from ever making another application under s 13A as it was not possible, in his Honour's view, to foresee whether "special reasons" may come into existence in the future which would entitle the appellant to make a further application[211].

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208 *R v Baker* [2001] NSWSC 412.

209 *R v Baker* [2001] NSWSC 412 at [123]-[125].

210 *R v Baker* [2001] NSWSC 412 at [122]-[123].

211 *R v Baker* [2001] NSWSC 412 at [124].

Appeal to the New South Wales Court of Criminal Appeal

156 The appellant appealed to the New South Wales Court of Criminal Appeal (Ipp AJA, Dunford and Bergin JJ)[212]. He argued there that the primary judge wrongly decided two matters: that the appellant was ineligible to make an application under s 13A; and that the primary judge was therefore not obliged to make a determination under s 13A(4). In the alternative, the appellant submitted that if the primary judge did make a determination under s 13A(4), he erred in the test he applied as to the existence of "special reasons" under s 13A(3A). The appellant also submitted that the amending Act which introduced sub-s (3A) in s 13A of the Sentencing Act was invalid in so far as it purported to vest functions in the Supreme Court of New South Wales that are incompatible with the exercise by that Court of the judicial power of the Commonwealth.

157 The Court (Ipp AJA, Dunford and Bergin JJ agreeing) dismissed the appeal. Ipp AJA was of the opinion that Greg James J had made a determination under s 13A[213] and that he had applied the appropriate test with respect to "special reasons"[214]. His Honour noted that the phrase "special reasons" was intended to raise the threshold of satisfaction required of a court in deciding whether to determine a minimum and an additional term. Special reasons were ones which were "out of the ordinary, unusual, and not to be expected"[215].

158 As to the third ground of appeal, the invalidity of the amending Act which introduced sub-s (3A) in s 13A of the Sentencing Act, Ipp AJA noted[216] that it was not in dispute that a determination under s 13A(4) would amount to the exercise of federal jurisdiction for the reasons expressed by Toohey J in *Kable v Director of Public Prosecutions (NSW)*[217]. Ipp AJA also accepted that if it could be shown that there was no judicial function to be performed under s 13A because, for example, the test of special reasons was impossible to satisfy, the legislation would be invalid[218].

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212 *Baker* (2002) 130 A Crim R 417.

213 *Baker* (2002) 130 A Crim R 417 at 427 [46]-[47].

214 *Baker* (2002) 130 A Crim R 417 at 429 [59].

215 *Baker* (2002) 130 A Crim R 417 at 427-428 [52].

216 *Baker* (2002) 130 A Crim R 417 at 430 [73].

217 (1996) 189 CLR 51 at 94-96.

218 *Baker* (2002) 130 A Crim R 417 at 431 [74]-[75].

159 His Honour was satisfied, however, that the test of special reasons was a test capable of being satisfied. Further, the determination of a minimum and an additional term in accordance with s 13A involved the making of a decision in accordance with conventional judicial method. The Supreme Court was required to[219]:

> "undertake a traditional and familiar judicial exercise, namely, the determination of the existence of factors which condition the power of the Court to afford relief to persons falling within a defined category. Having found that the factors exist, the Court is required to exercise a judicial discretion in determining whether relief should be granted."

The legislation was not[220]:

> "a device by parliament to ensure that persons such as the appellant would never be released from prison."

160 Based on the same reasoning, his Honour also rejected the appellant's argument that the operation of the legislation usurped judicial power because it purported to dictate the manner of the exercise of judicial discretion. The requirement of special reasons was, in effect, a legislated provision for the weighing of the different factors to be taken into account in the sentencing process[221]. Ipp AJA said[222]:

> "The legislation presently under consideration does not intrude into the essential judicial function of exercising, impartially, an objective and independent discretion. The court is not required to exercise power in a manner that is inconsistent with the judicial process[223]. The Act does not compromise the institutional impartiality of the court, nor does it undermine the ordinary safeguards of the judicial process[224]. Nothing that the court is required to do by the legislation would cause any loss of

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219 *Baker* (2002) 130 A Crim R 417 at 432 [84].

220 *Baker* (2002) 130 A Crim R 417 at 431 [76].

221 *Baker* (2002) 130 A Crim R 417 at 432 [85]-[88].

222 *Baker* (2002) 130 A Crim R 417 at 433-434 [92].

223 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 per Toohey J.

224 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 121 per McHugh J.

> confidence in the judicial process. In my view, the introduction of the requirement of special reasons did not usurp judicial power."

161 Ipp AJA also rejected the argument that the legislation was invalid because the requirement of special reasons could, as seems to be the fact, apply to nine persons only. That the legislation may be aimed at a small number of people does not make it invalid[225]. Nor does the arbitrary nature (if such it be) of the making of a recommendation for non-release by a sentencing judge have any bearing on the validity of the legislation[226].

The appeal to this Court

162 The appellant appeals to this Court on one ground only, that:

> "The Court of Criminal Appeal erred in holding that the Sentencing Legislation Further Amendment Act 1997 was valid and that it did not purport to vest functions in the Supreme Court of New South Wales that are incompatible with the exercise of judicial power of the Commonwealth by the Supreme Court of that State."

163 Some further reference to the relevant proceedings, the legislation and its history should now be made. Before 1955, s 19 of the *Crimes Act* 1900 (NSW) ("the Crimes Act") provided that the penalty for murder was death. In that year, s 19 was amended and penal servitude for life was substituted as the penalty for murder[227]. This was the position at the time of the appellant's conviction in June 1974. At that time, it was possible that the appellant might, at a future date, be granted a licence from the Executive to be conditionally at large on, in effect, a ticket of leave, for the unexpired portion of his sentence[228]. In 1982, s 19 of the Crimes Act was amended to enable a judge to pass a sentence of shorter duration upon a person convicted of murder in cases where the person's culpability was diminished by mitigating circumstances[229]. At the time of the appellant's conviction, the crime of conspiracy to murder was punishable by imprisonment

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225 *Baker* (2002) 130 A Crim R 417 at 434 [94].

226 *Baker* (2002) 130 A Crim R 417 at 436 [103].

227 See *Crimes (Amendment) Act* 1955 (NSW), s 5.

228 Crimes Act, s 463. This section was repealed by s 5 of the *Prisons (Serious Offenders Review Board) Amendment Act* 1989 (NSW) which was assented to on 21 December 1989 and commenced operation on 12 January 1990.

229 See *Crimes (Homicide) Amendment Act* 1982 (NSW), Sched 1, Item 1.

for life[230]. This statutory penalty was subsequently amended in 1989 and replaced with a maximum penalty of twenty-five years imprisonment[231].

164 On 5 March 1990, Crump, the co-offender, made an application for a determination of a minimum term and an additional term pursuant to s 13A of the Sentencing Act. This was rejected by the Supreme Court (Loveday J) on 10 December 1992. The appellant made a similar application which was refused by Sully J on 10 May 1993. Crump made a further application for a determination which was dealt with by McInerney J on 24 April 1997. His Honour re-sentenced Crump to a minimum of thirty years imprisonment from 13 November 1973 with an additional term of the remainder of his life. For the crime of conspiracy to murder, a term of twenty-five years dating from 13 November 1973 was fixed.

165 On 8 May 1997 a Bill entitled the Sentencing Legislation Further Amendment Bill was introduced. The appellant's counsel submitted that it was apparent from the second reading speeches in the Legislative Assembly and the Legislative Council that the Bill was directed at, in consequence of the order made in Crump's application, a group of several named persons including the appellant. Among other things, the responsible Minister said this[232]:

> "Allan Baker, Kevin Crump, Michael Murphy, Leslie Murphy, Gary Murphy, John Travers, Michael Murdoch, Stephen Jamieson, Matthew Elliot, Bronson Blessington – these animals represent pure evil. These animals deserve never to see the exit sign at the prison gate. These animals are reviled and shunned by anyone who has ever heard of their heinous crimes. There is not a person in our community who does not need protection from these animals and the security of knowing they will never again be free.
>
> The decision of the Supreme Court in redetermining Kevin Garry Crump's life sentence has caused grave concern in the community. Crump and Baker committed one of the most revolting crimes this nation has ever seen. Put simply, they deserve to die in gaol. Every honourable member of this House should be aware, in Crump's case, of what the sentencing judge, Justice Taylor, said in 1974. He said:

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230 Crimes Act, s 26.

231 See *Crimes (Life Sentences) Amendment Act* 1989 (NSW). This Act was assented to on 21 December 1989 and commenced operation on 12 January 1990.

232 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1997 at 8337.

> 'If, in the future, some application is made that you be released on the grounds of clemency or mercy, then I would venture to suggest to those who are entrusted with the task ... that the measure of your entitlement ... should be the clemency or mercy you extended to this woman when she begged for her life.'"

166 It was shortly after the enactment of the Bill that the appellant made the application in reliance on s 13A for an order determining his sentence with which this Court is concerned.

The appellant's arguments

167 It is the appellant's submission that applicable legislation before the enactment which governs this application and sentencing principles required the Supreme Court to have regard to several matters such as the circumstances of both the offence and the offender at the time of its commission, and the prisoner's subsequent history while in prison[233]. The Court was required to have regard to, as opposed to being required to give effect to, any "relevant recommendations, observations and comments" made by the original sentencing court[234]. The comments of Taylor J when sentencing the appellant, to the effect that he should spend the rest of his life in gaol were "relevant comments" within the meaning of s 13A(10A)(a) and amounted to a "non-release recommendation" within the meaning of s 13A(1) following the 1997 amendments of the Sentencing Act.

168 The appellant accepts that the fact that a mischief may have, as here, been precisely identified by reference to the activities or history of named persons who may be few in number could not, of itself, sensibly deprive Parliament of the capacity to legislate in a way calculated to meet that mischief.

169 The appellant submitted that the comments of Taylor J when sentencing the appellant were not, however, properly characterizable as a judicial pronouncement or order[235]. Not all judges sitting in the criminal jurisdiction of New South Wales made statements or recommendations of the kind made by Taylor J in this case in 1974. The appellant contended that such statements as were made were not made after giving an offender an opportunity to make a submission that they should not be made. They were recommendations that should not have been made in any circumstances. At a time when only some, as opposed to all judges customarily expressed views as to the full service of a term

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233 Sentencing Act, s 13A(9).

234 Sentencing Act, s 13A(10A)(a).

235 cf the remarks of Gleeson CJ, Hope AJA and Lee AJ agreeing, in *Jamieson, Elliott and Blessington* (1992) 60 A Crim R 68 at 80.

of life imprisonment, those who did were trespassing upon the territory of the Executive whose role it was to decide whether to release a prisoner before his term was served: but worse, judges so recommending were creating a situation of inequality before the law, by exposing those whose life sentences were the subject of a recommendation to a greater likelihood of continued detention than those whose crimes may have been as grave, or worse, but whose sentences were imposed in the absence of such a statement. Whether, however, such recommendations were made or not, the appellant submits, most prisoners serving sentences of life imprisonment did have an expectation, or some hope at least, of earlier release. I did not take it to be disputed that the last of these propositions was accurate. Nor, however, did either party contend that there was other than a long history of the inclusion in the remarks of many, but not of course all, judges of recommendations with respect to the service of the sentences imposed. As to that I would make this observation. If a person knows or is deemed to know the penalty for his crime, submissions that he or counsel on his behalf may make, may reasonably be expected to be directed towards all aspects of it, including the possibility of commentary by a trial judge. With respect to such callous crimes as these it is almost beyond argument that the appellant's counsel at his trial would have foreseen the possibility that a judge might well make a recommendation about the appellant's actual period of detention in prison.

170 Even if, however, all of the appellant's submissions so far were correct, it is not entirely clear what legal consequences the appellant contends should follow. The purpose of reliance upon them seems to be to demonstrate how fragile, uncertain, arbitrary, discriminatory and therefore unfair and unreasonable, legislation that takes as a basis for its application, the making or otherwise of an unnecessary recommendation of the relevant kind, is, and also to provide a basis for a submission, that if the legislative criteria for penal servitude depart from what can be seen to be logical, equal, and general in application, and fair and reasonable in some objectively ascertainable sense, then a court which applies those criteria will not be exercising judicial power. With respect to the first of these purposes, it was almost as if the appellant were contending for the implication of an inhibition upon State legislative power of a kind actually expressed in the Fourteenth Amendment to the Constitution of the United States which prohibits the denial of equal protection of the law.

171 The appellant's principal submissions were put in this way:

> "The arbitrariness or non-logical quality of the requirement imposed by subsec 13A(3A), [of] special reasons ... appear[s] from the impossibility of sensibly demonstrating any reason for a re-determination, outside those explicitly or inherently called up in every case, ordinarily, by the other provisions of sec 13A and the nature of a re-determination. It detracts from the judicial nature of the exercise that the intellectual weapons of deduction and application in the process of statutory

interpretation and the fitting of a particular set of facts to the construed statute are used on a wild goose chase. The appearance of judicial process dresses up what effectively emerges as a legislated impossibility by which the appellant must fail by default of showing the elusive special reason. The vice of the legislation is its involvement of judges who may exercise the judicial power of the Commonwealth in such a mockery. For these reasons, the Court of Criminal Appeal erred by rejecting the arguments noted at (2002) 130 A Crim R 417 at 431 [75], [78]. Whether the legislature could simply have disqualified certain persons from making re-determination applications is another question altogether, and purely hypothetical.

...

Underlying the whole of the arbitrariness argument is that subsec 13A(3A) requires special reasons, which ought as a matter of legal process emerge from the nature of some cases by comparison with each other, for cases (as it happens just nine in number) defined simply and solely by their history including a non-release recommendation. That discrimen is illogical because it is manifestly not the case that only the worst cases attracted such judicial comments and it was not the case that all the worst cases attracted such comments. Many judges confined themselves – properly, as it happens – to descriptions and findings of the offence and the offender. In so doing, they often used words of the utmost condemnation, such as to eg [sic] render an appeal against severity extremely difficult on orthodox grounds. But because such judges did not or perhaps would never make non-release recommendations, offenders sentenced by them do not have to show special reasons, let alone wait for twenty (now thirty) years, in a re-determination application. Consideration of the cases ... demonstrates the arbitrariness of the discrimen chosen for para 13A(3)(b) and subsec 13A(3A). Support for the argument is found in the comment by Lord Diplock delivering the advice of the Privy Council in *Ong Ah Chuan v Public Prosecutor*[236], in relation to arbitrariness in statutory sentencing discrimination imposed on a court against the background of a constitutional guarantee of equality before the law. For these reasons, it was erroneous [for] the Court of Criminal Appeal to regard the arbitrary nature of the impugned provisions as not relevant to their validity[237].

The parliamentary debate, as well as the nature of existing life sentences in a system where prisoners could not be forgotten, shows that

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236 [1981] AC 648 at 673-674.

237 (2002) 130 A Crim R 417 at 436 [103].

> this legislation was aimed at a known vituperated class, small in number. ... [T]he combination of that legislative history and background and the dubious nature of the special reasons requirement runs [the relevant] provisions foul of the principle illustrated in *Liyanage v The Queen*[238], discussed in *Nicholas v The Queen*[239]. It may be that some of their Honours saw significance in the fact that the statute in question in *Nicholas*, although plainly enacted in the knowledge of known cases, was not in terms speaking of a limited class[240]. In this case, by contrast, there could never have been any addition to the class of prisoners serving existing life sentences against whom there had been a non-release recommendation made when they were originally sentenced. Worse, from the point of view of validity of the law, is the evident parliamentary perception of the closed small class that they represented the remainder of a larger group all members of which as a matter of policy should have suffered the same restrictions as subsec 13(3A) was to impose."

172 In consequence, the appellant submits, in determining an application under s 13A the Supreme Court is not exercising judicial power, it is engaging in a futility, the section leaves nothing for the Court to decide, and the language of the section prevents all, or any genuine judicial deliberation and determination: that pre-emption of that kind is an affront to true judicial activity significantly reducing public expectations with respect to the institution of the judiciary, and involving an attack upon its integrity, and an incompatibility with, and usurpation of judicial power of the kind which *Kable*[241] holds to be impermissible.

173 In my opinion the appeal must fail. The appellant has not made out that the entertaining and determination of an application under s 13A of the Sentencing Act is not an exercise of judicial power. Legislative requirements that a judicial determination depend upon the demonstration of exceptional or special matters, events, circumstances, or reasons, are far from unique and have been the subject of much judicial deliberation. Regularly this Court is called upon to decide whether *special* leave to appeal should be granted. Speaking of

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238 [1967] 1 AC 259.

239 (1998) 193 CLR 173 at 191-193 [28] per Brennan CJ, 221 [113] per McHugh J, 233 [147]-[148] per Gummow J, 261 [205] per Kirby J, 278-279 [252]-[253] per Hayne J.

240 (1998) 193 CLR 173 at 191-193 [28] per Brennan CJ, 233 [147]-[148] per Gummow J, 278-279 [252]-[253] per Hayne J.

241 (1996) 189 CLR 51. See for example at 98-99 per Toohey J, 104, 107 per Gaudron J, 119-122 per McHugh J. No party sought to challenge the correctness of this case.

the expression "exceptional circumstances" in s 2 of the *Crime (Sentences) Act* 1997 (UK) required for a decision not to impose a sentence of life imprisonment, Lord Bingham of Cornhill CJ said in *R v Kelly (Edward)*[242]:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

174 "Special reasons" in my opinion share those characteristics.

175 It is not necessary to catalogue the matters which could constitute special reasons within s 13A(3A) of the Sentencing Act. It may be that it is only in combination, or in increasing degrees of relevance and importance that circumstances may come to be, or provide special reasons. The fact that one or more of them may have been, or should have been taken into account in fixing the original sentence may not necessarily mean that some or other of those circumstances, whether they have in some way changed or evolved, may not come to constitute in the future, alone, or with others, "special reasons". Indeed, s 13A(4A) of the Sentencing Act, not surprisingly requires the Supreme Court to look back and to take into account the circumstances of the offence, and other offences of an applicant. Section 13A(10A) states other matters to which regard must be had. Neither sub-section, however, precludes consideration of other matters.

176 Everything is to depend upon all that is relevant and known to the Supreme Court at the time of the application. This may perhaps include such matters as improved prospects of rehabilitation, senility, disability, genuine contrition, an act or acts of heroism in prison, a reduced need for deterrence, the discovery of fresh facts, and a marked change in sentencing patterns, taken of course with the matters to which the Court is to have regard, the circumstances of the offence and other offences of the offender. I express no concluded view on these matters. The experience and wisdom of the law counsel reticence in any attempt to foresee the future, or to give in advance the complexion of special to what may, but has so far not occurred or come into contention.

177 The appellant's further submission, that everything that might ever conceivably be regarded as special is not in truth more than an ordinary sentencing consideration, that the search therefore for special reasons is a futility, and a search for a futility is not an exercise in which a court can genuinely

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242 [2000] QB 198 at 208.

judicially engage should similarly be rejected. There is real content, as I have just pointed out, in what the Supreme Court has to decide under s 13A(3A) of the Sentencing Act. In making such a decision the Court is not therefore embarking on a futility. In deciding the application in the present case the Court was undertaking an orthodox and conventional judicial exercise. The section does not call for the application of the principles in any of their different formulations in *Kable*.

178 The appeal should be dismissed.