HIGH COURT OF AUSTRALIA

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

ROBERT JOHN FARDON APPELLANT

AND

RODNEY JON WELFORD, ATTORNEY-GENERAL
FOR THE STATE OF QUEENSLAND RESPONDENT

Fardon v Attorney-General for the State of Queensland
[2004] HCA 46
1 October 2004
B104/2003 and B105/2003

ORDER

In matter B104 of 2003

Appeal from the decision of the Court of Appeal of the Supreme Court of Queensland dated 23 September 2003 dismissed.

In matter B105 of 2003

1. *Declare that section 13 of the* Dangerous Prisoners (Sexual Offenders) Act *2003 (Q) is not beyond the legislative power of the State of Queensland.*

2. *Remit the cause to the Court of Appeal for hearing and determination of the remaining issues on the appeal to that Court.*

On appeal from Supreme Court of Queensland

Representation:

S R Southwood QC with P D Keyzer for the appellant (instructed by Prisoners' Legal Service)

P A Keane QC, Solicitor-General of the State of Queensland, with R V Hanson QC and R W Campbell for the respondent (instructed by Crown Solicitor for the State of Queensland)

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 of Western Australia)

R J Meadows QC, Solicitor-General for the State of Western Australia, with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

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

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 the Crown Solicitors Office of South Australia)

CATCHWORDS

Fardon v Attorney-General for the State of Queensland

Constitutional law (Cth) – Judicial power of Commonwealth – Vesting of federal jurisdiction in State courts – Act empowering State court to order continuing detention of persons convicted of serious sexual offences after expiry of their sentence where there is an "unacceptable risk" of the prisoner committing a serious sexual offence in the future – Whether criterion for order of continuing detention devoid of content – Whether order for continuing detention to protect the community an exercise of judicial power – Whether powers conferred by Act on State court incompatible with State court being a suitable repository of judicial power of the Commonwealth – Whether powers conferred by Act on State court compromise the institutional integrity of State court.

Constitutional law (Q) – Powers of State Parliament – Separation of powers – Act empowering State court to order continuing detention of persons convicted of serious sexual offences after expiry of their sentence where there is an "unacceptable risk" of the prisoner committing a serious sexual offence in the future – Whether a law – Whether incompatible with State court being suitable repository of federal judicial power – Whether public confidence in integrity or impartiality of judiciary compromised.

Words and phrases – "unacceptable risk".

Constitution, Ch III.

Dangerous Prisoners (Sexual Offenders) Act 2003 (Q), s 8, Pt 2, Div 3.

1 GLEESON CJ. The issue in this matter is whether the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) ("the Act") is valid. The suggested ground of invalidity is that the Act, contrary to the requirements of Ch III of the Constitution, involves the Supreme Court of Queensland in the process of deciding whether prisoners who have been convicted of serious sexual offences should be the subject of continuing detention orders, on the ground that they are a serious danger to the community. The contrariety is said to lie in the attempt by the Queensland Parliament to confer on the Supreme Court a function which is incompatible with the Court's position, under the Constitution, as a potential repository of federal jurisdiction, the function being repugnant to the Court's institutional integrity. The repugnancy is claimed to be similar to that identified in *Kable v Director of Public Prosecutions (NSW)*[1].

2 That formulation of the issue reflects the constitutional context. An Act of the Queensland Parliament provides, in certain circumstances, and subject to certain procedures, for the continuing, preventive, detention of serious sexual offenders who have served their terms of imprisonment, and who are shown to constitute a serious danger to the community. No one would doubt the power of the Queensland Parliament to legislate for the detention of such persons if they were mentally ill[2]. The constitutional objection to the legislative scheme is not based, or at least is not directly based, upon a suggested infringement of the appellant's human rights. The objection is based upon the involvement of the Supreme Court of Queensland in the process. It is the effect of the legislation upon the institutional integrity of the Supreme Court, rather than its effect upon the personal liberty of the appellant, that is said to conflict with the requirements of the Constitution. There is a paradox in this. As Charles JA pointed out in *R v Moffatt*[3] (a case in which there was an unsuccessful challenge, on similar grounds, to Victorian legislation providing for the imposition of indefinite sentences on dangerous persons convicted of certain serious offences), it might be thought surprising that there would be an objection to having detention decided upon by a court, whose proceedings are in public, and whose decisions are subject to appeal, rather than by executive decision. Furthermore, as Williams JA pointed out in this case, there is other Queensland legislation[4] under which indefinite detention may be imposed at the time of sentencing violent sexual offenders who are regarded as a serious danger to the community. If it is lawful and appropriate for a judge to make an assessment of danger to the community at the time of sentencing, perhaps many years before an offender is

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1 (1996) 189 CLR 51.

2 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

3 [1998] 2 VR 229 at 260.

4 *Penalties and Sentences Act* 1992 (Qld), s 163.

due to be released into the community, it may be thought curious that it is inappropriate for a judge to make such an assessment at or near the time of imminent release, when the danger might be assessed more accurately.

3 There are important issues that could be raised about the legislative policy of continuing detention of offenders who have served their terms of imprisonment, and who are regarded as a danger to the community when released. Substantial questions of civil liberty arise. This case, however, is not concerned with those wider issues. The outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court. If it is concluded that the function is not repugnant to the institutional integrity of that Court, the argument for invalidity fails. That was the conclusion reached by a majority in the Court of Appeal of Queensland (de Jersey CJ and Williams JA; McMurdo P dissenting)[5].

The appellant

4 On 8 October 1980, the appellant was sentenced to imprisonment for 13 years for rape. After serving eight years of that sentence he was released on parole. Twenty days after his release he committed further offences of rape, sodomy and assault occasioning actual bodily harm. He was sentenced to 14 years imprisonment. That sentence expired on or about 30 June 2003. The Act came into force on 6 June 2003. On 17 June 2003, the Attorney-General of Queensland applied for an interim detention order. A series of short-term interim orders were made. It was the first of those orders that was the subject of the appeal to the Court of Appeal, and is the subject of this appeal. In the meantime, White J dealt with the matter on a final basis (subject to the Act's scheme for periodic review). Her Honour made the following findings:

> "What is of major concern is the failure by [the appellant] to participate in or to participate to completion in a course or courses of therapy ... For some ten years there have been efforts made to assist [the appellant] towards reintegration into the community ... He has, for the most part, chosen not to take some responsibility for his own rehabilitation and engage in appropriate treatment ...
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> There is a great deal of guidance to be found in the most recent reports and evidence ... This could be further explored. The goal must be one of rehabilitation if [the appellant] is to remain detained and, with [the appellant's] co-operation, appropriate treatment together with staged reintegration as recommended by Dr Moyle may lead to a positive

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5 [2003] QCA 416.

outcome when this order is reviewed. But until that occurs, [the appellant] must be detained so that the community may be adequately protected."

The Act

The objects of the Act are stated in s 3:

"3 The objects of this Act are –

(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and

(b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

Under Pt 2, Div 3 of the Act, the Supreme Court may order, in respect of a prisoner serving imprisonment for a serious sexual offence, that the prisoner be detained in custody for an indefinite term, or that, upon release, the prisoner be subject to continuing supervision. Any continuing detention order is subject to periodic review. The Court may make such an order only if satisfied that the person would constitute a serious danger to the community, the danger taking the form of "an unacceptable risk that the prisoner [would] commit a serious sexual offence" (s 13(2)). The onus of establishing the serious danger to the community rests on the Attorney-General. It can only be discharged by acceptable, cogent evidence which satisfies the Court to a high degree of probability (s 13(3)). Detailed reasons must be given for any order (s 17). There is an appeal to the Court of Appeal. Provision for interim orders is made (s 8). The appellant challenges the validity of both s 8 and s 13.

Protection of the community

In 1975, Robert Charles Vincent Veen, who had stabbed and killed a man, and who had been charged with murder, was found guilty of manslaughter on the ground of diminished responsibility. Some four years earlier, he had been convicted of malicious wounding with a knife. The sentencing judge in the Supreme Court of New South Wales found that he suffered from brain damage which could cause uncontrolled aggression when he was affected by alcohol. The judge said he was likely to kill or injure someone if he was released, and imposed a sentence of life imprisonment for the protection of the community. This Court upheld an appeal, and reduced the sentence to imprisonment for twelve years: *Veen v The Queen*[6].

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6 (1979) 143 CLR 458.

8 Veen was released in January 1983. In October 1983, he stabbed and killed a man. The Crown accepted a plea of guilty to manslaughter on the ground of diminished responsibility. Once again, a judge of the Supreme Court of New South Wales sentenced him to life imprisonment, on the ground that he was a danger to society, and was likely to kill again when released. That sentence was upheld by this Court: *Veen v The Queen [No 2]*[7].

9 This is not the occasion to seek to reconcile those two decisions. The facts of the case reveal a common problem with which courts and legislatures have to deal. Although he dissented in the second case, Deane J said[8]:

> "[T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts."

10 The hope expressed in the final sentence relates to a matter of legislative policy rather than constitutional significance. That, no doubt, is why it was described as a hope about a statutory system.

11 As was pointed out in *Engert*[9], people suffering from mental disorders frequently come into collision with the criminal justice system, and discretionary sentencing decisions must take into account a number of sometimes competing considerations, including the protection of society. The law is a normative science, and many of its rules and principles are based upon assumptions about volition that would not necessarily be accepted as accurate by psychiatrists. In *United States v Chandler*[10], Chief Judge Haynsworth said:

> "The criminal law exists for the protection of society. Without undue harm to the interests of the society it protects, it can exclude from

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7 (1988) 164 CLR 465.

8 (1988) 164 CLR 465 at 495.

9 (1995) 84 A Crim R 67 at 68.

10 393 F 2d 920 (1968) at 929.

> its moral judgments those whose powers of intellect or will are so far impaired that they have no substantial control of their conduct. It can afford, too, elimination of the last vestiges of the notion of punishment for punishment's sake and a further implementation of the principles of rehabilitation, deterrence and, wherever necessary, the ultimate isolation from society of those individuals who have no capacity for the adjustments necessary to conform their conduct as active members of a free society to the requirements of the law. The law may not serve its purpose, however, should it embrace the doctrines of determinism. Should the law extend its rule of immunity from its sanctions to all those persons for whose deviant conduct there may be some psychiatric explanation, the processes of the law would break down and society would be forced to find other substitutes for its protection. The law must proceed upon the assumption that man, generally, has a qualified freedom of will, and that any individual who has a substantial capacity for choice should be subject to its sanctions. At least, we must proceed upon that assumption until there have been devised more symmetrical solutions to the many faceted problems of society's treatment of persons charged with commission of crimes."

12 The way in which the criminal justice system should respond to the case of the prisoner who represents a serious danger to the community upon release is an almost intractable problem. No doubt, predictions of future danger may be unreliable, but, as the case of *Veen* shows, they may also be right. Common law sentencing principles, and some legislative regimes, permit or require such predictions at the time of sentencing, which will often be many years before possible release. If, as a matter of policy, the unreliability of such predictions is a significant factor, it is not necessarily surprising to find a legislature attempting to postpone the time for prediction until closer to the point of release.

13 Legislative schemes for preventive detention of offenders who are regarded as a danger to the community have a long history[11]. Inebriates have been the subject of special legislation of that kind[12]. So have recidivists, or "habitual criminals"[13]. Some Australian States have enacted legislation which provides for indefinite sentences where a sentencing judge is satisfied that a

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11 See Dershowitz, "The Origins of Preventive Confinement in Anglo-American Law" (1974) 43 *University of Cincinnati Law Review* 1 (Pt 1) and 781 (Pt II).

12 eg *Inebriates Act* 1898 (UK), *Convicted Inebriates Act* 1913 (SA), *Inebriates Act* 1912 (NSW).

13 eg *Habitual Criminals Act* 1957 (NSW).

serious offender is a danger to the community[14]. In the United Kingdom, the *Powers of Criminal Courts (Sentencing) Act* 2000 allows a judge to pass a custodial sentence longer than commensurate with the seriousness of an offence in order to protect the public from harm (s 80(2)(b)). In *R (Giles) v Parole Board*[15], the House of Lords examined in some detail the law of various European countries on the subject, and the Strasbourg jurisprudence. In the United States, regimes of "civil commitment" of dangerous offenders have frequently been subjected to constitutional scrutiny[16].

14 Plainly, the lawfulness of systems of preventive detention is considered in the light of the particular constitutional context. In the United States, the right to substantive due process is significant. In Canada, the Charter of Rights and Freedoms must be considered[17]. In Australia, the Constitution does not contain any general statement of rights and freedoms. Subject to the Constitution, as a general rule it is for the federal Parliament, and the legislatures of the States and Territories, to consider the protection of the safety of citizens in the light of the rights and freedoms accepted as fundamental in our society. Principles of the common law, protective of such rights and freedoms, may come into play in the application and interpretation of valid legislation[18]. The constitutional objection to the legislative scheme presently under consideration has already been identified. It is convenient to consider it by reference to the decision of this Court in *Kable.*

Kable

15 The decision in *Kable* established the principle 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.

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14 eg *Sentencing Act* 1991 (Vic), Pt 3 Div 2 (1A), *Criminal Law (Sentencing) Act* 1988 (SA), Pt 2 Div 3, *Criminal Code* (WA), s 662(a) considered by this Court in *Chester v The Queen* (1988) 165 CLR 611, *Sentencing Act* 1995 (WA), s 98.

15 [2004] 1 AC 1.

16 See *Kansas v Crane* 534 US 407 (2002).

17 *R v Lyons* [1987] 2 SCR 309.

18 cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

16 The New South Wales legislation in question in that case provided for the preventive detention of only one person, Mr Kable. As was pointed out by Dawson J, the final form of the legislation had a number of curious features, because of its parliamentary history[19]. It was originally framed as a law of general application, but an amendment confined its application to the appellant. The object of the statute in its final form was said to be to protect the community by providing for the preventive detention of Gregory Wayne Kable. Toohey J said that the extraordinary character of the legislation and of the functions it required the Supreme Court to perform was highlighted by the operation of the statute upon one named person only[20]. In that respect, he said, the statute was virtually unique. Senior counsel for the appellant in the case argued that the legislation was not a carefully calculated legislative response to a general social problem; it was legislation *ad hominem*[21]. That argument was accepted. The members of the Court in the majority considered that the appearance of institutional impartiality of the Supreme Court was seriously damaged by a statute which drew it into what was, in substance, a political exercise[22].

17 The minor premise of the successful argument in *Kable* was specific to the legislation there in question. It is the major premise – the general principle – that is to be applied in the present case.

18 It is unnecessary in this case to decide whether, under the Constitution, the federal Parliament could enact a valid law imposing on a court a function comparable to that conferred by the Act on the Supreme Court of Queensland. The Act is State legislation, and the suggested ground of invalidity is that identified in the decision in *Kable*; a ground based upon the involvement of the Supreme Court in the decision-making process as to detention. Indeed, in the course of argument, senior counsel for the appellant acknowledged that his challenge to the validity of the Act would disappear if the power to make the relevant decision were to be vested in a panel of psychiatrists (or, presumably, retired judges).

19 The Act is a general law authorising the preventive detention of a prisoner in the interests of community protection. It authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character.

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19 (1996) 189 CLR 51 at 68-69.

20 (1996) 189 CLR 51 at 98.

21 (1996) 189 CLR 51 at 62.

22 See, eg, (1996) 189 CLR 51 at 133-134 per Gummow J.

It does not confer functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power. It confers a substantial discretion as to whether an order should be made, and if so, the type of order. If an order is made, it might involve either detention or release under supervision. The onus of proof is on the Attorney-General. The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community. The Court is obliged, by s 13(4) of the Act, to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits.

20 It might be thought that, by conferring the powers in question on the Supreme Court of Queensland, the Queensland Parliament was attempting to ensure that the powers would be exercised independently, impartially, and judicially. Unless it can be said that there is something inherent in the making of an order for preventive, as distinct from punitive, detention that compromises the institutional integrity of a court, then it is hard to see the foundation for the appellant's argument. As was noted above, there is legislation, in Queensland and elsewhere, providing for sentencing judges to impose indefinite sentences, or sentences longer than would be commensurate with the seriousness of a particular offence, by way of response to an apprehension of danger to the community. The validity of such legislation, when tested against the *Kable* principle, was upheld in *Moffatt*. We were not invited to hold that *Moffatt* was wrongly decided. The existence of legislation of that kind makes it difficult to maintain a strict division between punitive and preventive detention. Furthermore, as *Veen [No 2]* held, common law sentencing principles have long accepted protection of the community as a relevant sentencing consideration. The fate of the victim in that case had been foreseen, and foretold, by a sentencing judge years before. The devising of an appropriate community response to the problem referred to by Deane J in the passage from *Veen [No 2]* quoted above raises difficult questions involving the reconciliation of rights to liberty and concerns for the protection of the community. Such issues typically arise in the case of a small number of unfortunate individuals who suffer disorders which make them dangerous to others.

21 It cannot be a serious objection to the validity of the Act that the law which the Supreme Court of Queensland is required to administer relates to a subject that is, or may be, politically divisive or sensitive. Many laws enacted by parliaments and administered by courts are the outcome of political controversy, and reflect controversial political opinions. The political process is the mechanism by which representative democracy functions. It does not compromise the integrity of courts to give effect to valid legislation. That is their duty. Courts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action.

22 It was argued that the test, posed by s 13(2), of "an unacceptable risk that the prisoner will commit a serious sexual offence" is devoid of practical content. On the contrary, the standard of "unacceptable risk" was referred to by this Court in *M v M*[23] in the context of the magnitude of a risk that will justify a court in denying a parent access to a child. The Court warned against "striving for a greater degree of definition than the subject is capable of yielding". The phrase is used in the *Bail Act* 1980 (Q), which provides that courts may deny bail where there is an unacceptable risk that an offender will fail to appear (s 16). It is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade.

23 In some of the reasons in *Kable*, references were made to the capacity of the legislation there in question to diminish public confidence in the judiciary. Those references were in the context of a statute that was held to impair the institutional integrity of a court and involve it in an *ad hominem* exercise. Nothing that was said in *Kable* meant that a court's opinion of its own standing is a criterion of validity of law[24]. Furthermore, nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy. If courts were to set out to defeat the intention of Parliament because of disagreement with the wisdom of a law, then the judiciary's collective reputation for impartiality would quickly disappear. This case involves no question of the interpretation of an ambiguous statute, or of the application of the common law. It concerns a specific challenge to the validity of a State law on the ground that it involves an impermissible attempt to resolve a certain kind of problem through the State's judicial process.

Conclusion

24 The decision of the Court of Appeal was correct. The challenge to the validity of the Act fails. The appeal from the Court of Appeal in relation to the interim orders should be dismissed. In relation to the cause partly removed to this Court, it should be declared that s 13 of the Act is valid, and the matter should be remitted to the Court of Appeal for determination of the remaining issues.

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23 (1988) 166 CLR 69 at 78.

24 cf *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [36].

25 McHUGH J. Queensland legislation authorises the Supreme Court of that State to order that a prisoner be detained in custody if it is satisfied that there are reasonable grounds for believing that the prisoner is a serious danger to the community. In June 1989, the appellant, Robert John Fardon was sentenced to 14 years imprisonment in respect of various sexual offences. His sentences expired on or about 30 June 2003. He was detained in prison after the expiration of his sentences under interim orders made under the legislation. In November 2003, the Supreme Court ordered that he be detained in custody for an indefinite term. The question in this case is whether the Queensland legislation is invalid because it vests in the Supreme Court functions that are incompatible with its role as a repository of the judicial power of the Commonwealth. In my opinion, the legislation is valid.

The material facts

26 In June 1989, Fardon pleaded guilty to offences of sodomy and unlawful assault of a female. He pleaded not guilty, but was subsequently convicted, of a charge of rape of the same person. All offences were committed on 3 October 1988. On 30 June 1989, Fardon was sentenced to 14 years imprisonment on two of the counts and three years imprisonment on the third count, all sentences to be served concurrently. His sentences expired on or about 30 June 2003.

27 On 6 June 2003, the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) ("the Act") came into force. On 17 June 2003, the Attorney-General of the State of Queensland filed an Originating Application under s 5 of the Act for an order that Fardon be detained for an indefinite period under s 13. By a series of interim detention orders, the first of which was made by Muir J in the Supreme Court on 27 June 2003 under s 8 of the Act, Fardon was detained until the Supreme Court heard the Attorney-General's Application. In determining the first interim detention order, Muir J also upheld the validity of s 8 of the Act[25].

28 In the meantime, Fardon appealed to the Queensland Court of Appeal against the interim detention order of Muir J and his Honour's subsequent judgment as to the validity of s 8 of the Act. On 23 September 2003, the Court of Appeal (de Jersey CJ and Williams JA, McMurdo P dissenting) dismissed the appeal against the interim detention order and judgment of Muir J and also upheld the validity of the Act[26].

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25 *Attorney-General (Q) v Fardon* [2003] QSC 200.

26 *Attorney-General (Q) v Fardon* [2003] QCA 416.

29 In November 2003, on the Attorney-General's Application, White J in the Supreme Court ordered that Fardon be detained in custody for an indefinite term. The order was made under s 13 of the Act.

30 White J found[27] that it was established "to the requisite standard that [Fardon] is a serious danger to the community in that there is an unacceptable risk that he will commit a serious sexual offence if released from custody." Her Honour said that a major concern was[28]:

> "the failure by [Fardon] to participate in or to participate to completion in a course or courses of therapy which address his 'inner world' and give him risk minimisation strategies whether related to his violent sexual offending or alcohol and drug relapse prevention."

Her Honour said[29] that Fardon "has, for the most part, chosen not to take some responsibility for his own rehabilitation and engage in appropriate treatment." The appellant then appealed to the Court of Appeal against the order of White J.

31 This Court granted special leave to appeal against the dismissal by the Queensland Court of Appeal of the appeal against the interim detention order made under s 8 by Muir J and his Honour's judgment upholding the validity of s 8 of the Act. Acting under s 40 of the *Judiciary Act* 1903 (Cth), this Court also ordered that so much of the appeal pending in the Court of Appeal against the order of White J as raised the question of the validity of s 13 of the Act be removed into this Court. Both the appeal and the cause removed were heard together.

Kable v Director of Public Prosecutions (NSW)

32 The appellant contends that the Act is invalid because it confers a jurisdiction and powers on the Supreme Court of Queensland that is and are incompatible with the exercise by that Court of federal jurisdiction. He contends that the decision of this Court in *Kable v Director of Public Prosecutions (NSW)*[30] shows that this is so. In *Kable*, the Court held that the *Community Protection Act* 1994 (NSW) was incompatible with Ch III of the Constitution because it required the Supreme Court of New South Wales to order the continued imprisonment of a specified person on the expiration of his sentence

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27 *Attorney-General (Q) v Fardon* [2003] QSC 379 at [98].

28 *Fardon* [2003] QSC 379 at [100].

29 *Fardon* [2003] QSC 379 at [100].

30 (1996) 189 CLR 51.

for manslaughter. The majority Justices in that case held that, because State courts can be invested with federal jurisdiction, State legislation cannot confer jurisdiction or powers on State courts that compromises their integrity as courts exercising federal jurisdiction[31]. The majority held that the terms of the *Community Protection Act* were such that that Act compromised the integrity of the New South Wales Supreme Court and undermined the power conferred on the Federal Parliament by the Constitution to invest State courts with federal jurisdiction[32].

33 However, the legislation that the Court declared invalid in *Kable* was extraordinary. Section 3(1) of that Act declared that the object of the Act was "to protect the community by providing for the preventive detention ... of Gregory Wayne Kable." Section 3(3) declared that it "authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person." It was thus *ad hominem* legislation that, although dressed up as a Supreme Court legal proceeding, had been enacted for the purpose of ensuring that Kable remained in prison when his sentence expired. Indeed, I thought that it made the Supreme Court[33]:

> "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."

As Gaudron J pointed out[34]:

> "The proceedings which the Act contemplates are not proceedings otherwise known to the law. And except to the extent that the Act attempts to dress them up as legal proceedings (for example, by referring to the applicant as 'the defendant', by specifying that the proceedings are civil proceedings and by suggesting that the rules of evidence apply), they do not in any way partake of the nature of legal proceedings. They do not involve the resolution of a dispute between contesting parties as to their respective legal rights and obligations. And as already indicated, the applicant is not to be put on trial for any offence against the criminal law.

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31 *Kable* (1996) 189 CLR 51 at 96 per Toohey J, 103 per Gaudron J, 116-119 per McHugh J, 127-128 per Gummow J.

32 *Kable* (1996) 189 CLR 51 at 98 per Toohey J, 106-108 per Gaudron J, 122, 124 per McHugh J, 134 per Gummow J.

33 *Kable* (1996) 189 CLR 51 at 122.

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

> Instead, the proceedings are directed to the making of a guess – perhaps an educated guess, but a guess nonetheless – whether, on the balance of probabilities, the appellant will commit an offence of the kind specified in the definition of 'serious act of violence'. And, at least in some circumstances, the Act directs that that guess be made having regard to material which would not be admissible as evidence in legal proceedings." (footnotes omitted)

34 The relevant provisions of the Act for the purpose of this case are set out in Gummow J's reasons. The differences between the legislation considered in *Kable* and the Act are substantial. First, the latter Act is not directed at a particular person but at all persons who are serving a period of imprisonment for "a serious sexual offence"[35]. Second, when determining an application under the Act, the Supreme Court is exercising judicial power. It has to determine whether, on application by the Attorney-General, the Court is satisfied that "there is an unacceptable risk that the prisoner will commit a serious sexual offence" if the prisoner is released from custody[36]. That issue must be determined in accordance with the rules of evidence[37]. It is true that in form the Act does not require the Court to determine "an actual or potential controversy as to existing rights or obligations."[38] But that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is "an unacceptable risk that the prisoner will commit a serious sexual offence". That is a standard sufficiently precise to engage the exercise of State judicial power[39]. Indeed, it would seem sufficiently precise to constitute a "matter" that could be conferred on or invested in a court exercising federal jurisdiction[40]. Third, if the Court finds that the

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35 Sections 2, 5, 13.

36 Section 13(2).

37 Section 13(3).

38 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 375 per Kitto J.

39 *M v M* (1988) 166 CLR 69 at 78.

40 As to the need for issues to be defined with sufficient precision to involve an exercise of federal judicial power, see *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 319 per Dixon CJ, Williams, Kitto and Taylor JJ.

Attorney-General has satisfied that standard, the Court has a discretion as to whether it should make an order under the Act and, if so, what kind of order[41]. The Court is not required or expected to make an order for continued detention in custody. The Court has three discretionary choices open to it if it finds that the Attorney-General has satisfied the "unacceptable risk" standard. It may make a "continuing detention order"[42], a "supervision order"[43] or no order. Fourth, the Court must be satisfied of the "unacceptable risk" standard "to a high degree of probability"[44]. The Attorney-General bears the onus of proof. Fifth, the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment. The objects of the Act expressed in s 3 are:

> "(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

Sixth, nothing in the Act or the surrounding circumstances[45] suggests that the jurisdiction conferred is a disguised substitute for an ordinary legislative or executive function. Nor is there anything in the Act or those circumstances that might lead to the perception that the Supreme Court, in exercising its jurisdiction under the Act, is acting in conjunction with, and not independently of, the Queensland legislature or executive government.

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41 Section 13(5).

42 Section 13(5)(a).

43 Section 13(5)(b).

44 Section 13(3)(b).

45 See, eg, Queensland, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Q) Explanatory Notes, (2003); Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003 at 2484-2486 per Welford; Queensland, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Q), Amendments in Committee, Explanatory Notes, (2003); Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2003 at 5127 per Welford.

Does the Act compromise the institutional integrity of the Supreme Court of Queensland?

35 With great respect to those who hold the contrary view, nothing in the Act or the surrounding circumstances gives any ground for supposing that the jurisdiction conferred by the Act compromises the institutional integrity of the Supreme Court of Queensland. Nothing in the Act gives any ground for concluding that it impairs the institutional capacity of the Supreme Court to exercise federal jurisdiction that the Federal Parliament has invested or may invest in that Court. Nothing in the Act might lead a reasonable person to conclude that the Supreme Court of Queensland, when exercising federal jurisdiction, might not be an impartial tribunal free of governmental or legislative influence or might not be capable of administering invested federal jurisdiction according to law.

36 It is a serious constitutional mistake to think that either *Kable* or the Constitution assimilates State courts or their judges and officers with federal courts and their judges and officers. The Constitution provides for an integrated court system. But that does not mean that what federal courts cannot do, State courts cannot do. Australia is governed by a federal, not a unitary, system of government. As Knox CJ, Rich and Dixon JJ pointed out in *Le Mesurier v Connor*[46]:

> "The Parliament may create Federal Courts, and over them and their organization it has ample power. But the Courts of a State are the judicial organs of another Government. They are created by State law; their existence depends upon State law; that law, primarily at least, determines the constitution of the Court itself, and the organization through which its powers and jurisdictions are exercised. When a Court has been erected, its jurisdiction, whether in respect of place, person or subject matter, may be enlarged or restricted. The extent of the jurisdiction of a State Court would naturally be determined by State Law".

Application of Ch III to the States

37 The doctrine of the separation of powers, derived from Chs I, II and III of the Constitution, does not apply as such in any of the States, including Queensland. Chapter III of the Constitution, which provides for the exercise of federal judicial power, invalidates State legislation that purports to invest jurisdiction and powers in State courts only in very limited circumstances. One circumstance is State legislation that attempts to alter or interfere with the

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46 (1929) 42 CLR 481 at 495-496.

working of the federal judicial system set up by Ch III[47]. Another is the circumstance dealt with in *Kable*: legislation that purports to confer jurisdiction on State courts but compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction invested under Ch III impartially and competently. Subject to that proviso, when the Federal Parliament invests State courts with federal jurisdiction, it must take them as it finds them.

38 Cases in this Court have often demonstrated that, subject to the *Kable* principle, the Parliament of the Commonwealth must take State courts as it finds them[48]. Thus, the structure of a State court may provide for certain matters to be determined by a person other than a judge – such as a master or registrar – who is not a component part of the court. If the Parliament of the Commonwealth invests that court with federal jurisdiction in respect of those matters, the investiture does not contravene Ch III of the Constitution, and that person may exercise the judicial power of the Commonwealth. Thus, in *The Commonwealth v Hospital Contribution Fund*[49], this Court held that, notwithstanding that a Master of the Supreme Court of New South Wales was not a component part of that Court, under the *Supreme Court Act* 1970 (NSW), orders made by the Master were orders of that Court in both State and federal jurisdiction. Gibbs CJ said[50]:

> "He was the officer of the court by whom the jurisdiction and powers of the court in the matter in question were normally exercised, and an order made by him, if not set aside or varied by the court, would take effect as an order of the court. Although he was not a member of the court he was, in my respectful opinion, part of the organization through which the

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47 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 314-315 per Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing.

48 See, eg, *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 313 per Griffith CJ; *Le Mesurier* (1929) 42 CLR 481 at 496-498 per Knox CJ, Rich and Dixon JJ; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554-555 per Latham CJ; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37 per Latham CJ; *Kotsis v Kotsis* (1970) 122 CLR 69 at 109 per Gibbs J; *Russell v Russell* (1976) 134 CLR 495 at 516-517 per Gibbs J, 530 per Stephen J, 535 per Mason J, 554 per Jacobs J; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 61 per Mason J.

49 (1982) 150 CLR 49.

50 *Hospital Contribution Fund* (1982) 150 CLR 49 at 59.

> powers and jurisdiction of the court were exercised in matters of State jurisdiction, and through which they were to be exercised in matters of federal jurisdiction also, once the court was invested with federal jurisdiction."

39 Furthermore, when investing a State court with federal jurisdiction, the Federal Parliament cannot alter the structure of the court by making an officer of the Commonwealth a functionary of the court and empowering the officer to administer part of its jurisdiction[51]. Nor can it invest State courts with federal jurisdiction and, contrary to the open justice rule, require those courts to conduct proceedings in closed court[52]. Nor can the Parliament require a State court invested with federal jurisdiction to have trial by jury when the court is so organised under State law that it does not use that form of trial when exercising State jurisdiction[53]. For example, Magistrates' Courts in this country do not provide for trial by jury. If the Parliament, acting under s 77(iii) of the Constitution, enacted a law purporting to invest a Magistrates' Court of a State with jurisdiction to hear indictable offences and the law, expressly or impliedly, sought to require trial by jury in the Magistrates' Court, the law would be invalid because a law that invests a State court with federal jurisdiction must take the court as it finds it. In any event, s 80 of the Constitution, which requires trial by jury for federal indictable offences, would operate to invalidate the law.

40 Moreover, as Gaudron J pointed out in *Kable*[54]:

> "[T]here is nothing to prevent the Parliaments of the States from conferring powers on their courts which are wholly non-judicial, so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth."

Nor is there anything in the Constitution that would preclude the States from legislating so as to empower non-judicial tribunals to determine issues of criminal guilt or to sentence offenders for breaches of the law. The Queensland Parliament has power to make laws for "the peace welfare and good government" of that State[55]. That power is preserved by s 107 of the Commonwealth

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51 *Le Mesurier* (1929) 42 CLR 481 at 496-497 per Knox CJ, Rich and Dixon JJ.

52 *Russell* (1976) 134 CLR 495 at 506 per Barwick CJ, 520 per Gibbs J, 532 per Stephen J.

53 *Brown v The Queen* (1986) 160 CLR 171 at 199 per Brennan J.

54 (1996) 189 CLR 51 at 106.

55 *Constitution Act* 1867 (Q), s 2.

Constitution. Those words give the Queensland Parliament a power as plenary as that of the Imperial Parliament[56]. They would authorise the Queensland Parliament, if it wished, to abolish criminal juries and require breaches of the criminal law to be determined by non-judicial tribunals. The content of a State's legal system and the structure, organisation and jurisdiction of its courts are matters for each State. If a State legislates for a tribunal of accountants to hear and determine "white collar" crimes or for a tribunal of psychiatrists to hear and determine cases involving mental health issues, nothing in Ch III of the Constitution prevents the State from doing so. Likewise, nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts. The powers conferred on the Queensland Parliament by s 2 of the *Constitution Act* 1867 (Q) are, of course, preserved subject to the Commonwealth Constitution. However, no process of legal or logical reasoning leads to the conclusion that, because the Federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.

41 The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.

42 The pejorative phrase – "repugnant to the judicial process" – is not the constitutional criterion. In this area of constitutional discourse, it is best avoided, for it invites error. That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures. State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other

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56 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.

provisions of the legislation or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government.

Conclusions

43 In my opinion, *Kable* does not govern this case. *Kable* is a decision of very limited application. That is not surprising. One would not expect the States to legislate, whether by accident or design, in a manner that would compromise the institutional integrity of their courts. *Kable* was the result of legislation that was almost unique in the history of Australia. More importantly, however, the background to and provisions of the *Community Protection Act* pointed to a legislative scheme enacted solely for the purpose of ensuring that Mr Kable, alone of all people in New South Wales, would be kept in prison after his term of imprisonment had expired. The terms, background and parliamentary history of the legislation gave rise to the perception that the Supreme Court of that State might be acting in conjunction with the New South Wales Parliament and the executive government to keep Mr Kable in prison. The combination of circumstances which gave rise to the perception in *Kable* is unlikely to be repeated. The *Kable* principle, if required to be applied in future, is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges or in circumstances where State judges are used to carry out non-judicial functions, rather than in the context of *Kable*-type legislation.

44 In this case, it is impossible to conclude that the Queensland Parliament or the executive government of that State might be working in conjunction with the Supreme Court to continue the imprisonment of the appellant. Nor is it possible to conclude that the Act gives rise to a perception that the Supreme Court of Queensland might not render invested federal jurisdiction impartially in accordance with federal law. The Act is not directed to a particular person but to a class of persons that the Parliament might reasonably think is a danger to the community[57]. Far from the Act giving rise to a perception that the Supreme Court of Queensland is acting in conjunction with the Queensland Parliament or the executive government, it shows the opposite. It requires the Court to adjudicate on the claim by the Executive that a prisoner is "a serious danger to the community" in accordance with the rules of evidence and "to a high degree of probability". Even if the Court is satisfied that there is an unacceptable risk that

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57 See, eg, Queensland, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Q) Explanatory Notes, (2003) at 1; Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003 at 2484 per Welford; Queensland, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Q), Amendments in Committee, Explanatory Notes, (2003) at 1.

the prisoner will commit a serious sexual offence if released from custody, the Court is not required to order the prisoner's continued detention or supervised release. Furthermore, the Court must give detailed reasons for its order[58], reasons that are inevitably subject to public scrutiny. It is impossible to hold, therefore, that the Queensland Parliament and the executive government intend that the appellant's imprisonment should continue and that they have simply used the Act "to cloak their work in the neutral colors of judicial action."[59] On the contrary, the irresistible conclusion is that the Queensland Parliament has invested the Supreme Court of Queensland with this jurisdiction because that Court, rather than the Parliament, the executive government or a tribunal such as a Parole Board or a panel of psychiatrists, is the institution best fitted to exercise the jurisdiction.

Orders

45 I agree with the orders proposed by Gummow J.

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58 Section 17.

59 *Mistretta v United States* 488 US 361 at 407 (1989).

46 GUMMOW J. On 30 June 1989, after a trial in the Supreme Court of Queensland at Townsville before Kneipp J and a jury, the appellant was convicted of rape, sodomy and assault. He was sentenced to 14 years imprisonment.

47 Thereafter, the *Penalties and Sentences Act* 1992 (Q) ("the Sentences Act") was enacted. Part 10 (ss 162-179) is headed "INDEFINITE SENTENCES". Section 163(1) states:

> "A court may, instead of imposing a fixed term of imprisonment, impose an indefinite sentence on an offender convicted of a violent offence on –
>
> (a) its own initiative; or
>
> (b) an application made by counsel for the prosecution."

A "violent offence" must be one attracting a penalty of imprisonment for life (s 162). An application may be made only with the consent of the Attorney-General (s 165). An order is subject to periodic review by a court (s 171), but continues until a court orders that the indefinite term of imprisonment is discharged (s 162). As s 163(1) indicates, this system applies only as part of the trial process and thus had no application to the pre-1992 conviction of the appellant.

48 The sentence imposed upon the appellant in 1989 was due to expire on or about 30 June 2003. Shortly before that date, that is to say, on 6 June 2003, the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) ("the Act") came into force. It is the validity of the central provision of the Act, s 13, which is now challenged in this Court.

The structure of the Act

49 In the Second Reading Speech on the Bill for the Act, the respondent, the Attorney-General of Queensland, said[60]:

> "[T]he law has never regarded detention as legitimately authorised only for the purpose of punishment for proven criminal offending. Even the sentencing process contemplates the factors of rehabilitation and protection of the public be considered in deciding whether to impose a custodial sentence."

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60 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003 at 2484.

Both propositions may be accepted but they do not necessarily provide answers to the challenge to validity of the legislation.

50 Section 3 of the Act states:

> "The objects of this Act are –
>
> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

51 The Act empowers the Trial Division of the Supreme Court, upon application pursuant to s 5 by the Attorney-General, to make certain orders in relation to a "prisoner". For this purpose, the term "prisoner" is defined in s 5(6) as follows:

> "'**prisoner**' means a prisoner detained in custody *who is serving* a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, *whether the person was sentenced* to the term or period of imprisonment *before or after* the commencement of this section." (emphasis added)

The phrase "serious sexual offence" is defined in the Schedule to the Act as meaning:

> "an offence of a sexual nature, whether committed in Queensland or outside Queensland –
>
> (a) involving violence; or
>
> (b) against children".

The offences of which the appellant had been convicted on 30 June 1989 answered the description in par (a). Accordingly, at the time the Act commenced, the appellant was one who was then serving a period of imprisonment for a serious sexual offence within the meaning of the legislation.

52 After what is identified in s 8 as a preliminary hearing, the Supreme Court may make an "interim detention order" (s 8(2)) pending the hearing of an application for an order under s 13. If the interim detention order requires the detention of the prisoner in custody after the end of the prisoner's period of

imprisonment, that person "remains a prisoner, including for all purposes in relation to an application under this Act" (s 8(3)).

The litigation

53 Consecutive interim detention orders under s 8 were made in the Supreme Court in respect of the appellant by Muir J on 27 June 2003 (two days before he otherwise would have ceased to be a prisoner), by Philippides J on 31 July 2003, and by Atkinson J on 2 October 2003. In the meantime, on 23 September 2003, the Court of Appeal (de Jersey CJ and Williams JA; McMurdo P dissenting)[61] had dismissed an appeal against the order made by Muir J on 27 June 2003 and the judgment of Muir J delivered on 9 July 2003 in which the validity of s 8 of the Act had been upheld. The suggested grounds of invalidity of s 8 resembled those upon which s 13 is now attacked.

54 Section 13 of the Act provides for the making of two species of order: a "supervision order" involving release from custody subject to appropriate conditions; and a "continuing detention order" (s 13(5)). In each case, the "paramount consideration" for the Supreme Court is "the need to ensure adequate protection of the community" s 13(6)).

55 The respondent's application under s 13 for a "continuing detention order" was heard by White J on 27-30 October 2003. On 6 November 2003, her Honour, after delivery of detailed reasons, made an order as follows[62]:

> "Robert John Fardon be detained in custody for an indefinite term for control, care and treatment."

56 An appeal to the Court of Appeal against the order made by White J was instituted and, by order of this Court made on 18 December 2003 under s 40 of the *Judiciary Act* 1903 (Cth), there was removed into this Court so much of the cause pending in the Court of Appeal as raises the question of the validity of s 13 of the Act. This Court had earlier granted special leave to appeal against the dismissal by the Court of Appeal of the appeal against the interim order under s 8 made by Muir J on 27 June 2003 and his later judgment upholding the validity of s 8 of the Act. Both the removed cause and the appeal have been heard in this Court together, but submissions have concentrated upon the removed matter and the outcome of the challenge made there to the validity of s 13 will determine the outcome of the appeal respecting s 8.

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61 *A-G (Qld) v Fardon* [2003] QCA 416.

62 *Attorney-General (Qld) v Fardon* [2003] QSC 379.

Continuing detention orders

57 Section 14 states the effect of a continuing detention order in these terms:

> "(1) A continuing detention order has effect in accordance with its terms –
>
> (a) on the order being made or at the end of the prisoner's period of imprisonment, whichever is the later; and
>
> (b) until rescinded by the court's order.
>
> (2) A person subject to a continuing detention order remains a prisoner."

In this setting, "prisoner" is defined in the Schedule as meaning "a prisoner within the meaning of the *Corrective Services Act 2000* [(Q)]" ("the Corrective Act").

58 Further, s 50 of the Act provides:

> "An order of the court or the Court of Appeal under this Act that a prisoner be detained in custody for the period stated in the order is taken to be a warrant committing the prisoner into custody for [the Corrective Act]."

59 A continuing detention order may be made only if s 13 applies. That section applies only if, on the hearing of the Attorney-General's application, "the court is satisfied [that] the prisoner is a serious danger to the community" in the absence of an order thereunder (s 13(1)). For there to be such a danger, there must be (s 13(2)):

> "an unacceptable risk that the prisoner will commit a serious sexual offence –
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made".

60 For guidance as to the content of the phrase "unacceptable risk", the Queensland Solicitor-General, who in this Court appeared for the Attorney-General, referred to the following passage in the joint judgment of the Court in the family law case of *M v M*[63]:

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63 (1988) 166 CLR 69 at 78.

> "Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a 'risk of serious harm'[64], 'an element of risk' or 'an appreciable risk'[65], 'a real possibility'[66], a 'real risk'[67], and an 'unacceptable risk'[68]. This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse."

The appellant's case

61 The appellant complains that (i) by the order of White J under s 13 of the Act, his detention has been extended beyond the limit of the period of the sentence imposed after his conviction, and (ii) this result has been obtained by reason not of his past conduct but by a finding under a law made after the commencement of his sentence that there is an unacceptable risk that he will offend again by committing a serious sexual offence were he released from custody.

62 To some degree, the gravamen of this complaint reflects what was written by Professor Norval Morris more than 50 years ago. He wrote[69]:

> "The main point made by those resisting the introduction of the indeterminate sentence is that only by adhering to the conception of *nulla*

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64 *A v A* [1976] VR 298 at 300.

65 *Marriage of M* (1986) 11 Fam LR 765 at 771.

66 *B v B (Access)* [1986] FLC ¶91-758 at 75,545.

67 *Leveque v Leveque* (1983) 54 BCLR 164 at 167.

68 *In re G (A minor)* [1987] 1 WLR 1461 at 1469.

69 In the Introduction to a number of the *McGill Law Journal* devoted exclusively to the question of habitual criminal and preventive detention, (1967) 13 *McGill Law Journal* 534 at 552, reprinted from his earlier work, *The Habitual Criminal,* (1951).

> *poena sine lege*[70] in its application to punishment can any defence against official abuse be guaranteed to the individual; and to support this they point to the development in criminology under totalitarian régimes where 'scientific criminology' was perverted to political ends. In the absence of legal control of punishments they fear administrative arbitrariness. Thus Jerome Hall contends that 'the insight of the common lawyer on these vital issues reflects the informed knowledge of Western civilization. In the choice of alternatives, he knows the value of legal control of official conduct, especially when the personal rights of weak individuals are at stake.'[71]"

Professor Morris went on to refer to the statement made in 1945 by Sir Leon Radzinowicz[72]:

> "Unless indeterminate sentences are awarded with great care, there is a grave risk that this measure, designed to ensure the better protection of society, may become an instrument of social aggression and weaken the basic principle of individual liberty."

63 Legislative schemes for preventative detention have emphasised the predictive, not merely the diagnostic, aspects of psychiatry. The distinction was drawn by Michel Foucault in lectures at the Collège de France given in 1974-1975. Speaking of changes to French law made as long ago as 1838, he contrasted the identification of a condition which disqualified a person from the exercise of his fundamental rights and the binding administrative force given to conclusions concerning "the possibility of disturbance, disorder and danger"[73].

64 In those countries of Europe where a remedy in the nature of a writ of habeas corpus is not an essential element in the legal systems they inherit, the fear of "administrative arbitrariness" to which Professor Morris referred, is reflected in Art 5(4) of the Convention for the Protection of Human Rights and

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70 In an earlier and fuller form, the maxim is "there can be no capital punishment destructive either to the individual or his property, which is not established by law before the fact" (*Nulla poena capitis nulla quae hominem remve ejus destruat esse potest nisi legibus praefinita*), Lofft, *Reports of Cases adjudged in the Court of King's Bench*, (1790) Appendix, 16, maxim 466.

71 *General Principles of Criminal Law*, (1947) at 53.

72 In his article, "The Persistent Offender", in Radzinowicz and Turner (eds), *The Modern Approach to Criminal Law*, (1945), 162 at 167.

73 Foucault, *Abnormal*, (2003) at 141.

Fundamental Freedoms[74] ("the Convention"). This is now found in a Schedule to the *Human Rights Act* 1998 (UK). Article 5(4) states:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

65 The Strasbourg jurisprudence construing Art 5(4) was considered by the House of Lords in *R (Giles) v Parole Board*[75]. Their Lordships saw the drawing in it of a distinction between a deprivation of liberty for an indeterminate term by a court order and by administrative decision[76]. The House of Lords held that a sentence which was imposed by an English court for a longer period than would be commensurate with the seriousness of the offences for which there had been convictions, in order to protect the public from serious harm from the offender, and which was thereafter the subject of review by a judicial body – the Parole Board – did not attract the operation of Art 5(4). In particular, there was no conferral upon the executive of a power of determination of when the public interest permitted the release of the prisoner.

66 The Queensland Solicitor-General correctly emphasised that the system established by the Act does not display that vice perceived by Art 5(4) of the Convention, namely the intrusion of administrative or executive power into what should be the role of the courts in determining the lawfulness of detention. The immediate issue for this Court that is presented by the appellant's grievance is of a different order. It concerns the recruitment by the Act of the Supreme Court of Queensland to exercise powers and functions which are said to be repugnant to a particular character of that State court given it by the Constitution. Precisely, the issue is whether s 13 of the Act confers a jurisdiction upon the Supreme Court which is repugnant to, or incompatible with, its character under the Constitution of a State court available for investment with federal jurisdiction by federal law made under s 77(iii).

67 The appellant contends that the Act displays the same or like characteristics to those of the *Community Protection Act* 1994 (NSW) ("the NSW Act") which was held invalid in *Kable v Director of Public Prosecutions*

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74 Agreed by the Council of Europe at Rome on 4 November 1950.

75 [2004] 1 AC 1 at 25-34 per Lord Hope of Craighead, 38-45 per Lord Hutton; Lord Bingham of Cornhill, Lord Steyn, Lord Scott of Foscote agreeing at 20, 21, 45.

76 [2004] 1 AC 1 at 25 per Lord Hope of Craighead; Lord Bingham of Cornhill, Lord Steyn and Lord Scott of Foscote agreeing at 20, 21, 45.

(NSW)[77]. On the other hand, the Solicitor-General submitted that the Act was drawn with an eye to learning from the fate of the earlier New South Wales legislation and that the Act mandates procedures which do not involve the Supreme Court in the exercise of jurisdiction repugnant to, or incompatible with, its character of a State court invested with federal jurisdiction.

Chapter III of the Constitution

68 The submissions for the Attorney-General of the Commonwealth, who intervened in this Court, took a different tack and should be considered first. The contention here is that s 13 of the Act, the object of the primary challenge by the appellant, does not fall beyond the limit established by *Kable* because the Parliament of the Commonwealth itself could validly confer on a Ch III court the functions contained in s 13. This is said to be so even though the detention which the Act provides is preventative, not punitive, in nature.

69 The Commonwealth's submissions are to be rejected. Several steps are involved in reaching that conclusion. The first is by way of disclaimer. It may be accepted that, consistently with Ch III and with what was said by this Court in *Veen v The Queen [No 2]*[78], the objectives of the sentencing process include the various and overlapping purposes of "protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform". It may be observed that in Queensland these matters are reflected in the terms of s 9(1) of the Sentences Act. This states:

> "The only purposes for which sentences may be imposed on an offender are –
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
>
> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
>
> (c) to deter the offender or other persons from committing the same or a similar offence; or
>
> (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

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77 (1996) 189 CLR 51.

78 (1988) 164 CLR 465 at 476; cf *Crimes Act* 1914 (Cth), Pt IB.

(e) to protect the Queensland community from the offender; ...".

70 Further, for the purposes of argument, it may be accepted that a propensity to commit serious offences in the future and the consequential need for protection of the public may, consistently with Ch III, support the imposition at trial of a sentence which fosters that protection by a measure of preventative detention of the offender.

71 That appears, in the different constitutional setting in Canada, to be the outcome of the decision of the Supreme Court in *R v Lyons*[79]. The Supreme Court upheld the validity of Pt XXI of the Canadian Criminal Code (headed "PREVENTIVE DETENTION")[80]; this provided that where a person had been adjudged guilty of a "serious personal injury offence", the court, on application, might find the offender to be a dangerous offender and thereupon impose a sentence of indeterminate detention in place of any other sentence that might have been imposed. However, La Forest J emphasised[81] that this punishment "flows from the actual commission of a specific crime, the requisite elements of which have been proved to exist beyond a reasonable doubt". Particular issues in *Lyons* turned upon the consideration that Pt XXI also applied where there had been acceptance of a guilty plea.

72 An analogy is provided by the consideration in this Court of the legislation of Western Australia. In *McGarry v The Queen*, it was observed in the joint judgment of the Court[82]:

> "The *Criminal Code* (WA) makes separate provision for appeals to the Court of Criminal Appeal against an order for indefinite imprisonment (s 688(1a)(a)) and against any other sentence (s 688(1a)(b)). The former lies as of right; the latter lies only with the leave of the Court of Criminal Appeal. That might be thought to suggest that two appellate processes had been engaged in the present case – one concerning the order for indefinite imprisonment and the other concerning the nominal sentence. Even if that were so, it should not obscure the fact that the decision to make an order for indefinite imprisonment, and the decision fixing the nominal sentence, form part of a single sentencing decision."

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79 [1987] 2 SCR 309.

80 RSC 1970, c C-34.

81 [1987] 2 SCR 309 at 328.

82 (2001) 207 CLR 121 at 126 [8].

Their Honours continued[83]:

> "It follows that if an appellate court concludes that the sentencing judge's discretion miscarried in fixing the nominal term of imprisonment, the whole of the sentence imposed by the sentencing judge, including the order for indefinite imprisonment, should be set aside and the appellate court would then be obliged itself to re-sentence the offender."

73 The continuing detention orders for which s 13 of the Act provides are not of the character identified in *Lyons* and *McGarry*. It is true that the prisoner must still be under sentence when the Attorney-General moves under s 5 for an order and that the effect of the continuing detention order made by White J is the same as if the appellant had been, by warrant, committed into custody in the sense spoken of in the Corrective Act (s 50). Nevertheless, that detention of the appellant does not draw its authority from what was done in the sentencing of the appellant by Kneipp J in 1989. The Solicitor-General, in oral submissions, correctly accepted that the Act took as the factum for its application the status or condition of the appellant as a "prisoner" within the meaning of s 5(6); but, the Solicitor-General emphasised, the legislature might have adopted some other relevant factum.

74 It will be necessary to return to that latter submission. However, one point should be made now. It is accepted that the common law value expressed by the term "double jeopardy" applies not only to determination of guilt or innocence, but also to the quantification of punishment[84]. However, the making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted. The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure. It did not implicate the common law principle in the same way as, for example, the conferral by statute of a right in the prosecution to appeal against sentence.

75 Upon the hypothesis propounded by the Commonwealth, the significant result of the foregoing is that a person may be held in detention in a corrective facility, to use the modern euphemism, by order of a court exercising federal jurisdiction and by reason of a finding of criminal propensity rather than an

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83 (2001) 207 CLR 121 at 126 [9].

84 *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 128-129; *Pearce v The Queen* (1998) 194 CLR 610 at 628 [64]; cf Pfaffenroth, "The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of *Kansas v Crane*", (2003) 55 *Stanford Law Review* 2229 at 2254-2255.

adjudication of criminal guilt[85]. That invites attention to two related propositions.

76 The first is that expressed as follows by Gaudron J in *Re Nolan; Ex parte Young*[86]:

> "[I]t is beyond dispute that the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power."

The making by the Supreme Court of a continuing detention order under s 13 is conditioned upon a finding, not that the person has engaged in conduct which is forbidden by law, but that there is an unacceptable risk that the person will commit a serious sexual offence.

77 That directs attention to the second proposition and to what was said by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*[87]. That litigation directly concerned the detention of aliens with no title to enter or remain in Australia, not the situation of citizens such as the appellant. However, their Honours earlier in their judgment had said that, putting aside the cases of detention on grounds of mental illness, infectious disease and the qualifications required by other "exceptional cases", there was a constitutional principle derived from Ch III that[88]:

> "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".

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85 cf *R v Lyons* [1987] 2 SCR 309 at 328.

86 (1991) 172 CLR 460 at 497. See also the remarks of Deane J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580.

87 (1992) 176 CLR 1 at 27-28.

88 (1992) 176 CLR 1 at 27.

That passage was applied as a step in the reasoning in *Kable* of Toohey J[89] and Gummow J[90], and is reflected in that of Gaudron J[91] and McHugh J[92].

78 It must be said that the expression of a constitutional principle in this form has certain indeterminacies. The first is the identification of the beneficiary of the principle as "a citizen". That may readily be understood given the context in *Lim* of the detention of aliens with no title to enter or remain in Australia and their liability to deportation processes. But in other respects aliens are not outlaws[93]; many will have a statutory right or title to remain in Australia for a determinate or indeterminate period and at least for that period they have the protection afforded by the Constitution and the laws of Australia. There is no reason why the constitutional principle stated above should not apply to them outside the particular area of immigration detention with which *Lim* was concerned. Subsequent references in these reasons to "a citizen" should be read in this extended sense.

79 Another indeterminacy concerns the phrase "criminal guilt". In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*, Hayne J, after referring to the unstable nature of a dichotomy between civil and criminal proceedings, went on[94]:

> "It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under

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89 (1996) 189 CLR 51 at 97-98.

90 (1996) 189 CLR 51 at 131-132.

91 (1996) 189 CLR 51 at 106-107.

92 (1996) 189 CLR 51 at 121-122.

93 *R v Home Secretary, Ex parte Khawaja* [1984] AC 74 at 111-112; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 298-299, 327-328, 335-336; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056 at 1066 [51]-[53]; 208 ALR 271 at 283-284. See also the Opinion of the Supreme Court of the United States in *Rasul v Bush* 72 USLW 4596 at 4600-4601 (2004).

94 (2003) 77 ALJR 1629 at 1649 [114]; 201 ALR 1 at 28-29. See also at 1634 [29]; 7 of ALR; and see further *Rich v Australian Securities and Investments Commission* [2004] HCA 42.

> companies[95] and trade practices[96] legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing."

However, what is involved here is the loss of liberty of the individual by reason of adjudication of a breach of the law. In such a situation, as Kirby J remarked in *Labrador*[97], that loss of liberty is "ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide".

80 I would prefer a formulation of the principle derived from Ch III in terms that, the "exceptional cases" aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts. That central conception is consistent with the holding in *Polyukhovich v The Commonwealth*[98] that the conduct may not have been forbidden by law when it was engaged in; the detention under federal legislation such as that upheld in *Polyukhovich* still follows from a trial for past, not anticipated, conduct.

81 That formulation also eschews the phrase "is penal or punitive in character". In doing so, the formulation emphasises that the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose[99].

82 Further, "punishment" and cognate terms have an indeterminate reference, and are "heavily charged with subjective emotional and intellectual overtones"[100]. The indeterminacy of the term "punishment" is illustrated by the division of opinion in the United States Supreme Court in *Kansas v Hendricks*[101]. The

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95 *Corporations Act* 2001 (Cth), Pt 9.4B (ss 1317DA-1317S).

96 *Trade Practices Act* 1974 (Cth), s 77.

97 (2003) 77 ALJR 1629 at 1638 [56]; 201 ALR 1 at 13; cf *Kansas v Hendricks* 521 US 346 at 361-363, 379-381 (1997).

98 The *War Crimes Act Case* (1991) 172 CLR 501.

99 *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1125 [137]-[139]; 208 ALR 124 at 159-160.

100 Morris, (1967) 13 *McGill Law Journal* 534 at 538.

101 521 US 346 (1997). See Pfaffenroth, "The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of *Kansas v Crane*", (2003) 55 *Stanford Law Review* 2229.

Kansas law under challenge in that case established procedures for the commitment of those who by reason of a "mental abnormality" or a "personality disorder" were likely to engage in "predatory acts of sexual violence". The issues (resolved in favour of validity) whether the law violated the United States Constitution's double jeopardy prohibition or its ban on *ex post facto* law-making were treated by the Supreme Court as turning on the classification of commitment under the law as "punishment". The majority contrasted detention for the purpose of protecting the community from harm and "the two primary objectives of criminal punishment: retribution and deterrence"[102]. This Court has looked at the objectives of the sentencing process rather more broadly, as noted above with the reference to *Veen v The Queen [No 2]*.

83 Preventative detention regimes attached by legislation to the curial sentencing process upon conviction have a long history in common law countries. The *Habitual Criminals Act* 1905 (NSW) and Pt II of the *Prevention of Crime Act* 1908 (UK) are examples of such legislation. It may be accepted that the list of exceptions to which reference was made in *Lim*[103] is not closed. But it is not suggested that regimes imposing upon the courts functions detached from the sentencing process form a new exceptional class, nor that the detention of the mentally ill for treatment is of the same character as the incarceration of those "likely to" commit certain classes of offence.

84 Another of the well-understood exceptions to which the Court referred in *Lim*[104], with a citation from Blackstone, was committal to custody, pursuant to executive warrant of accused persons to ensure availability to be dealt with by exercise of the judicial power. But detention by reason of apprehended conduct, even by judicial determination on a *quia timet* basis, is of a different character and is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct.

85 It is not to the present point, namely, consideration of the Commonwealth's submissions, that federal legislation, drawing its inspiration from the Act, may provide for detention without adjudication of criminal guilt but by a judicial process of some refinement. The vice for a Ch III court and for the federal laws postulated in submissions would be in the nature of the outcome, not the means by which it was obtained.

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102 521 US 346 at 361-362 (1997).

103 (1992) 176 CLR 1 at 28.

104 (1992) 176 CLR 1 at 28.

86 The repugnancy doctrine in *Kable* does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III. That is fundamental for an understanding of *Kable*. No party or intervener submits otherwise.

87 Hence, in the joint judgment in *Silbert v Director of Public Prosecutions (WA)*[105], it was emphasised that the repugnancy doctrine in *Kable* operates upon the footing that the outcome provided for by the State law in question could not be obtained in the exercise of federal jurisdiction. If it could be so obtained then, as in *Silbert*[106] and *Baker v The Queen*[107], the necessary comparator for the repugnancy doctrine to operate has not been established and that is the end of the matter. It may logically be sustainable to proceed on the hypothesis that the outcome could not be obtained in the exercise of federal jurisdiction and to conclude that, even so, no case under the *Kable* doctrine of repugnancy is made out and the State legislation is valid. However, given particularly the detailed submissions by the Attorney-General of the Commonwealth, I have, as indicated above, dealt directly with the federal jurisdiction issue.

88 No "legal fiction" has been involved in this consideration of the Commonwealth's submissions. A supposition known to be false or fictional but the disproving of which the law forbids is one thing; the assumption of a proposition or condition taken as a step in syllogistic reasoning to test a larger thesis is another. The first denies the exercise of logic, the second exemplifies it.

89 The conclusion reached on the federal jurisdiction issue directly leads to the further issue, that on which the appellant and respondent are at odds, namely the application to the Act of the repugnancy doctrine.

The Act and judicial process

90 At this stage, the nature of the process for which the Act provides assumes particular importance. This process may ameliorate what otherwise would be the sapping of the institutional integrity of the Supreme Court.

91 In *Kable*, the majority judgments in varying degrees, but with significant common ground, accepted the submission of Sir Maurice Byers QC[108] that the NSW Act was "not a carefully calculated legislative response to a general social

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105 (2004) 78 ALJR 464 at 466 [10]; 205 ALR 43 at 46.

106 (2004) 78 ALJR 464 at 466 [11]-[13]; 205 ALR 43 at 46.

107 [2004] HCA 45.

108 (1996) 189 CLR 51 at 62.

problem". McHugh J stressed that the NSW Act required a decision as to the propensities of the defendant be made on material otherwise inadmissible in legal proceedings[109]. His Honour concluded[110]:

> "The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. It makes the Supreme Court 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."

Hence the relevance to the reasoning in *Kable* of the statement by the Supreme Court of the United States in *Mistretta v United States*[111] that the reputation of the judicial branch of government may not be borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action".

92 In *Nolan*, Gaudron J described the "general features" of the judicial process as including[112]:

> "open and public enquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts[113]."

93 There is nothing in the Act to exclude rules of natural justice from the process of the Supreme Court. However, as was emphasised in the joint judgment in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[114], many persons at various levels in the executive branch of government are obliged to act without bias and by a procedure giving to persons with the necessary interest an opportunity to be heard and to deal with any case presented by those with opposing interests.

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109 (1996) 189 CLR 51 at 120-121; see also at 105, 106 per Gaudron J, 131 per Gummow J.

110 (1996) 189 CLR 51 at 122.

111 488 US 361 at 407 (1989).

112 (1991) 172 CLR 460 at 496.

113 See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

114 (1996) 189 CLR 1 at 17.

94 Nevertheless, the Act goes further. Section 25(2) imposed upon the respondent a duty of disclosure of evidence or things in his possession which was the same duty of disclosure as the prosecution has in a criminal proceeding. The respondent was entitled to appear at the hearing of the application for the continuing detention order (s 49).

95 The procedure at the hearing of the s 13 application was governed by s 45(2), (3), (4). This states:

> "(2) Subject to the admissibility of the evidence, before the court makes a decision or order on the hearing of an application it must –
>
> (a) hear evidence called by the Attorney-General; and
>
> (b) hear evidence given or called by the prisoner, if the prisoner elects to give or call evidence.
>
> (3) Subject to subsection (4), ordinary rules of evidence apply to evidence given or called under subsection (2).
>
> (4) In making its decision, the court may receive in evidence the following documents –
>
> (a) the prisoner's antecedents and criminal history;
>
> (b) anything relevant to the issue contained in the certified transcription of, or any medical, psychiatric, psychological or other report tendered in, any proceeding against the prisoner for a serious sexual offence."

The respondent had the onus of proof that the appellant was a serious danger to the community in the sense required for the making of a continuing detention order (s 13(7)).

96 The satisfaction of the Supreme Court that the appellant is a serious danger to the community could be attained (s 13(3)):

> "only if it is satisfied –
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision."

97 The requirements in s 13(3) respecting the cogency of acceptable evidence and the attainment by the Supreme Court of a high degree of probability are

important in considering the validity of s 13, given the nature of the ultimate issue in a s 13 application for a continuing detention order. That is the existence of an unacceptable risk of commission of a "serious sexual offence" as defined, if the "prisoner" as defined is released from custody. In *Kable*[115], McHugh J pointed to the requirement in the NSW Act that the Supreme Court of New South Wales "speculate whether, on the balance of probabilities, it is more likely than not the appellant will commit a serious act of violence". His Honour went on to refer to the prediction of dangerousness as a notoriously difficult matter[116].

98 However, under the present legislation, in considering the application for a continuing detention order against the appellant, the Court was required to have regard to the matters listed in pars (a)-(j) of s 13(4). These include psychiatric reports indicating, with reasons, an assessment of the level of risk that the prisoner will commit another serious sexual offence if released from custody or released without the making of a supervision order (s 13(4)(a), s 11(2)); the existence of any pattern of offending behaviour on the part of the prisoner (s 13(4)(d)); participation in rehabilitation programmes (s 13(4)(e), (f)); and "any other relevant matter" (s 13(4)(j)).

99 The Court was obliged by s 17 to give "detailed reasons" for the making of the continuing detention order in respect of the appellant and to do so at the time that order was made. Provision is made in Pt 4 of the Act (ss 31-43) for appeals by the Attorney-General or the prisoner against whom a decision under the Act has been made. An appeal is to the Queensland Court of Appeal and is by way of a rehearing (s 43(1)). The Court of Appeal has all the powers and duties of the court that made the decision from which the appeal is brought and "on special grounds" may receive further evidence as to questions of fact (s 43).

Kable

100 In the written submissions, the Victorian Solicitor-General essays the principle for which *Kable* is authority in a fashion which in its essentials should be accepted. First, it was a particular combination of features of the NSW Act that led to its invalidity. These included the apparent legislative plan to conscript the Supreme Court of New South Wales to procure the imprisonment of the appellant by a process which departed in serious respects from the usual judicial process.

101 Secondly, the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their

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115 (1996) 189 CLR 51 at 122-123.

116 (1996) 189 CLR 51 at 123.

constitutionally mandated position in the Australian legal system. The point was made as follows by Gaudron J in *Kable*[117]:

> "Once the notion that the Constitution permits of different grades or qualities of justice is rejected, the consideration that State courts have a role and existence transcending their status as State courts directs the conclusion that Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth."

102 Thirdly, one important indication that a particular law has the character just stated is that the exercise of the power or function in question is calculated, in the sense of apt or likely, to undermine public confidence in the courts exercising that power or function. The relationship between institutional integrity and public confidence in the administration of justice was discussed, in strongly disapproving any judicial participation in "plea bargaining", by the Full Court of the Supreme Court of Victoria in *R v Marshall*[118]. However, although in some of the cases[119] considering the application of *Kable*, institutional integrity and public confidence perhaps may have appeared as distinct and separately sufficient considerations, that is not so. Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity.

103 Fourthly, the notions of repugnancy and incompatibility appear elsewhere in constitutional doctrine. Examples are provided by the interaction between Imperial law and colonial and State law before the enactment of s 3 of the *Australia Act* 1986 (Cth)[120], between federal and Territory laws[121], and between statute and delegated legislation[122]. A closer, if inexact, analogy is provided by

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117 (1996) 189 CLR 51 at 103.

118 [1981] VR 725 at 733-734.

119 See, for example, *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 78 ALJR 977 at 990-991 [65]; 206 ALR 315 at 334.

120 See *Yougarla v Western Australia* (2001) 207 CLR 344 at 354-355 [17].

121 *Northern Territory v GPAO* (1999) 196 CLR 553 at 579-580 [51], 636 [219].

122 *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [52].

the constitutional restriction on the availability of Ch III judges to perform non-judicial functions as designated persons[123].

104 But, in that last category, as with *Kable* and the present case, the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes. For example, in the joint judgment in *Northern Australian Aboriginal Legal Aid Service Inc v Bradley*[124], there was reserved for consideration elsewhere "the application of *Kable* to a series of acting rather than full [judicial] appointments which is so extensive as to distort the character of the court concerned". The notions of particular disability or burden upon State activity which are derived from *Melbourne Corporation v The Commonwealth*[125] provide another instance of constitutional doctrine which is not framed in terms apt to dictate future outcomes. That a particular constitutional doctrine requires close attention to the detail of impugned legislation and that its invalidating effect may be demonstrated infrequently does not, as the history of the application of *Melbourne Corporation* over 50 years shows, warrant its description at any one time as a dead letter.

105 Reflection upon the range of human affairs, the scope of executive and legislative activity, and the necessity for close analysis of complex and varied statutory schemes will indicate that this may be a strength rather than a weakness of constitutional doctrine. So also, for example, in private law with the protection extended by equity to the victims of fraud. Two and a half centuries ago, in a perspicacious passage in a letter to Lord Kames, Lord Hardwicke LC wrote[126]:

> "But as to relief against frauds, no invariable rules can be established. Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to

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123 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

124 (2004) 78 ALJR 977 at 986 [32]; 206 ALR 315 at 327.

125 (1947) 74 CLR 31. The *Melbourne Corporation* doctrine has successfully been invoked twice since 1947, in *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 and *Austin v Commonwealth* (2003) 77 ALJR 491; 195 ALR 321.

126 Written 30 June 1759 and reproduced in Parkes, *A History of the Court of Chancery*, (1828) at 508. See also *Reddaway v Banham* [1896] AC 199 at 221 per Lord Macnaghten; *Nocton v Lord Ashburton* [1914] AC 932 at 954 per Viscount Haldane LC; Story, *Commentaries in Equity Jurisprudence as administered in England and America*, 13th ed (1886), vol 1, §186.

define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive."

Conclusions

106 Emphasis already has been given in these reasons to the consideration that, while the outcome contemplated and authorised by the Act, the making of a continuing detention order under s 13, could not be attained in the exercise of federal jurisdiction by any court of a State, this circumstance itself cannot dictate a conclusion of repugnancy and incompatibility and therefore of invalidity of the Act.

107 On the other hand, the particular preventative detention regime established by the Act cannot be said to bestow upon the Supreme Court a function which "is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government"[127]. Rather, the regime is *sui generis* in nature. That, other things being equal, supports the case by the respondent that no incompatibility in the necessary sense is to be found[128].

108 Mention also should be made of several matters of significance which, taken together with others, support the case in opposition to the appellant's attack on the validity of s 13 of the Act. First, the factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a "prisoner" (s 5(6)) who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody. To this degree there remains a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled the validity of s 13.

109 Secondly, s 13(5) states that if the Supreme Court attains the necessary satisfaction it "may order" what is a "continuing detention order" or the lesser option of conditional release under a "supervision order". It will be assumed that "may" is used here in a sense that requires one or the other outcome, without the possibility of declining to make either order[129]. What is of present significance is

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127 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

128 cf *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

129 See *Samad v District Court of New South Wales* (2002) 209 CLR 140 at 152-154 [31]-[38], 160-163 [66]-[76].

provisions of Pt 3 (ss 26-30) headed "ANNUAL REVIEWS". Despite the statement in s 13(5), exemplified in the order made here by White J[130], that the prisoner be detained under a continuing detention order for "an *indefinite* term for control, care or treatment" (emphasis added), less than that outcome is mandated by the Act.

110 Section 27 imposes upon the Attorney-General an obligation to cause a review to be carried out at the end of one year after the order first has effect and afterwards at intervals of not more than one year after the last review. The Supreme Court at any time after the first review under s 27 may give the prisoner leave to apply for review on the grounds that there are exceptional circumstances relating to the prisoner (s 28).

111 On a review under Pt 3, the Supreme Court must rescind the continuing detention order unless it orders that the prisoner continue to be subject to that order (s 30(5)). The Supreme Court is empowered by s 30(2) to:

> "affirm the decision only if it is satisfied –
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to affirm the decision".

112 The purpose of Pt 3 "is to ensure that a prisoner's continued detention under a continuing detention order is subject to regular review" (s 26). That statement of purpose guides the construction of the balance of Pt 3. That which is affirmed under s 30 is the primary decision "that the prisoner *is* a serious danger to the community in the absence of a division 3 order" (emphasis added) (s 30(1)). The phrase "is a serious danger" involves the use of the continuous present to require a decision that, by reason of the attainment of satisfaction by the means and to the degree specified in s 30(3), the prisoner presently is a serious danger to the community in the absence of a Div 3 order. Upon the reaching of that decision, the court may order further subjection to a continuing detention order or release subject to a supervision order (s 30(3)); in making a choice between those orders, the court is to have as "the paramount consideration ... the need to ensure adequate protection of the community" (s 30(4)).

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130 Her Honour expressed the order as one for "control, care *and* treatment" (emphasis added); the Act speaks of "control, care *or* treatment" (emphasis added) (s 13(5)(a)). It is unnecessary here to determine whether par (a) of s 13(5) should be read, as was submitted for the respondent, "any one or more of, care control or treatment".

113 Section 30(2) may permit refusal by the court of an order for further detention, by reason of failure by the appropriate authorities to implement the earlier order. An example would be an order for treatment of the prisoner to facilitate rehabilitation, an objective of the Act (s 3(b)). It is unnecessary to decide that question here. However, what is vital for Pt 3, and thus to the validity of the Act, is the requirement that the regular "review" does not, with the passage of time, become no more than a periodic formality; if the exercise in which the court was involved had been permitted by the legislation to lose its requirement for deeply serious consideration upon specified criteria and to a high degree of satisfaction, then invalidity of such legislation may well result.

114 The nature of the factum selected for the attraction of the Act (the definition of "prisoner" in s 5(6)) and the subjection of continuing orders to annual "review" by the Supreme Court together support the maintenance of the institutional integrity of the Supreme Court.

115 So also does the character of their judicial process provided by the Act with respect to applications under s 8 and s 13 and detailed earlier in these reasons. This process, together with that required for the annual "reviews" under Pt 3, answers the description of the general features of judicial process given by Gaudron J in the passage from *Nolan*[131] which has been set out and makes special allowance by the standard of satisfaction required for the deprivation of liberty that is involved with a continuing detention order.

116 It also should be emphasised that the Supreme Court performs its functions under the Act independently of any instruction, advice or wish of the legislative or executive branches of government. Further, the grounds upon which the Supreme Court exercises its powers conferred by the Act are confined to those prescribed by law; there is no scope for the exercise of what in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* was classed as a "political discretion"[132].

117 In the light of the combination of considerations, the conclusion is that the appellant fails to establish the necessary impairment of the institutional integrity of the Supreme Court by reason of repugnancy or incompatibility of the Act, in particular s 13 of the statute.

118 It should be added that the conclusions already expressed supply the answer to the appellant's argument that the Act imposes a Bill of Penalities. The argument appears to have been put on the basis that, if the Act did answer that

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131 (1991) 172 CLR 460 at 497; see also at 496.

132 (1996) 189 CLR 1 at 17.

description, repugnancy in the sense required for the application of *Kable* would be established. However, the Act does not impose punishment for guilt declared by the legislature[133].

Orders

119 With respect to the removed cause (a) there should be a declaration that s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) is not beyond the legislative power of the State of Queensland, and (b) the cause otherwise should be remitted to the Queensland Court of Appeal for hearing and determination of the remaining issues on the appeal to that Court.

120 The appeal to this Court in the other matter should be dismissed.

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133 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 534-535, 646, 721-722; *Kariapper v Wijesinha* [1968] AC 717 at 736 per Sir Douglas Menzies (delivering the judgment of the Board).

121 KIRBY J. This appeal, heard together with a cause removed into this Court[134], involves a challenge to the constitutional validity of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) ("the Act"). The Queensland Court of Appeal, by majority[135], confirmed the decision of the primary judge[136] that the Act was valid. However, in the Court of Appeal, McMurdo P (dissenting) observed[137]:

> "The scheme instituted under the Act is unique in Australia in that it makes a prisoner who has been convicted and sentenced for an offence liable for an order for further detention imposed by a Supreme Court judge, not because of any further unlawful actions but because of the potential that the prisoner may commit further unlawful actions."

122 Mr Robert Fardon (the appellant) asserts that the Act is invalid because it seeks to impose on the Supreme Court of Queensland, a court constitutionally recognised within the integrated judicature of the Commonwealth[138], functions inconsistent with ("repugnant to"[139]) the requirements of Ch III of the federal Constitution.

Unreliable predictions of criminal dangerousness

123 The appellant points out that the sentences of imprisonment imposed on him in 1989 have been served in their entirety[140]. Nevertheless, pursuant to orders made under the Act, the appellant has remained a prisoner, incarcerated in the Townsville Correctional Centre after the date of the expiry of his sentences. This has occurred without allegation, still less proof, of any further offence by

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134 Under the *Judiciary Act* 1903 (Cth), s 40. See reasons of Gummow J at [56].

135 de Jersey CJ and Williams JA; McMurdo P dissenting. See *Attorney-General (Q) v Fardon* [2003] QCA 416.

136 *Attorney-General (Q) v Fardon* [2003] QSC 200 (Muir J).

137 *Fardon* [2003] QCA 416 at [76].

138 Constitution, s 73. See also ss 74, 106.

139 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103-104 per Gaudron J, 132 per Gummow J.

140 The term of imprisonment was 14 years on each of two counts of the indictment charging offences of rape and sodomy and three years on a third count charging unlawful assault on a female. The sentences were ordered to be served concurrently.

him, or breach of the law. He complains that, effectively, his judicial punishment has been extended by orders made under the Act, a supervening law[141]:

> "because opinions have been formed, probably on material which would not be admissible in a legal proceeding and on a standard other than beyond reasonable doubt, that [he] will commit a serious sexual offence as defined if released from custody, or at least unsupervised custody, after completing [his] sentenced terms of imprisonment."

124 Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness[142]. In a recent comment, Professor Kate Warner remarked[143]:

> "[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate[144]. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate."

125 Judges of this Court have referred to such unreliability[145]. Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess"[146]. The Act does so in circumstances,

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141 [2003] QCA 416 at [91] per McMurdo P (diss).

142 eg Webster et al, "Introduction", in Webster et al (eds), *Dangerousness: Probability and prediction, psychiatry and public policy*, (1985) at 1, 4, 10; Gabor, *The Prediction of Criminal Behaviour: Statistical Approaches*, (1986) at 87, 89; Glaser, "Profiling the Rapist: The Prediction of Dangerousness", in Easteal (ed), *Without Consent: Confronting Adult Sexual Violence*, Australian Institute of Criminology Conference Proceedings No 20, (1993) at 287.

143 Warner, "Sentencing review 2002-2003", (2003) 27 *Criminal Law Journal* 325 at 338; Shea, *Psychiatry in Court*, 2nd ed, (1996) at 155.

144 Ashworth, *Sentencing and Criminal Justice*, 3rd ed (2000) at 180.

145 eg *Kable* (1996) 189 CLR 51 at 122-123 per McHugh J; *Veen v The Queen* (1979) 143 CLR 458 at 463-465 per Stephen J; *McGarry v The Queen* (2001) 207 CLR 121 at 141-142 [61] of my own reasons.

146 *Fardon* [2003] QCA 416 at [91], applying the language of *Kable* (1996) 189 CLR 51 at 106 per Gaudron J, 123 per McHugh J.

and with consequences, that represent a departure from past and present notions of the judicial function in Australia.

126 As the Act's provisions show, it targets people who "will almost inevitably be unpopular with the community and the media who can be expected to take considerable interest in orders of the type sought under the Act"[147]. As framed, the Act is invalid. It sets a very bad example, which, unless stopped in its tracks, will expand to endanger freedoms protected by the Constitution. In this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded[148], nor for future crimes that people fear but which those concerned have not committed. In strictly limited circumstances, the judiciary permits "executive interference with the liberty of the individual"[149] where "the purpose of the imprisonment is to achieve some legitimate non-punitive object"[150]. Despite some attempts to give the Act that appearance, that is not the true meaning and effect of its terms. The appellant's continued imprisonment is unlawful. Having served his lawful sentences, he should be released forthwith.

The facts and relevant legislation

127 *Facts and legislation*: The facts, so far as they are relevant, are stated in the reasons of the other members of this Court[151]. Also set out there are the important provisions of the Act[152] and of other Queensland statutes relevant to the operation of the Act or to understanding its purposes[153].

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147 *Fardon* [2003] QCA 416 at [91]. See also "Editorial: Law and Order State Elections", (2003) 27 *Criminal Law Journal* 5 at 7, quoting Brown and Hogg, *Rethinking Law and Order*, (1998).

148 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 ("the *Communist Party Case*").

149 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56 per Gaudron J.

150 *Lim* (1992) 176 CLR 1 at 71 per McHugh J.

151 Reasons of Gummow J at [46]-[48], [53]-[56]; reasons of Callinan and Heydon JJ at [200]-[205].

152 Reasons of Gummow J at [49]-[52], [57]-[59], [95]-[96], [109]-[111]; reasons of Callinan and Heydon JJ at [211].

153 eg the *Penalties and Sentences Act* 1992 (Q). See reasons of Gummow J at [47], [69].

128 I will not repeat any of this material. However, it is pertinent to add reference to two other Queensland statutes. By s 4 of the Act it is provided that the *Bail Act* 1980 (Q) does not apply to a person detained under the Act[154]. By s 14(2) of the Act, it is provided that a "person subject to a continuing detention order remains a prisoner". The word "prisoner" is defined in the "dictionary" referred to in s 2 of the Act (and contained in the Schedule) to mean "a prisoner within the meaning of the *Corrective Services Act* 2000 [(Q)]"[155]. By s 6(1) of the last-mentioned Act, it is provided that a "person sentenced to a period of imprisonment, or required by law to be detained for a period of imprisonment, must be detained for the period in a corrective services facility".

129 By s 14(1) of the Act a "continuing detention order" under the Act has effect in accordance with its terms: "(a) on the order being made or at the end of the prisoner's period of imprisonment, whichever is the later; and (b) until rescinded by the court's order". A general facility exists under the *Corrective Services Act* for a corrective services officer to make an order transferring a prisoner from a corrective services facility to a place for medical or psychological examination or treatment[156]. This is not special to a "prisoner" subject to an order under the Act.

130 Under the *Corrective Services Act*, the chief executive of corrective services must establish services or programmes "for the medical welfare of prisoners"[157] and to "help prisoners to be integrated into the community after their release from custody"[158], and to "take into account the special needs of offenders"[159]. These too are general provisions. There was no evidence, on the face of the Act or otherwise, that, under the orders made under the Act, the appellant was to be transferred into a different facility, separate from the ordinary prison environment. On the contrary, the only available inference from the record is that the appellant remains in the Townsville Correctional Centre. Inferentially, he stays in the very same cell in which he had served the sentences

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154 A like consideration was relevant in *Kable* (1996) 189 CLR 51 at 129 per Gummow J.

155 In this respect the legislation is similar to that provided in *Kable* (1996) 189 CLR 51 at 98 per Toohey J.

156 *Corrective Services Act*, s 53(1).

157 *Corrective Services Act*, s 190(1)(a).

158 *Corrective Services Act*, s 190(1)(b).

159 *Corrective Services Act*, s 190(2).

judicially imposed upon him as punishment upon his conviction for criminal offences.

131 *Common ground*: Although the appellant suggested that the primary issue presented by the proceeding was whether the Act, specifically ss 8 and 13, infringed Ch III of the Constitution, he did not seek to propound an argument of constitutional incompatibility ("repugnance") based upon an implied right to due process or equality derived from implications to be discovered in Ch III[160]. I am content in this case, where other arguments are determinative, to put those issues to one side. But if they had been explored, they might well have sustained the conclusion that I will support on other grounds.

132 Similarly, no party, and none of the governmental interveners, challenged the principle expressed by the majority of this Court in *Kable v Director of Public Prosecutions (NSW)*[161]. The issue for decision, as litigated, was therefore whether the *Kable* principle rendered invalid the impugned provisions of the Act under which the appellant's detention has continued; and indeed whether it invalidated the entire scheme of the Act having regard to those sections[162].

133 *Kable: chimera or protection?*: The reasons of the judges below, respectively upholding and rejecting the validity of the Act, are sufficiently described in the reasons of other members of this Court[163]. So is the subsequent litigation, pursuant to which a "continuing detention order" under the Act was made against the appellant[164].

134 I do not pretend that the ultimate issue raised by these proceedings is cut and dried. The validity of similar enactments has repeatedly divided the Supreme Court of the United States, giving effect to its own constitutional

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160 See *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 606-614, 703-707; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-490, 501-503; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 94-95, 112-113; *Cameron v The Queen* (2002) 209 CLR 339 at 352-353 [44]-[45], 368-369 [93]-[95]. See also Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341 at 350-354.

161 (1996) 189 CLR 51.

162 [2003] QCA 416 at [92] per McMurdo P. Her Honour held that ss 8 and 13 could not be severed and that the entire scheme of the Act was invalid.

163 Reasons of Gummow J at [53]; reasons of Callinan and Heydon JJ at [203]-[204].

164 *Attorney-General (Q) v Fardon* [2003] QSC 379 per White J. See reasons of Gummow J at [55]-[56]; reasons of Callinan and Heydon JJ at [205].

obligations[165]. In this country, the *Kable* principle has so far proved a weak protection against State legislation said to have intruded impermissibly into the judicial function[166]. In only one case has the principle been upheld and applied by this Court, namely in *Kable* itself. What was seen at first to be an important assurance that the State judiciary in Australia (certainly the named Supreme Courts) enjoyed many of the constitutional protections of the federal judiciary[167], has repeatedly been revealed as a chimera.

135 I disagree with this approach. It is unnecessary to the principle stated in *Kable* and undesirable in terms of constitutional fundamentals. In my opinion, *Kable* is especially important when the rights of unpopular minorities are committed to the courts. That is when legislatures may be tempted to exceed their constitutional powers, involving the independent judiciary in incompatible activities so as to cloak serious injustices with the semblance of judicial propriety. Against such risks, Ch III of the Constitution stands guard. This Court should be vigilant to uphold such protection. That is what the principle in *Kable* requires.

The *Kable* principle

136 *Avoiding repugnance to Ch III*: Too much has been made of the differing ways in which the majority in *Kable* expressed their respective reasons for upholding the constitutional objection to the *Community Protection Act* 1994 (NSW), challenged in that case. The essential idea was relatively clear and simple. Because State courts (and unavoidably State Supreme Courts named in the Constitution) may be vested with federal jurisdiction which they are then bound to exercise[168], they must exhibit certain basic qualities as "courts" fit for that function.

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165 *Kansas v Hendricks* 521 US 346 (1997); *Seling v Young* 531 US 250 (2001); *Kansas v Crane* 534 US 407 (2002).

166 See eg *H A Bachrach Pty Ltd v The State of Queensland* (1998) 195 CLR 547; *Silbert v Director of Public Prosecutions (WA)* (2004) 78 ALJR 464 at 470 [32]-[33]; 205 ALR 43 at 51.

167 Campbell, "Constitutional Protection of State Courts and Judges", (1997) 23 *Monash University Law Review* 397 at 408; 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.

168 Constitution, s 77(iii).

137 In short, State courts must remain at all times curial receptacles proper to the exercise of federal jurisdiction. Although they are not, as such, federal courts, subject to the express strictures of Ch III, their inclusion in the integrated judicature of the Commonwealth, the provisions for appeals from them to federal courts[169] and the facility for the vesting of federal jurisdiction all imply that they cannot be required by State law to perform functions inconsistent with ("repugnant to") Ch III.

138 In particular instances of challenge, it falls to the courts themselves (ultimately this Court), to explain the contents of the *Kable* principle. The principle must be given meaning in a context that respects the different constitutional origins and histories of State courts; but which also upholds the implications necessary to their undoubted place within the judicature envisaged by the federal Constitution. Just as the States of Australia are not, constitutionally speaking, merely the colonies renamed, so State courts, after Federation (and specifically State Supreme Courts named in the Constitution) derive particular functions and characteristics from the federal Constitution itself. These requirements are not identical to those imposed explicitly on federal courts. However, they cannot be so different from such requirements as to undermine the integrated scheme for the national judicature which the Constitution creates.

139 Self-evidently, a conclusion that legislation infringes the Constitution and is for that reason invalid is a serious one[170]. The only justification for such a conclusion can be the Constitution itself. It cannot depend on the whim of judges to set aside an unliked law that has been made by the vote of a majority of the representatives of the people, elected to Parliament[171]. However, just as the legislators have their functions under the Constitution, so do the courts. If any branch of government neglects, or exceeds, its functions, the harmony envisaged by the Constitution is disturbed.

140 Within the system of representative government created by the Constitution, legislators sometimes respond to waves of community fear and

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169 Constitution, s 73. See *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 277, 281-282.

170 *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 347, 356; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252].

171 *Nicholas v The Queen* (1998) 193 CLR 173 at 197 [37] per Brennan CJ.

emotion, occasionally promoted by sections of the media[172]. As this Court demonstrated in *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*")[173], its function, derived from the Constitution, responds to a time frame that is much longer than that of the other branches of government. Inevitably, it affords a constitutional corrective to transient passions and, sometimes, to ill-considered laws repugnant to the timeless constitutional design.

141 This is what I take *Kable* to require. It forbids attempts of State Parliaments to impose on courts, notably Supreme Courts, functions that would oblige them to act in relation to a person "in a manner which is inconsistent with traditional judicial process"[174]. It prevents attempts to impose on such courts "proceedings [not] otherwise known to the law", that is, those not partaking "of the nature of legal proceedings"[175]. It proscribes parliamentary endeavours to "compromise the institutional impartiality" of a State Supreme Court[176]. It forbids the conferral upon State courts of functions "repugnant to judicial process"[177].

142 Recent, and not so recent, experience teaches that governments and parliaments can, from time to time, endeavour to attract electoral support by attempting to spend the reputational currency of the independent courts in the pursuit of objectives which legislators deem to be popular. Normally, this will be constitutionally permissible and legally unchallengeable. However, as *Kable* demonstrates, a point will be reached when it is not, however popular the law in question may at first be. The criteria for the decision are stated in *Kable* in general terms. Yet such is often the case in constitutional adjudication. Evaluation and judgment are required of judicial decision-makers responding, as they must, to enduring values, not to immediate acclaim.

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172 See *Fardon* [2003] QCA 416 at [91]. See also "Editorial: Law and Order State Elections", (2003) 27 *Criminal Law Journal* 5; Warner, "Sentencing review 2002-2003", (2003) 27 *Criminal Law Journal* 325 at 330.

173 (1951) 83 CLR 1.

174 *Kable* (1996) 189 CLR 51 at 98 per Toohey J. See also *Grollo v Palmer* (1995) 184 CLR 348 at 363-365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 8-9, 13-14, 20-22.

175 *Kable* (1996) 189 CLR 51 at 106 per Gaudron J.

176 *Kable* (1996) 189 CLR 51 at 121 per McHugh J.

177 *Kable* (1996) 189 CLR 51 at 134 per Gummow J.

143 Protection of the legal and constitutional rights of minorities in a representative democracy such as the Australian Commonwealth is sometimes unpopular. This is so whether it involves religious minorities[178], communists[179], illegal drug importers[180], applicants for refugee status[181], or persons accused of offences against anti-terrorist laws[182]. Least of all is it popular in the case of prisoners convicted of violent sexual offences or offences against children. Yet it is in cases of such a kind that the rule of law is tested. As Latham CJ pointed out long ago, in claims for legal protection, normally, "the majority of the people can look after itself": constitutional protections only really become important in the case of "minorities, and, in particular, of unpopular minorities"[183]. It is in such cases that the adherence of this Court to established constitutional principle is truly tested, as it is in this case.

144 *The implications of Kable*: A number of propositions about the ambit of the *Kable* principle can be derived from the case itself and from subsequent decisions:

(1) The circumstances that will invoke the principle of repugnance must be "extraordinary"[184]. Despite occasional derogations, Australian legislatures are normally respectful of the separation of the judicial power and of the constitutional functions assigned to the courts. Yet this adjective ("extraordinary") gives little guidance in a particular case. Such appellations tend to depend on the eye of the beholder;

(2) The law considered in *Kable* was directed at one person only. Here, the Act is drafted as one of apparently general application. It has already been invoked in cases other than that of the appellant. Nevertheless, it is

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178 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116.

179 *Communist Party Case* (1951) 83 CLR 1.

180 *Ridgeway v The Queen* (1995) 184 CLR 19.

181 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

182 See *M v Secretary of State for the Home Department* [2004] EWCA Civ 324 per Lord Woolf CJ; [2004] 2 All ER 863. See also *Rasul v Bush* 72 USLW 4596 (2004).

183 *Jehovah's Witnesses Inc* (1943) 67 CLR 116 at 124. See also Morris, "Introduction", (1967) 13 *McGill Law Journal* 534 at 552.

184 *Kable* (1996) 189 CLR 51 at 98. See also at 134.

unthinkable that *Kable* was a stand-alone decision, concerned to state a constitutional principle limited to only one case and never to be repeated. It is sufficient to attract the *Kable* rule that the impugned law should apply to a small number of identifiable persons, singled out for special treatment[185]. It could not be denied that the Act in issue in this appeal is concerned with a small, limited and defined class, identified with relative ease. To that extent, it invites *Kable* scrutiny;

(3) All judges in the majority in *Kable* referred to the importance of maintaining community confidence in the integrity of the courts[186]. However, as such, this is not a criterion for the application of the *Kable* principle[187]. It is what will be lost as a result of neglecting the considerations which the principle defends. Such a view of what was meant by the reasons of the majority in *Kable* is increasingly accepted[188]. It is singularly inappropriate to place undue emphasis on the fiction of public perceptions in this context. At the time of a constitutional challenge on this basis, it is quite possible that the public will share, at least in the short run, some of the passions that may have led to the legislation under consideration. So it may have been in *Kable*. So it may have been at first in the *Communist Party Case*. So it may be in the present proceedings. The cautionary voice of constitutional principle is not always popular, assuming that it is expressed at all[189];

(4) Occasionally, it is useful to test the suggested repugnancy to Ch III of the impugned State law by asking whether, if enacted by the Federal Parliament, its provisions would have passed muster in relation to a federal court. If they would, the "occasion for the application of *Kable*

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185 See *Nicholas* (1998) 193 CLR 173 at 261 [204].

186 *Kable* (1996) 189 CLR 51 at 108 per Gaudron J, 118-119 per McHugh J, 133 per Gummow J. See also *Mann v O'Neill* (1997) 191 CLR 204 at 245 per Gummow J.

187 *Silbert* (2004) 78 ALJR 464 at 468-469 [26]; 205 ALR 43 at 49-50.

188 See reasons of Gummow J at [102]. See also Handsley, "Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power", (1998) 20 *Sydney Law Review* 183; *Nicholas* (1998) 193 CLR 173 at 197 [37]. See also at 275-276 [242].

189 See eg *Dred Scott v Sandford* 60 US 393 (1856) (slaves); *Ex parte Quirin* 317 US 1 (1942) (war prisoners); *Korematsu v United States* 323 US 214 (1944) (Japanese-American internees); *Dennis v United States* 341 US 494 (1951) (communists). See also *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1135-1136 [190]; 208 ALR 124 at 173.

does not arise"[190]. However, I agree with Callinan and Heydon JJ that this test is not "the exclusive test of validity"[191] of a State law measured by the *Kable* standard. This is because, in their Honours' words, "[n]ot everything by way of decision-making denied to a federal judge is denied to a judge of a State"[192]; and

(5) If it is shown that the jurisdiction and powers conferred on a State court could not be conferred on a federal court, the party complaining that the State law imposes functions on the State judiciary, inconsistent with ("repugnant to") Ch III of the federal Constitution, is well advanced in making good the *Kable* argument. This is because of the integrated character of the Australian judiciary, both in terms of Ch III and in fact. If one part of the nation's judiciary *could not* lawfully perform a specified function, there is a heavy burden of persuasion that another *could* do so. There are differences between the federal and State judiciaries in Australia. Most of them are concerned with the capability of the State judiciary to perform non-judicial functions prohibited to federal courts under the present understanding of the separation of judicial powers mandated by the federal Constitution[193]. But where, outside this limited field of difference, a State Parliament has purportedly assigned to a State court the performance of functions that are unusual, beyond the traditional judicial process and repugnant to the ordinary judicial role, this Court will more readily come to the conclusion that the State law demonstrates *Kable* inconsistency.

Preventive detention and federal courts

145 As Gummow J has noted in his reasons[194], the Federal Attorney-General intervened in these proceedings to support the validity of the Act. He did so on the footing that like legislation could have been enacted by the Federal Parliament. Accordingly, he argued, the Act occasioned no offence to Ch III and hence did not offend the principle in *Kable*. I agree with Gummow J, for the reasons that he gives, that this argument should be rejected[195].

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190 *Bachrach* (1998) 195 CLR 547 at 561-562 [14].

191 Reasons of Callinan and Heydon JJ at [219]. See also *Silbert* (2004) 78 ALJR 464 at 470 [32]; 205 ALR 43 at 51.

192 Reasons of Callinan and Heydon JJ at [219].

193 *Mabo v Queensland* (1988) 166 CLR 186 at 201-202.

194 Reasons of Gummow J at [68]. See also reasons of Hayne J at [196].

195 Reasons of Gummow J at [69].

146 This conclusion clearly lifts the appellant's case into arguable application of the *Kable* principle. The question becomes whether the character of a State court, specifically a State Supreme Court, viewed together with the provisions incorporated into the Act in the attempt to avoid *Kable* invalidity, are sufficient to produce the conclusion that the Act is constitutionally valid and does not have the disqualifying characteristics identified in the legislation considered in *Kable*.

The Act imposes functions repugnant to Ch III

147 *Five features of repugnance*: Despite the attempts in the Act to dress up the jurisdiction and powers given to the Supreme Court of Queensland as a measure for the protection of the public, a close analysis of its features confirms the impression which is derived, at the threshold, from its short title. This is an Act to make provision for the continuous punishment of prisoners who have already served punishment previously imposed upon them by the judiciary for specified sexual offences and who, approaching their release, towards completion of that punishment, are ordered to be retained in prison, as prisoners, on an hypothesis of dangerousness.

148 There are five features in the Act which, combined, indicate an attempted imposition upon the judges of the Supreme Court of Queensland functions repugnant to Ch III of the federal Constitution as explained in *Kable*. These features severally authorise the Supreme Court, contrary to traditional judicial process in Australia, to order:

(1) The civil commitment of a person to a prison established for the reception of prisoners, properly so-called;

(2) The detention of that person in prison, in the absence of a new crime, trial and conviction and on the basis of the assessment of future re-offending, not past offences;

(3) The imprisonment of the person in circumstances that do not conform to established principles relating to civil judicial commitment for the protection of the public, as on a ground of mental illness;

(4) The imposition of additional judicial punishment on a class of prisoners selected by the legislature in a manner inconsistent with the character of a court and with the judicial power exercised by it; and

(5) The infliction of double punishment on a prisoner who has completed a sentence judicially imposed by reference, amongst other things, to the criterion of that person's past criminal conduct which is already the subject of final judicial orders that are (or shortly will be) spent at the time the second punishment begins.

149 I shall explain each of these disqualifying considerations in turn. It is their cumulative effect that brings the Act into conflict with the principle stated in *Kable*.

150 *Civil commitment unknown to law*: Generally speaking, in Australia, the involuntary detention of a person in custody by any agency of the state is viewed as penal or punitive in character. In Australian law, personal liberty has always been regarded as the most fundamental of rights[196]. Self-evidently, liberty is not an absolute right[197]. However, to deprive a person of liberty, where that person is otherwise entitled to it, is a grave step. If it is to extend for more than a very short interval, such as may properly be entrusted to officials in the Executive Government, it requires the authority of a judicial order[198].

151 These rules explain a fundamental principle that lies deep in our law. Ordinarily, it requires officers of the Executive Government, who deprive a person of liberty, to bring that person promptly before the judicial branch, for orders that authorise, or terminate, the continued detention[199]. The social purpose behind these legal obligations is to divorce, as far as society can, the hand that would deprive the individual of liberty from the hand that authorises continued detention. The former, which normally lies in the Executive branch[200], is taken to be committed to the deprivation of liberty for some purpose[201]. The latter is taken to be independent and committed only to the application in the particular case of valid laws. The operation of the writ of *habeas corpus* is another assurance, afforded to the judiciary, requiring the prompt legal justification of any contested deprivation of liberty[202]. So precious does our legal system regard

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196 *Whittaker v The King* (1928) 41 CLR 230 at 248; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 632; *Williams v The Queen* (1986) 161 CLR 278 at 292.

197 *Hendricks* 521 US 346 at 356-357 (1997).

198 See *Al-Kateb* (2004) 78 ALJR 1099 at 1131 [167]; 208 ALR 124 at 167.

199 See eg *Dallison v Caffery* [1965] 1 QB 348 at 367; *Drymalik v Feldman* [1966] SASR 227; *R v Banner* [1970] VR 240. See also The Law Reform Commission, *Criminal Investigation*, Report No 2 – An Interim Report, (1975) at 38-39 [87].

200 The arrest by order of a House of Parliament in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 is an anomalous and questionable exception.

201 See *Kable* (1996) 189 CLR 51 at 120-121 per McHugh J.

every moment of personal freedom. The scrutiny of a justification of the deprivation of liberty must not be perfunctory. It is a real and solemn responsibility of the judiciary, rooted in our constitutional history.

152 In *R v Quinn; Ex parte Consolidated Food Corporation*, Jacobs J observed[203]:

> "[W]e have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

153 The necessary involvement of the judiciary in adjudging and punishing criminal guilt is a fixed feature of the courts participating in the integrated judicature of the Commonwealth, provided for in the Constitution[204]. Precisely because liberty is regarded as so precious, legal provisions derogating from liberty (and especially those that would permit the Executive Government to deprive a person of liberty) are viewed by courts with heightened vigilance. Normally, a law providing for the deprivation of the liberty of an individual will be classified as punitive. As a safeguard against expansion of forms of administrative detention without court orders, our legal system has been at pains to insist that detention in custody must ordinarily be treated as penal or punitive, precisely because only the judiciary is authorised to adjudge and punish criminal guilt[205]. Were it otherwise, it would be a simple matter to provide by law for various forms of administrative detention, to call such detention something other than "punishment", and thereby to avoid the constitutional protection of independent judicial assessment before such deprivation is rendered lawful.

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202 *In re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36; *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452. See also *Rumsfeld v Padilla* 72 USLW 4584 (2004).

203 (1977) 138 CLR 1 at 11.

204 *Lim* (1992) 176 CLR 1 at 26-29; *Kable* (1996) 189 CLR 51 at 97, 131.

205 *Lim* (1992) 176 CLR 1 at 26-29; *Kable* (1996) 189 CLR 51 at 97, 131. See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056 at 1078-1079 [117]-[124]; 208 ALR 271 at 299-301.

154 It is true that a limited number of exceptions to this constitutional scheme have been acknowledged by this Court. They include immigration detention of "unlawful non-citizens" for the purposes of deportation or to enable an application for an entry permit to be made and determined[206]; quarantine detention for reasons of public health[207]; detention of the mentally ill and the legally insane for the protection of the community[208]; and analogous non-punitive, protective orders permitted by valid legislation[209]. This Court has assumed, or suggested, that the imposition by federal and State courts of sentences that involve indefinite periods of imprisonment is compatible with Ch III[210]. Such provisions have a long history. In intermediate courts, they have been held compatible with *Kable*[211]. This Court has also made it clear that the list of permissible burdens upon liberty, classified as "non-punitive," is not closed[212].

155 Nonetheless, where, as in the case of the Act, a new, different and so far special attempt is made by State legislation to press the judiciary into a function not previously performed by it, it is necessary to evaluate the new role by reference to fundamental principles. The categories of exception to deprivations of liberty treated as non-punitive may not be closed; but they remain exceptions. They are, and should continue to be, few, fully justifiable for reasons of history or reasons of principle developed by analogy with the historical derogations from the norm. Deprivation of liberty should continue to be seen for what it is. For the person so deprived, it will usually be the worst punishment that our legal system now inflicts. In Australia, punishment, as such, is reserved to the

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206 *Lim* (1992) 176 CLR 1 at 25-26, 28, 33, 55; *Behrooz* (2004) 78 ALJR 1056 at 1078 [121]; 208 ALR 271 at 300-301.

207 *Lim* (1992) 176 CLR 1 at 28.

208 *Lim* (1992) 176 CLR 1 at 28.

209 *Lim* (1992) 176 CLR 1 at 27-29, 33, 55, 65, 71; *Kable* (1996) 189 CLR 51 at 121, 131.

210 See *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 495.

211 eg *R v Moffatt* [1998] 2 VR 229 at 249 per Hayne JA.

212 *Lim* (1992) 176 CLR 1 at 55; *Kable* (1996) 189 CLR 51 at 121; *Kruger* (1997) 190 CLR 1 at 162; *Behrooz* (2004) 78 ALJR 1056 at 1078 [121]; 208 ALR 271 at 300-301.

judiciary in a case following an established breach of the law. For that the offender "can be punished [but] for nothing else"[213].

156 In the case of the Act, the drafter has not even attempted a change of nomenclature to disguise the reality of the order assigned to the judiciary in a case such as that affecting the appellant. The person the subject of the order is a "prisoner", convicted of a previous crime. He or she is already detained in prison and must be so at the time of the application and order. If the order under the Act is made, he or she is nominally detained as a "serious danger to the community". However, such continued detention is served in a prison and the detainee, although having completed the service of imprisonment, remains a "prisoner". The detention continues under the "continuing detention order". From the point of view of the person so detained, the imprisonment "continues" exactly as it was.

157 Where a court is concerned with the constitutional character of an Act, its attention is addressed to actuality, not appearances. Were it otherwise, by the mere choice of legislative language and the stroke of a pen, the requirements of the Constitution could be circumvented. In *Ha v NSW*[214] the joint majority reasons explained[215]:

> "When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices."

158 The same point was made in *Chu Kheng Lim v Minister for Immigration*[216]:

> "In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form."

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213 *Lim* (1992) 176 CLR 1 at 27-28, quoting Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 202.

214 (1997) 189 CLR 465.

215 (1997) 189 CLR 465 at 498.

216 (1992) 176 CLR 1 at 27. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 572 [103].

159 The same rule must apply to the evaluation of a State law said to be incompatible with Ch III of the federal Constitution. Invalidity does not depend on verbal formulae or the proponent's intent[217]. It depends upon the character of the law[218]. Effectively, the Act does not provide for civil commitment of a person who has completed a criminal sentence. Had it done so, one would have expected commitment of that person to a different (non-prison) institution, with different incidents, different facilities, different availability of treatment and support designed to restore the person as quickly as possible to liberty, which is that person's ordinary right as a human being in Australia and under the protection of its Constitution and laws.

160 Occasionally, for a very short interval and in exceptional circumstances, civil commitment to prison may occur[219]. But that is not the character of the Act. It contemplates lengthy commitment, generally with assessment and reassessments at annual intervals. In Australia, we formerly boasted that even an hour of liberty was precious to the common law. Have we debased liberty so far that deprivation of liberty, for yearly intervals, confined in a prison cell, is now regarded as immaterial or insignificant[220]? Under the Act, just as in the law invalidated in *Kable*, the prisoner could theoretically be detained for the rest of the prisoner's life. This could ensue not because of any *past* crime committed, but because of a prediction of *future* criminal conduct[221].

161 In the United States, where post-sentence detention legislation has been enacted, such continuing detention is ordinarily carried out in different facilities, controlled by a different governmental agency, with different features to mark the conclusion of the punitive element of the judicial sentence and the commencement of a new detention with a different quality and purpose[222]. The Queensland Act does not even pretend to make such distinctions. The realities are unashamedly displayed. The punitive character of the Act is indicated by the precondition for its orders (that the subject is a "prisoner" convicted of criminal

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217 *Al-Kateb* (2004) 78 ALJR 1099 at 1131 [167]; 208 ALR 124 at 167.

218 *Kable* (1996) 189 CLR 51 at 116 per McHugh J. See also *Bachrach* (1998) 195 CLR 547 at 560-561 [9]-[12].

219 eg in the case of aliens who are serving a sentence of imprisonment and are subject to immediate deportation or removal from Australia. See *Migration Act* 1958 (Cth), ss 200, 201, 202, 203, 204.

220 See the Act, Pt 3 ("Annual Reviews"), esp s 26.

221 See *Kable* (1996) 189 CLR 51 at 108 per McHugh J, 131-132 per Gummow J.

222 See *Hendricks* 521 US 346 at 368-369 (1997).

offence(s)); by the requirement that the Court have regard to "the prisoner's antecedents and criminal history"[223] for which inferentially the prisoner has previously been punished; and by the obligation imposed by the Act to retain the prisoner in a corrective services facility under an order accurately described as a "continuing detention order". A clearer indication could not be given that the past "detention" of punitive imprisonment, judicially imposed, is to "continue".

162 On its face, the Act hardly makes any effort to pretend to a new form of "civil commitment". To the extent that it does, it fails to disguise its true character, namely punishment. And, by Australian constitutional law, punishment as such is reserved to the judiciary for breaches of the law. An order of imprisonment as punishment can therefore only be made by a court following proof of the commission of a criminal offence, established beyond reasonable doubt[224] where the charge is contested[225], in a fair trial at which the accused is found guilty by an independent court of the offence charged. Here there has been no offence; no charge; no trial. Effectively, the presumption of innocence has been removed[226]. Instead, because of a prisoner's antecedents and criminal history, provision is made for a new form of additional punishment utilising the courts and the corrective services system in a way that stands outside the judicial process hitherto observed in Australia. Civil commitment to prison of persons who have not been convicted of a crime is inconsistent with, and repugnant to, the exercise of the judicial power as envisaged by the Constitution[227].

163 *Predictive superadded imprisonment*: Although the features of the criminal process in the common law have taken a "meandering course" over many centuries[228] it has been fundamental, until now, that (save for the remand of accused persons awaiting trial who are not granted bail) imprisonment has followed final proof of crime. It has not anticipated the crime. Even remanded

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223 The Act, s 13(4)(g). See *Kable* (1996) 189 CLR 51 at 132 per Gummow J, where the fact of imprisonment without adjudgment by a court of criminal guilt was seen as the essential reason for treating the legislation as inconsistent with Ch III. See also at 121 per McHugh J.

224 *Azzopardi v The Queen* (2001) 205 CLR 50 at 64-65 [34]. See also *RPS v The Queen* (2000) 199 CLR 620 at 630 [22], 634 [33].

225 *Dietrich v The Queen* (1992) 177 CLR 292.

226 See *State v Coetzee* [1997] 2 LRC 593 at 677-678 [220], cited in *R v Lambert* [2002] 2 AC 545 at 569-570 [34].

227 See *Kable* (1996) 189 CLR 51 at 125 per Gummow J.

228 *Azzopardi* (2001) 205 CLR 50 at 65 [36].

prisoners are imprisoned for defined and generally limited periods and *after* a fresh crime is alleged to have occurred. In our system of criminal justice, prisons are therefore a place of punishment for *past* wrong-doing. By a sentence that includes imprisonment, a judge communicates the censure of society deserved by the prisoner for proved *past* crimes. Imprisonment is not used as punishment *in advance* for crimes feared, anticipated or predicted in the future. To introduce such a notion of punishment, and to require courts to impose a prison sentence in respect of perceived *future* risks, is a new development. It is one fraught with dangers and "inconsistent with traditional judicial process"[229].

164 The focus of the exercise of judicial power upon past events is not accidental. It is an aspect of the essential character of the judicial function. Of its nature, judicial power involves the application of the law to *past* events or conduct[230]. Although, in discharging their functions, judges are often called upon to predict future happenings[231], an order imprisoning a person because of an estimate of some future offence is something new and different.

165 Simply calling the imprisonment by a different name ("detention") does not alter its true character or punitive effect. Least of all does it do so in the case of an Act that fixes on the subject's status as a "prisoner" and "continues" the type of "detention" that previously existed, that is, punitive imprisonment. Such an order, superimposed at the end of judicial punishment for past crimes, must be distinguished from an order imposing imprisonment for an indeterminate period also for past crimes that is part of the judicial assessment of the punishment for such crimes, determined at the time of sentencing. There, at least, the exercise of judicial power is addressed to past facts proved in a judicial process. Such a sentence, whatever problems it raises for finality and proportionality, observes an historically conventional judicial practice. It involves the achievement of traditional sentencing objectives, including retribution, deterrence and incapacitation applied prospectively[232]. It does not involve supplementing, at a future time, a previously final judicial sentence with new orders that, because they are given effect by the continuation of the fact of imprisonment, amount to new punishment beyond that already imposed in accordance with law[233].

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229 *Kable* (1996) 189 CLR 51 at 98 per Toohey J.

230 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188. See also *Ha* (1997) 189 CLR 465 at 503-504.

231 The granting of *Quia Timet* injunctions constitutes an example.

232 See *Lowndes v The Queen* (1999) 195 CLR 665 at 670 [11]; *McGarry* (2001) 207 CLR 121 at 123-124 [1], 149-150 [84].

233 See *McGarry* (2001) 207 CLR 121.

166 Properly informed, the public understands the role of judges in ordering the deprivation of liberty on the basis of proved breaches of the law in the *past*. The introduction of a power to deprive persons of liberty, and to commit them to prison potentially for very long, even indefinite, periods on the basis of someone's estimate of the risk that they will offend in the *future*, inevitably undermines public confidence in the courts as places exhibiting justice to all, including those accused and previously convicted of serious crimes[234]. A court in the position of this Court is always obliged to test a novel law by what would occur if the novelty became common or repeated or is taken to its logical extent. The Act, if valid, opens the way for future instances of preventative detention in prison, based on prediction. Such a departure from traditional judicial functions is constitutionally impermissible.

167 *Beyond mental illness orders*: But can it be said that the orders permitted under the Act are, or are analogous to, civil commitment for mental illness[235]? Although the predicted dangerousness of sexual offenders, based on past conduct, might not involve proof of a mental illness in the usual sense of that term[236], is it sufficiently analogous to allay constitutional concerns based on the novelty of the function committed by the Act to a State court?

168 Certainly, before a "continuing detention order" is made under the Act, there is no requirement for a finding as to mental illness, abnormality or infirmity in the accepted sense. In his Second Reading Speech on the Bill that became the Act, the respondent Attorney-General made it clear that the Act was *not* founded on concepts of mental illness[237]. This is perhaps understandable given that considerations of mental illness may lead to reducing, not increasing, criminal punishment[238]. Section 8(2)(a) of the Act authorises the Supreme Court to make "an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports". By s 11(2) of the Act, there is no requirement for a diagnosis of mental illness, abnormality or infirmity. Nothing in the Act requires such a diagnosis, or finding by the court, to justify the exercise of the court's powers under ss 8 or 13 of the Act. The inquiry required

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234 See *Kable* (1996) 189 CLR 51 at 98, 107.

235 *Lim* (1992) 176 CLR 1 at 28, 55.

236 See *Veen [No 2]* (1988) 164 CLR 465 at 495 per Deane J.

237 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003 at 2484-2486. See also the Act, ss 3(a), 13(6).

238 eg *Scognamiglio* (1991) 56 A Crim R 81 at 86; *Engert* (1995) 84 A Crim R 67 at 68 per Gleeson CJ.

of the court must simply focus on the *risk* of re-offending. It operates on a prediction as to *future* conduct based on estimates of propensity that would ordinarily be inadmissible in a judicial trial conducted to adjudge whether a person was liable to be sentenced to imprisonment[239]. It follows that the civil commitment envisaged by the Act is based on estimates of re-offending unaccompanied by any requirement on the part of the court to make a finding of the existence of a recognised mental illness, abnormality or infirmity.

169 These and related features of the Act illustrate the novelty of its provisions; their departure from the mental health exception for civil commitment deemed to fall short of "punishment"; and the free hand given to the psychiatric witnesses upon whose evidence the Act requires the State court to perform its function. In effect, the psychiatrists are allowed to estimate dangerousness without any accompanying requirement to anchor such estimations in an established mental illness, abnormality or infirmity[240]. Because such predictions involve guesswork and are notoriously unreliable at the best of times, such functions cannot be imposed on judges divorced from an appropriate footing based on an established mental illness, abnormality or infirmity. It is that established foundation that gives the assurance necessary to justify detention based on a prediction depending on more than the contestable and fallible predictive capacity, absent a recognised and well-established mental disease of settled and describable features.

170 It is true that bail decisions will often be made by reference to predictive considerations. Commonly, such decisions require a court to evaluate whether an accused *will* appear to answer the charge at a trial, *will* interfere with the safety or welfare of a victim or witness or *will* be harmed or commit self-harm[241]. In other countries, constitutional courts have rejected the use in bail decisions of considerations of the possibility that the accused *will* commit further offences[242]. For example, in the Irish Supreme Court, which was unanimous on the point, Walsh J observed[243]:

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239 The Act, ss 13(4), 13(6).

240 See above, these reasons at [123]-[126].

241 eg *Bail Act*, s 16(1)(a).

242 *The People (Attorney General) v O'Callaghan* [1966] IR 501; see also *Ryan v Director of Public Prosecutions* [1989] IR 399 at 404-405.

243 *O'Callaghan* [1966] IR 501 at 516-517. Ó Dálaigh CJ and Budd J reached similar conclusions as Walsh J.

> "In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the [Parliament] and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."

171 The *Bail Act* expressly provides for consideration, in bail decisions, of whether there is an unacceptable risk that, whilst released, the accused *will* commit an offence, that is, a future offence[244]. It is unnecessary to decide here the constitutional validity of that provision. It is enough to point to the great difference between refusal of bail in respect of a pending charge of a *past offence* and refusal of liberty, potentially for very long intervals of time, in respect of estimations of *future* offending, based on predictions of propensity and submitted to proof otherwise than by reference to the criminal standard of proof.

172 In addressing legislation bearing some similarities to the Act, the Supreme Court of the United States has concluded that dangerousness by itself is insufficient to sustain civil commitment of prisoners beyond the term of punishment imposed for criminal offences. Relevantly, it is necessary for the additional finding to be made, warranting continued deprivation of liberty, that the subject is suffering from a mental illness, abnormality or infirmity that justifies the very large step of depriving him or her of liberty[245]. The Supreme Court has held that post-sentence civil commitment must be undertaken in hospitals or equivalent institutions, segregated from prisons established for the punishment of those convicted of crime[246].

173 The Act under consideration includes amongst its objects "care" and "treatment" of a "particular class of prisoner to facilitate their rehabilitation"[247]. However, in the scheme of the Act, this object obviously takes a distant second place (if any place at all) to the true purpose of the legislation, which is to provide for "the continued detention in custody … of a particular class of

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244 *Bail Act*, s 16(1)(a)(ii)(A).

245 *Hendricks* 521 US 346 at 358 (1997).

246 *Hendricks* 521 US 346 at 368-369 (1997); *Seling v Young* 531 US 250 at 261 (2001).

247 The Act, s 3(b).

prisoner"[248]. If the real objective of the Act were to facilitate rehabilitation of certain prisoners retained in prison under a "continuing detention order", significant, genuine and detailed provisions would have appeared in the Act for care, treatment and rehabilitation. There are none. Instead, the detainee remains effectively a prisoner. He or she is retained in a penal custodial institution, even as here the very prison in which the sentences of judicial punishment have been served. After the judicial sentence has concluded, the normal incidents of punishment continue. They are precisely the same.

174 These features of the Act demonstrate that the orders for which it provides do not fall within the category of civil commitment for mental illness contemplated in *Lim* as an exception to the comprehensive control enjoyed by the judiciary over orders depriving persons of their liberty[249]. Here, the deprivation can only be viewed as punishment[250]. Although the constitutional setting in the United States is different from that operating in Australia, our legal tradition shares a common vigilance to the dangers of civil commitment that deprives persons of their liberty. In my view, the purposes of Ch III and the tests expounded by the majority in *Kable*[251] require this Court to adopt a similar vigilance to this new mode of effective punishment provided for in the Act.

175 The Act is not proportional (that is, appropriate and adapted) to a legitimate non-punitive objective[252]. It conscripts judges in the imposition of effective judicial punishment in proceedings not otherwise known to the law[253]. The misuse of psychiatry and psychology[254] in recent memory in other countries

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248 The Act, s 3(a).

249 *Lim* (1992) 176 CLR 1 at 28. See also *Al-Kateb* (2004) 78 ALJR 1099 at 1103 [10], 1121 [109]-[110], 1127 [147], 1128-1129 [153], 1146-1147 [257]-[258]; 208 ALR 124 at 128, 152-153, 161-162, 163, 188-189.

250 For the characteristics of punishment, see Hart, *Punishment and Responsibility*, (1968) at 4-5, cited in *Al-Kateb* (2004) 78 ALJR 1099 at 1147-1148 [265] per Hayne J; 208 ALR 124 at 190.

251 *Kable* (1996) 189 CLR 51 at 98, 106, 121, 134. See *Silbert* (2004) 78 ALJR 464 at 472 [49]; 205 ALR 43 at 55.

252 *Lim* (1992) 176 CLR 1 at 58; *Kruger* (1997) 190 CLR 1 at 162.

253 *Kable* (1996) 189 CLR 51 at 134 per Gummow J.

254 Bloch and Reddaway, *Psychiatric Terror: How Soviet Psychiatry Is Used to Suppress Dissent*, (1977); Masserman and Masserman (eds), *Social Psychiatry and World Accords*, (1996).

demands the imposition of rigorous standards before courts may be enlisted to deprive persons of liberty on psychological evidence, absent an established mental illness, abnormality or infirmity. This is why, in other countries, and hitherto in Australia, recognised and well documented mental illnesses, abnormalities or infirmities are the prerequisite for civil commitment on this ground. Psychiatric assessment of *risk* alone is insufficient. To involve the judiciary in assessments of the latter kind is to attempt to cloak such unreliable and potentially unjust guesswork with the authority of the judicial office. It is repugnant to the judicial process to do so.

176 *Highly selective punishment*: Whilst it is true that the Act does not single out, or name, an individual prisoner for continued detention (as was the case in the legislation involving Mr Kable) it is still inconsistent with the traditional judicial process. It is directed to a readily identifiable and small group of individuals who have committed the specified categories of offence and are in Queensland prisons. It adds to the effective punishment of those individuals by exposing them to continued detention beyond the sentence judicially imposed by earlier final orders. It does not contain the procedural safeguards involved in the trial before an Australian court of a criminal offence carrying the risk of punishment by imprisonment. In effect, the appellant and the small class of persons in a like position, are identified by reference both in the short title to the Act and in its provisions[255]. Only the most formalistic approach to the continued detention of the appellant in *prison*, in the same conditions as those imposed as punishment for criminal convictions, could result in the pretence that his continued detention was not punishment. This Court has repeatedly insisted that, in matters of constitutional evaluation, substance, and not mere form, provides the touchstone[256].

177 Thus, in *Witham v Holloway*[257] it became necessary for the Court to classify contempt proceedings. Traditionally, they had been treated by the common law as civil in character. However, they often resulted in orders of imprisonment or the imposition of fines. This Court concluded that such

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255 The Act, ss 1, 3(a) and 5(6).

256 eg *Lim* (1992) 176 CLR 1 at 27; *Ha* (1997) 189 CLR 465 at 498; *Re Wakim* (1999) 198 CLR 511 at 572 [103].

257 (1995) 183 CLR 525. See also *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 364.

proceedings were more correctly classified as criminal in nature. The joint reasons explained[258]:

> "Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines … constitute punishment."

178 Upon this basis, the continued imprisonment of the appellant likewise constitutes punishment. There are too many features of the Act to deny that classification to the order made against him. Such order is "taken to be a warrant committing the prisoner into custody for the *Corrective Services Act*"[259]. It designates the continuing detainee "a prisoner". The prisoner is even denied eligibility for the entitlements of other prisoners, such as post-prison community based release[260]. This is added punishment and the Act makes little or no effort to pretend to the contrary.

179 In argument, it was suggested that, even if the Act created an effective trial and punishment of persons such as the appellant, it did no offence to the Constitution because the separation of the judicial power in the States is not as rigorous as with respect to federal courts named or contemplated in Ch III courts. I doubt the correctness of this oft-stated proposition expressed so broadly; but it is unnecessary to examine that question here. By involving a State court in the imposition of punishment, without the safeguards associated with a judicial trial, the Act offends the implications of Ch III in the precise way that *Kable* described. In this country imprisonment as punishment must follow the standard of traditional judicial process and be for a conventional purpose. The Act does not observe those standards. It pretends to a form of civil commitment; but that pretence does not survive even perfunctory scrutiny. Punishment is punishment and that is what the continued imprisonment ordered in the appellant's case is in law as well as effect.

180 *Double and retrospective punishment*: The rule against double punishment for proved crimes may be traced to Biblical times[261]. In English law it is often traced to the *Constitutions of Clarendon* (1164) by which King

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258 *Holloway* (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ, 545 per McHugh J. See also *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 276-279, 288, 292.

259 The Act, s 50.

260 Under the *Corrective Services Act*, Ch 5. See the Act, s 51.

261 In the Old Testament Book of *Nahum* 1:9 (King James Bible). See Thomas, *Double Jeopardy: The History, the Law*, (1998) at 72.

Henry II asserted a right to subject clergy to trial in the civil as well as ecclesiastical courts. The resolution of that conflict, following the murder of Archbishop Thomas à Becket, witnessed the beginning of the acceptance by English law that a person should not be put in danger twice for the same crime[262]. This rule is reflected in the common law. It is expressed in the Fifth Amendment to the *Constitution of the United States* 1787, stating that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb". By the Fourteenth Amendment, that provision has been held applicable to State as well as federal laws in the United States[263].

181 Although there is no similar express constitutional provision in Australia, our law has repeatedly upheld procedural and substantive rules that provide effective protection against double jeopardy[264]. The principle is also reflected in the International Covenant on Civil and Political Rights ("ICCPR")[265]. Australia is a party to the ICCPR and also to the First Optional Protocol to the ICCPR[266]. Because of this, the influence of the ICCPR upon Australian law is large, immediate and bound to increase, particularly in statutory construction[267].

182 But can it be said that, by enacting the Act, the Queensland Parliament has, within its legislative powers, adopted a law that deliberately involves a form of double punishment which is nevertheless valid and binding? Certainly, by force of the Act, a person such as the appellant is liable, as I would conclude, to further punishment[268]. That punishment is based, in part at least, upon the criterion of his former conviction(s). Accordingly, the punishment constitutes an increase to the punishment already judicially imposed by reference to the

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262 Blackstone, *Commentaries*, (1769), bk 4, c 26 at 329.

263 *Benton v Maryland* 395 US 784 at 793-796 (1969).

264 See *Rogers v The Queen* (1994) 181 CLR 251 at 273; *Pearce v The Queen* (1998) 194 CLR 610 at 625 [52]-[54]; *R v Carroll* (2002) 213 CLR 635. See also *Stafford v United Kingdom* (2002) 35 EHRR 32 at 1121, 1143-1144 [79]-[80].

265 Done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23, Art 14.7.

266 Done at New York on 19 December 1966, [1991] *Australian Treaty Series* No 39.

267 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Al-Kateb* (2004) 78 ALJR 1099 at 1128 [150], 1133 [180]; 208 ALR 124 at 162-163, 170. See also *Coleman v Power* [2004] HCA 39 at [17]-[19], [22] per Gleeson CJ, [240]-[241], [243]-[247] of my own reasons.

268 The Act, ss 8, 13, 50.

appellant's earlier conviction(s) and final sentence(s) for the same crime(s). It involves a later judge being required, in effect, to impose new punishment beyond that fixed by an earlier judge, without any intervening offence, trial or conviction.

183 In *R v Carroll*[269], Gaudron and Gummow JJ remarked that the interests at stake in that appeal "touch upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power". Respectfully, I agree with that observation. In that case, the attempt was made, despite Mr Carroll's earlier acquittal, to expose him again to punishment by reference to the same past acts by charging him with a new and different offence. This Court unanimously held that the attempt failed. The reasoning of the Court did not rest upon constitutional grounds. It did not have to do so because the common law afforded the solution.

184 In the present case, the common law would not prevail over clear State legislation, so long as that law was constitutionally valid. The reference in *Carroll* to "matters fundamental … to the nature of judicial power" is therefore pertinent. In my view, it is essential to the nature of the judicial power that, if a prisoner has served in full the sentence imposed by a court as final punishment it is not competent for the legislature to require another court, later, to impose additional punishment by reference to previous, still less the same, offences. Such a requirement could not be imposed upon Ch III courts. Equally, it is repugnant to the exercise by State courts of the federal judicial power that may be vested in those courts for such courts to be obliged to perform such functions.

185 Effectively, what is attempted involves the second court in reviewing, and increasing, the punishment previously imposed by the first court for precisely the same *past* conduct. Alternatively, it involves the second court in superimposing additional punishment on the basis that the original maximum punishment provided by law, as imposed, has later proved inadequate and that a new foundation for additional punishment, in effect retrospective, may be discovered in order to increase it. Retrospective application of new criminal offences and of additional punishment is offensive to the fundamental tenets of our law. It is also contrary to the obligations assumed by Australia under the ICCPR[270]. It is contrary to truth and transparency in sentencing. It is destructive of the human capacity for redemption. It debases the judiciary that is required to play a part in it.

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269 (2002) 213 CLR 635 at 661 [86].

270 Art 15.1. See generally debates in the NSW Parliament on the *Sentencing (Life Sentences) Amendment Bill* 1993 (NSW): NSW, Legislative Council, *Parliamentary Debates* (Hansard), 9 November 1993 at 4948, 4950, 4952.

186 On this footing, the imposition of such functions on a State court is offensive to the basic notions of the judicial power contained in Ch III of the Constitution of the Commonwealth. It follows that the provisions of the Act are invalid. The offending provisions cannot be severed. They lie at the very heart of the Act. In my opinion, the entire Act fails.

The dangers of phenomenological punishment

187 This Court should not resolve the arguments of the parties in the present proceedings unaware of what has gone before. History evidences many patterns of unacceptable intrusions by other sources of power into the independence of the judiciary. These should not be dismissed as irrelevant to Australia. They have occurred in "highly civilised" countries, with strong legal and judicial traditions. This Court should be vigilant to the patterns demonstrated by history wherever they arise in the Commonwealth. It is against their emergence that the doctrine expressed in *Kable* protects fundamental features of the judicial branch of government.

188 One pattern of intrusion into judicial functions may be observed in what occurred in Germany in the early 1930s. It was provided for in the acts of an elected government. Laws with retroactive effect were duly promulgated. Such laws adopted a phenomenological approach. Punishment was addressed to the estimated character of the criminal instead of the proved facts of a crime. Rather than sanctioning specified criminal conduct, the phenomenological school of criminal liability procured the enactment of laws prescribing punishment for identified "criminal archetypes". These were the *Volksschädlinge* (those who harmed the nation). The attention of the courts was diverted from the *corpus delicti* of a crime to a preoccupation with the "pictorial impression" of the accused. Provision was made for punishment, or additional punishment, not for specific acts of proved conduct but for "an inclination towards criminality so deep-rooted that it precluded [the offender's] ever becoming a useful member of the ... community"[271].

189 This shift of focus in the criminal law led to a practice of not releasing prisoners at the expiry of their sentences. By 1936, in Germany, a police practice of intensive surveillance of discharged criminals was replaced by increased utilisation of laws permitting "protective custody". The German courts were not instructed, advised or otherwise influenced in individual cases[272]. They did not

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271 Grunberger, *A Social History of the Third Reich*, (1971) at 123, quoting from *Hamburger Fremdenblatt*, 6 June 1943.

272 See reasons of Gummow J at [116].

need to be. The basis of the law had shifted from the orthodox to the new, just as here. Offenders for whom such punishments were prescribed were transferred from civil prisons to other institutions, such as lunatic asylums, following the termination of their criminal sentence. Political prisoners and "undesirables" became increasingly subject to indeterminate detention[273].

190 In the *Communist Party Case*, Dixon J taught the need for this Court to keep its eye on history, including recent history, so far as it illustrated the over-reach of governmental power[274]. He and his generation of Australian judges were aware of the challenge to the capacity of the judiciary to defend the rule of law[275]. This Court should not allow the passage of fifty years since this insight to dull its memory or its appreciation of the distortions of the judicial power that are now being attempted. The principle in *Kable* was a wise and prudent one, defensive of judicial independence in Australia and concerned with much more than Mr Kable's liberty. I dissent from the willingness of this Court, having stated the principle, now repeatedly to lend its authority to the confinement of the application of the principle. This has been done virtually to the point where the principle itself has disappeared at the very time when the need for it has greatly increased, as this case shows.

Conclusions and orders

191 In *Veen v The Queen [No 2]*[276], Deane J pointed out that cases may exceptionally arise where a prisoner, who has completed the punishment, judicially imposed upon proof of a criminal offence, may continue to represent a danger to the community. Where such a danger arises from an established mental illness, abnormality or infirmity which requires and justifies civil commitment, the law already provides solutions. If it is desired to extend powers to deprive of their liberty persons who do *not* exhibit an established mental illness, abnormality or infirmity, it is possible that another form of detention might be created. It is also possible that judges might play a part in giving effect to it in ways compatible with the traditional judicial process and observing the conventional nature of legal proceedings. However, at a minimum, any such detention would have to be conducted in a medical or like institution, with full

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273 Grunberger, *A Social History of the Third Reich*, (1971) at 123-124.

274 (1951) 83 CLR 1 at 187-188. See Winterton, "*The* Communist Party *Case*", in Lee and Winterton (eds), *Australian Constitutional Landmarks*, (2003) at 132.

275 *Communist Party Case* (1951) 83 CLR 1 at 193.

276 (1988) 164 CLR 465 at 495. The remarks of Deane J suggest a possibility of an "acceptable statutory system" of preventive restraint. They do not suggest that this "system" would simply involve continuation of imprisonment.

facilities for rehabilitation and therapy, divorced from the punishment for which prisons and custodial services are designed.

192 In the present case there was no attempt to observe this important constitutional distinction. On the contrary, the "continued detention" is wholly integrated with, and expressly continues, the imprisonment of the prisoner. The appellant remains a prisoner in the same custodial institution. The need to treat any continuing civil commitment differently is not purely symbolic, although in matters of liberty, symbols matter. Instead, it is essential to avoid a procedure repugnant to the solemn function performed by courts in the imposition of criminal punishment by sentences of imprisonment. In Australia, such punishment is reserved to courts in respect of the crimes that prisoners are proved to have committed. It is not available for crimes that are feared, anticipated or predicted to occur in the future on evidence that is notoriously unreliable and otherwise would be inadmissible and by people who do not have the gift of prophesy.

193 The appeal should be allowed. The judgment of the Court of Appeal of the Supreme Court of Queensland should be set aside. In lieu thereof, it should be ordered that the judgment of the primary judge be set aside. In its place it should be declared that the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) is invalid. The appellant should be released from detention.

194 In the cause removed to this Court pursuant to the *Judiciary Act* 1903 (Cth), it should be ordered that the cause be returned to the Court of Appeal of the Supreme Court of Queensland to be determined consistently with the declaration that the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) is invalid.

195 HAYNE J. I agree that in the cause, part of which has been removed into this Court, there should be a declaration that s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) ("the Act") is not beyond the legislative power of the State of Queensland and that the cause otherwise should be remitted to the Queensland Court of Appeal for hearing and determination of the remaining issues in the appeal to that Court. The appeal to this Court concerning the interim order made by Muir J on 27 June 2003 and his judgment upholding the validity of the Act should be dismissed.

196 Subject to one exception, I agree in the reasons of Gummow J. The exception is that I would reserve my opinion about whether federal legislation along the lines of the Act would be invalid. As Gummow J points out, no sharp line can be drawn between criminal and civil proceedings or between detention that is punitive and detention that is not. And once it is accepted, as it has been in Australia, that protection of the community from the consequences of an offender's re-offending is a legitimate purpose of sentencing[277], the line between preventative detention of those who have committed crimes in the past (for fear of what they may do in the future) and punishment of those persons for what they have done becomes increasingly difficult to discern. So too, when the propensity to commit crimes (past or future) is explained by reference to constructs like "anti-social personality disorder" and it is suggested that the disorder, or the offender's behaviour, can be treated, the line between commitment for psychiatric illness and preventative detention is difficult to discern. Indeed, the premise for the decisions of the Supreme Court of the United States upholding State civil commitment statutes[278] is that the statutes do not differ in substance or effect from a legislative regime providing for the confinement of some who suffer psychiatric illness.

197 I acknowledge the evident force in the proposition that to confine a person for what he or she might do, rather than what he or she has done, is at odds with identifying the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct. Nonetheless, I would reserve for further consideration, in a case where it necessarily falls for decision, whether legislation requiring a federal court to determine whether a person previously found guilty of an offence should be detained beyond the expiration of the sentence imposed, on the ground that the prisoner will or may offend again, would purport to confer a non-judicial function on that court. Because the distinctions referred to above are so uncertain much may turn on the particular terms and operation of the legislation in question.

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277 *Veen v The Queen [No 2]* (1988) 164 CLR 465.

278 *Addington v Texas* 441 US 418 (1979); *Jones v United States* 463 US 354 (1983); *Kansas v Hendricks* 521 US 346 (1997); *Kansas v Crane* 534 US 407 (2002).

198 Subject to that, I agree that, for the reasons given by Gummow J, first, that the principle for which *Kable v Director of Public Prosecutions (NSW)*[279] stands requires for its application that the Act in question be repugnant to, or incompatible with, that institutional integrity which the exercise of federal jurisdiction conferred upon the Supreme Court of Queensland requires and, secondly, that the Act is not of that kind.

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279 (1996) 189 CLR 51.

CALLINAN AND HEYDON JJ.

The issue

199 The question raised by this appeal is whether ss 8 and 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q) ("the Act") infringe Ch III of the Commonwealth Constitution by vesting in the Supreme Court of Queensland functions that are incompatible with the exercise by that Court of the judicial power of the Commonwealth contrary to the principles expounded by this Court in *Kable v Director of Public Prosecutions (NSW)*[280].

Facts and previous proceedings

200 On 30 June 1989 the appellant was convicted of rape, sodomy and assault occasioning bodily harm. He was sentenced to a term of imprisonment of 14 years expiring on or about 30 June 2003.

201 The Act commenced operation on 6 June 2003.

202 On 17 June 2003, the respondent filed an application in the Supreme Court of Queensland under s 5 of the Act for an order that the appellant be detained for an indefinite period pursuant to s 13 of the Act. On 27 June 2003, the Supreme Court (Muir J) made orders pursuant to s 8(2)(b) of the Act for the interim detention of the appellant, pending a psychiatric assessment. The appellant challenged the Act on the basis that its provisions were incompatible with Ch III of the Constitution.

203 On 9 July 2003, Muir J rejected the constitutional challenge to s 8 of the Act[281]. The appellant had argued that s 8 of the Act, by conferring on the Supreme Court the power to make an interim preventative detention order, infringed Ch III of the Constitution by vesting in the Supreme Court functions incompatible with the Court's function as a repository of judicial power of the Commonwealth: that the Act was relevantly the same in substance and effect as the legislation which this Court struck down in *Kable*. His Honour was of the opinion however that *Kable* was distinguishable: contrary to the appellant's argument, there were "substantial differences" between the provisions of the Act and the legislation in *Kable*. His Honour said this[282]:

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280 (1996) 189 CLR 51.

281 *A-G (Q) v Fardon* [2003] QSC 200.

282 *A-G (Q) v Fardon* [2003] QSC 200 at [78].

> "In particular, the Act, unlike the *Kable* legislation, is not directed towards securing the continued detention of one person. The Act has general application, rules of evidence apply, the Attorney-General has the onus of proof 'to a high degree of probability' in respect of orders made under s 13 and the court has a discretion as to whether to make one of the orders specified in s 13(5) or no order at all. All continuing detention or supervision orders must be accompanied by detailed reasons and are subject to rights of appeal."

204 On 23 September 2003, the Court of Appeal (de Jersey CJ and Williams JA, McMurdo P dissenting) affirmed the decision of Muir J. The majority found that the Act conferred genuine discretionary power on the Supreme Court and infringed no principle for which *Kable* stands[283].

205 Between 27 and 30 October 2003, the Court (White J) heard the respondent's application for an order that the appellant be detained in prison for an indefinite term pursuant to s 13 of the Act. Her Honour had before her not only the reports by two psychiatrists ordered by the Court, but also reports by two other such practitioners. Provision was also made for the appellant to be present by video link to the hearing. He availed himself of this opportunity by giving oral evidence by this means. The evidence before her Honour was that the appellant had spent almost 23 years in prison since October 1980. His most serious crimes were sexual offences. Two involved children. The offences were accompanied by marked violence. There was also evidence that the appellant had claimed that he had committed some offences in order that he would be sent to prison where "he was comfortable". On 6 November 2003, her Honour held that there was a serious risk that the appellant would commit a serious sexual offence if he were to be released from custody, and ordered that he be detained for an indefinite term, for control, care and treatment.

Appeal to this Court

206 The grounds of the appellant's appeal to this Court are:

> "The majority of the Supreme Court of Appeal of Queensland (the Court of Appeal) erred in holding that:
>
> (a) Section 8 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) fell within the legislative competence of the Queensland Parliament; and

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283 *A-G (Qld) v Fardon* [2003] QCA 416.

(b) Section 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) fell within the legislative competence of the Queensland Parliament; and

The majority of the Court of Appeal erred in distinguishing *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 for the reasons they did."

207 We should say at the outset that we are generally in agreement with the reasoning and conclusion of the majority in the Court of Appeal.

Appellant's submissions

208 The appellant in this Court repeated the argument that he had advanced in the Court of Appeal, that ss 8 and 13 of the Act have the same objectionable features as the legislation that this Court held invalid in *Kable*, in particular, that the purported conferral of a power upon a court to detain a person in custody upon the basis of a prediction that an offender will re-offend, rather than upon an adjudication of actual criminal guilt, is offensive to Ch III of the Constitution.

The scheme of the Act

209 The purpose of the Act is to enable "the Supreme Court to order the post-sentence preventative detention of sex offenders who pose a serious danger to the community."[284]

210 In outline, the Act applies to persons imprisoned for a "serious sexual offence" which is defined in the schedule to the Act as "an offence of a sexual nature, whether committed in Queensland or outside Queensland involving violence or against children". The Attorney-General may apply to the Court for orders requiring such a person to submit to psychiatric assessment[285]. Upon an application, the Court may order that the person undergo a risk assessment by two qualified psychiatrists, who must prepare an assessment of the risk of the person re-offending[286]. If the Court is satisfied that the person would, if released, pose a serious danger to the community, it is empowered to order the prisoner's detention (a "continuing detention order") or supervision subject to conditions

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284 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003 at 2484.

285 s 5.

286 s 8.

imposed by the Court (a "supervision order")[287]. In determining which order to make, the paramount consideration is to be the need to protect the community[288]. A continuing detention order is to remain in effect until revoked by order of the court. In the meantime, the person subject to the order is to remain a prisoner[289]. Supervision orders are to be made for a definite term[290].

211 Section 8 of the Act provides:

"**8 Preliminary hearing**

(1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.

(2) If the court is satisfied as required under subsection (1), it may make either or both of the following orders –

(a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports (a "**risk assessment order**");

(b) if the court is satisfied that the prisoner may be released from custody before the application is finally decided, an order that the prisoner be detained in custody for the period stated in the order (an "**interim detention order**").

(3) If the prisoner is ordered to be detained in custody after the prisoner's period of imprisonment ends, the person remains a prisoner, including for all purposes in relation to an application under this Act.

(4) If the court sets a date for the hearing of the application for a division 3 order but the prisoner is released from custody before the application is finally decided, for all purposes in relation to

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287 s 13.

288 s 13(6).

289 s 14.

290 s 15.

deciding the application this Act continues to apply to the person as if the person were a prisoner."

Section 13 of the Act provides:

"**13 Division 3 orders**

(1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a "**serious danger to the community**").

(2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence –

(a) if the prisoner is released from custody; or

(b) if the prisoner is released from custody without a supervision order being made.

(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied –

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the decision.

(4) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following –

(a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;

(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;

(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;

(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;

(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

(g) the prisoner's antecedents and criminal history;

(h) the risk that the prisoner will commit another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter.

(5) If the court is satisfied as required under subsection (1), the court may order –

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment ("**continuing detention order**"); or

(b) that the prisoner be released from custody subject to the conditions it considers appropriate that are stated in the order ("**supervision order**").

(6) In deciding whether to make an order under subsection (5)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)." (footnote omitted)

The decision in *Kable*

212 In Kable, this Court found that the Community Protection Act 1994 (NSW) was incompatible with Ch III of the Commonwealth Constitution, and therefore invalid, because it effectively required a Judge of the Supreme Court of New South Wales to make an order depriving a named person of his liberty at the expiration of his term of imprisonment. The majority was of the opinion that the Community Protection Act compromised the integrity of the judicial system established by Ch III because it obliged the Supreme Court of New South Wales, a Court which exercised the judicial power of the Commonwealth from time to time, to act non-judicially when exercising State jurisdiction.

213 In *Kable*, the Justices in the majority used differing formulations when stating the principles, but all of them referred to constitutional integrity, or public confidence, or both. With respect to the powers purportedly conferred by the *Community Protection Act*, Toohey J held that they were incompatible with the exercise of the judicial power of the Commonwealth because they were of such a nature that public confidence in the integrity of the judiciary as an institution was diminished[291]. Gaudron J said that they compromised the integrity of the judicial system brought into existence by Ch III of the Constitution, which depends on State courts acting in accordance with the judicial process and on the maintenance of public confidence in that process[292]. The opinion of McHugh J was that the impugned conferral of non-judicial power or other incidents of the Court should not be such as could lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State, or that the Court as an institution was not free of governmental influence in administering the judicial functions invested in the Court, and compromised the institutional impartiality of the Court[293]. Gummow J was of the view that the exercise of statutory powers jeopardized the integrity of the Court, and sapped the appearance of institutional impartiality, and the maintenance of public confidence in the judiciary[294].

Detention under the Act is for non-punitive purposes

214 It is accepted that in some circumstances, it is valid to confer powers on both non-judicial and judicial bodies to authorize detention, for example, in cases of infectious disease or mental illness. These categories are not closed. In this respect, the second object of the Act is relevant[295]:

> "[T]o provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

To the extent that the Act in fact furthers this object, a court applying it would be undertaking, without compromise to its judicial integrity, a conventional adjudicative process.

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291 (1996) 189 CLR 51 at 98.

292 (1996) 189 CLR 51 at 107.

293 (1996) 189 CLR 51 at 117, 119 and 121.

294 (1996) 189 CLR 51 at 133.

295 s 3(b).

215 To determine whether detention is punitive, the question, whether the impugned law provides for detention as punishment or for some legitimate non-punitive purpose, has to be answered. As Gummow J said in *Kruger v The Commonwealth*[296]:

> "The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed." (footnotes omitted)

216 Several features of the Act indicate that the purpose of the detention in question is to protect the community and not to punish. Its objects are stated to be to ensure protection of the community and to facilitate rehabilitation[297]. The focus of the inquiry in determining whether to make an order under ss 8 or 13 is on whether the prisoner is a serious danger, or an unacceptable risk to the community. Annual reviews of continuing detention orders are obligatory[298].

217 In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorizing involuntary detention in the interests of public safety. Its proper characterization is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment[299]. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes.

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296 (1997) 190 CLR 1 at 162.

297 s 3(a).

298 s 27.

299 See *Crimes Act* 1914 (Cth), ss 20B(4), 20B(5), 20BC(2)(b), 20BJ(1) and 20BM(5)(d); *Migration Act* 1958 (Cth), s 178; *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic), ss 10(1)(c), 12(2)(c), 19(1)(c) and 26(2)(a)(ii); *Criminal Law Consolidation Act* 1935 (SA), ss 269O(1)(b)(i) and 269V(2)(b); *Health Act* 1937 (Q), ss 36, 37 and 130B; *Mental Health Act* 2000 (Q), ss 57, 59, 61-63, 68, 69, 101, 273 and 288; *Penalties and Sentences Act* 1992 (Q), ss 162 and 163; *Public Safety Preservation Act* 1986 (Q), ss 34, 35 and 36; *Criminal Law (Mentally Impaired Defendants) Act* 1996 (WA), s 24.

218 One further submission of the appellant requires consideration. He contended that the Act was a Bill of Pains and Penalties, that is, a "legislative enactment which inflicts punishment without a judicial trial"[300]. In *Chu Kheng Lim v Minister for Immigration*, McHugh J discussed such a Bill and said this of it in a Constitutional context[301]:

> "At common law, special Acts of Parliament under which the legislature inflicted punishment upon persons alleged to be guilty of treason or felony 'without any conviction in the ordinary course of judicial proceedings' were known as Bills of Attainder and Bills of Pains and Penalties. The term 'Bill of Attainder' was used in respect of Acts imposing sentences of death, the term 'Bill of Pains and Penalties' in respect of Acts imposing lesser penalties. In the sixteenth and seventeenth centuries, the Parliament of the United Kingdom passed many such Bills, particularly 'in times of rebellion, or of gross subserviency to the crown, or of violent political excitements'. During the American Revolution, a number of such Bills were passed in the thirteen States. Subsequently, the Constitution of the United States prohibited the enactment of Bills of Attainder. The Supreme Court of the United States has construed the term 'Bill of Attainder' in that clause to include all 'legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial'. Thus, a Bill of Attainder or a Bill of Pains and Penalties is a law (1) directed to an individual or a particular group of individuals (2) which punishes that individual or individuals (3) without the procedural safeguards involved in a judicial trial.
>
> No express prohibition against the enactment of Bills of Attainder or Bills of Pains and Penalties is to be found in the Constitution. However, it is a necessary implication of the adoption of the doctrine of separation of powers in the Constitution that the Parliament of the Commonwealth cannot enact such Bills. An Act of the Parliament which sought to punish individuals or a particular group of individuals for their past conduct without the benefit of a judicial trial or the procedural safeguards essential to such a trial would be an exercise of judicial power of the Commonwealth and impliedly prohibited by the doctrine of the separation of powers. Such an Act would infringe the separation of

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300 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535-536, 646, 685-686, 719-721.

301 (1992) 176 CLR 1 at 69-70.

> judicial and legislative power by substituting a legislative judgment of guilt for the judgment of the courts exercising federal judicial power." (footnotes omitted)

219 The Act here is not such a bill. Its purpose is not to punish people for their past conduct. It is a protective measure and provides, in any event, for many of the safeguards of a judicial trial. It is necessary to keep in mind the issues with which *Kable* was concerned and the true nature of the decision which the Court made there. Despite the differing formulations of the Justices in the majority, the primary issue remained whether the process which the legislation required the Supreme Court of New South Wales to undertake, was so far removed from a truly judicial process that the Court, by undertaking it, would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of Federal judicial power under Ch III of the Constitution. This Court did not in *Kable* hold however that in all respects, a Supreme Court of a State was the same, and subject to the same constraints, as a federal court established under Ch III of the Constitution. Federal judicial power is not identical with State judicial power. Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the Constitution, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the Constitution, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the Constitution.

220 The forms and procedures prescribed by the Act bear the hallmarks of traditional judicial forms and procedure. Section 5(3) raises a formidable threshold for the Attorney-General as applicant to surmount: a need at a preliminary hearing to satisfy the Court that "there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of [an] … order." This is a considerably higher threshold than a prosecutor has to surmount at a committal, effectively the establishment of a prima facie case only.

221 The Act requires that the prisoner will be provided with full disclosure and details of the allegations and all other relevant material filed by the Attorney-General against him[302] and provides for the filing of material by him[303]. The

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302 ss 5(5), 12 and 25.

303 s 6.

effect of s 7 is to apply the rules of evidence except with respect to a preliminary hearing where the rules may be relaxed to accord with those generally obtaining in urgent interlocutory applications. The prisoner has full rights to cross-examine and to adduce evidence[304]. The Court may decide some relatively less important matters only on the papers[305].

222 Should the Court reach the requisite degree of satisfaction at a preliminary hearing, the application is then to proceed to a final hearing[306] and the Court has a discretion to order two independent psychiatric examinations and reports.

223 These points should be made about the section which empowers the Court to make an order for the detention of a prisoner. First, the prisoner's release must be shown to present an unacceptable risk of the commission by him of a serious sexual offence. In so deciding, the Court may only act upon "acceptable, cogent evidence"[307] and the degree of satisfaction that it must reach is one of "a high degree of probability"[308].

224 Section 13(4) provides another safeguard by requiring the Court to have regard to these relevant and important matters: the psychiatrists' reports; the co-operation or otherwise of the prisoner with the psychiatrists; other relevant reports; the prisoner's propensities; any pattern of offending by the prisoner; the prisoner's participation in rehabilitative programmes and the results of them; the prisoner's efforts to address the cause of his behaviour; the prisoner's antecedents and criminal history; "the risk that the prisoner will commit another serious sexual offence if released into the community"[309]; and the need to protect the community against that risk and any other relevant matter.

225 The yardstick to which the Court is to have regard, of an unacceptable risk to the community, relevantly a risk established according to a high degree of probability, that the prisoner will commit another sexual offence if released, established on and by acceptable and cogent evidence, adduced according to the rules of evidence, is one which courts historically have had regard to in many

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304 s 45.

305 s 44.

306 s 8(1).

307 s 13(3)(a).

308 s 13(3)(b).

309 s 13(4)(h).

areas of the law. The process of reaching a predictive conclusion about risk is not a novel one. The Family Court undertakes a similar process on a daily basis and this Court (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) said this in *M v M* of the appropriate approach by the Family Court to the evaluation of a risk to a child[310]:

> "Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a 'risk of serious harm'[311], 'an element of risk' or 'an appreciable risk'[312], a 'real possibility'[313], a 'real risk'[314], and an 'unacceptable risk'[315]. This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse."

226 Sentencing itself in part at least may be a predictive exercise requiring a court on occasions to ask itself for how long an offender should be imprisoned to enable him to be rehabilitated, or to ensure that he will no longer pose a threat to the community. The predictive exercise of an assessment of damages for future losses is also a daily occurrence in the courts.

227 Even if the Court concludes under s 13(1) of the Act that the prisoner is a serious danger to the community, it still has a discretion under s 13(5) as to the way in which the application should be disposed of. It may, for example, order that the prisoner be released from custody subject to conditions. Section 16 prescribes the contents of such an order.

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310 (1988) 166 CLR 69 at 78.

311 *A v A* [1976] VR 298 at 300.

312 *Marriage of M* (1986) 11 Fam LR 765 at 771.

313 *B v B (Access)* [1986] FLC ¶91-758 at 75,545.

314 *Leveque v Leveque* (1983) 54 BCLR 164 at 167.

315 *In re G (A minor)* [1987] 1 WLR 1461 at 1469.

228 Section 13(6) of the Act uses the expression "paramount consideration" which is similar to the expression "paramount interests" referred to in *M v M*[316], and is one that is well familiar to, and regularly construed by family courts.

229 It should be observed at this point that it is possible, although in practice almost unthinkable that, having regard to the discretion apparently conferred on the Court by s 8(2) of the Act whether to order psychiatric examinations and reports, the Court might make a continuing detention order in their absence. Whether however in doing so, a court would be acting on acceptable, cogent evidence establishing unacceptable risk to a high degree of probability is another matter. In any event, courts are on occasions required to decide matters on evidence of less than desirable quality and volume, and that they may have to do so, will not necessarily deprive their function of its judicial character.

230 Another judicial hallmark of the process for which the Act provides is the requirement that the Court give reasons for its decision[317].

231 The purpose of Pt 3 of the Act is to ensure that a prisoner's continual detention be reviewed annually. Sections 26 and 27 require the Attorney-General to ensure that this purpose is effected. In exceptional circumstances, a prisoner may himself seek leave to apply for a review[318]. The balance of Pt 3 contains provisions of similar kind to those governing the applications for the original order and ensures fair process. And again, before the Court may affirm the order for detention it must be satisfied to a high degree of probability.

232 Part 4 of the Act confers a right of appeal upon both the Attorney-General and the prisoner. The rights may be exercised without the necessity to obtain prior leave and are available in respect of any decision under the Act[319].

233 It can be seen therefore that careful attention has been paid in the drafting of the Act to a need for full and proper legal process in the making of decisions

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316 (1988) 166 CLR 69.

317 s 17.

318 s 28.

319 s 31.

under it. It is an Act of general application, unlike the *ad hominem* nature of the legislation in *Kable*[320].

Conclusion

234 The Act does not offend against the principle for which *Kable* stands. It is designed to achieve a legitimate, preventative, non-punitive purpose in the public interest, and to achieve it with due regard to a full and conventional judicial process, including unfettered appellate review. In undertaking that process, and in making a decision as part of it, the Supreme Court did not exercise power inconsistent with its function as a Court which exercises judicial power pursuant to Ch III of the Constitution. The appeal should be dismissed.

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320 (1996) 189 CLR 51 at 121-134. See also *Liyanage v The Queen* [1967] 1 AC 259 at 289-290; *Leeth v Commonwealth* (1992) 174 CLR 455 at 469-470; *Nicholas v The Queen* (1998) 193 CLR 173 at 192.