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The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld): the High Court decision in Kable and applications under the Act

Following immense public concern regarding the release of certain prisoners upon the expiry of their term of imprisonment, particularly where it was alleged that those prisoners were susceptible to re-offending or had indicated an intention to do so, the Queensland Legislative Assembly enacted the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) (the Act).

On 2 March 2004, the High Court heard an appeal regarding the constitutional validity of the Act. Central to the appeal is an examination of the principle in the earlier High Court decision in Kable v Director of Public Prosecutions (NSW), that State legislatures may not vest in State courts functions which are incompatible with the operation and standing of those courts as repositories of the judicial power of the Commonwealth.

This Research Brief discusses the background to the Act, its key provisions, the decision in Kable and the applications that have been made under the Act to date.

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EXECUTIVE SUMMARY

Following immense public concern expressed in early 2003 regarding the release of convicted sex offender Dennis Raymond Ferguson from prison upon the expiry of his term of imprisonment, the Queensland Legislative Assembly enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (the Act) (**pages 2-3**).

The Act was seen as “updating the outmoded concepts” by which indefinite detention of an offender was already available under Part 10 of the *Penalties and Sentences Act 1992* (Qld) (**pages 4-6**) and section 18 of the *Criminal Law Amendment Act 1945* (Qld) (**pages 6-7**).

The key provisions of the Act are discussed at **pages 7-12**. Broadly, the Act allows the Supreme Court to make continuing detention and supervision orders in relation to prisoners who are detained in custody for a ‘serious sexual offence’.

The 1996 decision of the High Court in *Kable v Director of Public Prosecutions* is authority for the principle that State legislatures may not vest in State courts functions which are incompatible with the operation and standing of those courts as repositories of the judicial power of the Commonwealth. It is also the leading authority in an examination of the constitutional validity of the Act (**page 12**).

The *Community Protection Act 1990* (NSW) (**pages 12-14**), which allowed for the preventative detention of Gregory Wayne Kable (**page 12**), was held invalid by a 4:2 majority. There were differences in the approaches of members of the majority (**pages 15-18**) and the minority (**pages 18-19**). *Kable* has subsequently been considered in *Nicholas v R* (**pages 19-20**) and, most recently, in the refusal of an application for special leave to appeal in *Silbert v DPP (WA)* (**page 20**).

The High Court decision in *Chu Kheng Lim v Minister for Immigration* is also relevant to a consideration of the validity of the Act (**pages 21-22**).

Applications have been made to the Supreme Court, with varying success, for orders under the Act. A continuing detention order has been made in relation to Robert John Fardon. A 2:1 majority of the Court of Appeal dismissed an appeal by Fardon regarding the validity of the Act. The High Court heard an appeal against that decision on 2 March 2004. Judgment has not yet been delivered by the High Court (**pages 23-31**). Applications for orders in relation to David Gregory Watego (**pages 31-33**) and Wayne Michael Nash (**page 33**) were refused, principally due to a denial of natural justice because insufficient time was given between the making of the application and the prisoner’s pending release, resulting in the prisoner not having adequate opportunity to defend the application. These cases have resulted in changes to departmental guidelines to ensure that sufficient notice is provided of the pending release of prisoners to whom the Act relates (**page 33-34**).

1 INTRODUCTION

In early 2003, considerable public concern was expressed about the release of certain prisoners whose sentences were about to expire, particularly where it was alleged that those prisoners were susceptible to re-offending or had indicated an intention to do so. In June 2003, the Queensland Legislative Assembly enacted the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* (the Act).

A number of applications have been made to the Supreme Court, with varying success, for orders under the Act. The validity of the Act has also been considered, and upheld, by the Court of Appeal. An appeal from this decision to the High Court was heard on 2 March 2004.

The Hon R Welford MP, Attorney-General and Minister for Justice, has stated that the Act is “treading in new territory in relation to law making in this country”.¹ In 1996, however, the High Court in *Kable v Director of Public Prosecutions (NSW)*² held that similar preventative detention legislation in New South Wales³ was invalid because it vested in the Supreme Court of New South Wales functions which were incompatible with the court’s operation and standing as a repository of the judicial power of the Commonwealth.

Although the Act differs from the legislation in *Kable* in a number of key respects, the appeal to the High Court involves an examination of the principle in *Kable* and a determination of whether the Act offends that principle.

This Research Brief discusses the background to the Act, its key provisions, the decision in *Kable* and the applications that have been made under the Act to date.

¹ Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld), *Queensland Parliamentary Debates*, 4 June 2003, p 2581.

² 1996 (138) ALR 577; <http://www.austlii.edu.au/au/cases/cth/HCA/1996/24.html>. Preventative detention legislation was also enacted in Victoria under the now repealed *Community Protection Act 1990* (Vic).

³ *Community Protection Act 1994* (NSW).

2 BACKGROUND TO THE ACT

2.1 COMMUNITY CONCERN REGARDING RELEASE OF SEX OFFENDERS

Considerable public concern was expressed in January 2003 regarding the release of Dennis Raymond Ferguson from prisoner after a 14 year sentence for the kidnap and sexual molestation of three children in a Brisbane motel over a three day period in 1987.⁴ The concern centred on fears that Ferguson would re-offend, and allegations that he had made comments indicating a possibility of doing so.

It was recognised that Ferguson was a serial sex offender who had failed to participate in treatment and other rehabilitation programs in prison. At the time of his sentencing, the judge stated that Ferguson's chances of rehabilitation were "absolutely nil" and he seemed to regard paedophilia as an accepted practice.

The Director of Public Prosecutions (DPP) sought an order requiring Ferguson to report to his nearest police station within 48 hours of his release and, for the next 15 years, to advise the police of every plan to change his name or address.⁵ In granting the order, the Supreme Court found that there was a "substantial risk" that Ferguson would commit further offences of a sexual nature against children.⁶

Ferguson was arrested in September 2003 after failing to inform the police about a new job that potentially put him into contact with children.⁷ It was alleged that he had visited a school as the representative of a cleaning company that distributes products for use in fundraising activities.⁸ In November 2003, Ferguson was sentenced to 15 months' imprisonment without parole for that offence. Although

⁴ In 1988, Ferguson was convicted on 19 charges including kidnapping, gross indecency, sodomy and indecent dealing with, and unlawful carnal knowledge of, the children. He also had an extensive criminal record involving indecent dealing, assaulting children and false pretences (Paula Doneman, 'Child-sex monster to go free', *Courier Mail*, 8 January 2003, p 1).

⁵ Paula Doneman, 'Child-sex monster to go free'.

⁶ *Director of Public Prosecutions v Ferguson* [2003] QSC 001; <http://www.courts.qld.gov.au/qjudgment/QSC%202003/QSC03-001.pdf>.

⁷ Under New South Wales legislation, Ferguson was required to visit the police station nearest to his home within 28 days of taking up residence and provide them with an address, vehicle registration number and occupation. Ferguson did so; however, he failed to follow up when he obtained a job. He was charged with failing to comply with the reporting conditions of the Child Protection Offenders Registration system (Chris Taylor, 'Dirty business – paedophile set up enterprise aimed at children', *Sunday Mail*, 7 December 2003, p 20).

⁸ 'Paedophile in jail after school visit', *Sydney Morning Herald*, 18 September 2003.

he pleaded guilty, it was noted in sentencing that many of Ferguson's activities since release had "centred around children" and other convicted sexual offenders. The court also considered that Ferguson "was likely to re-offend if given the chance and appeared to lack contrition".⁹

It was reported that Ferguson had "came close to establishing a business designed to teach youngsters about 'stranger danger'" and had volunteered as a charity collector for a children's group in Sydney without disclosing his past.¹⁰

2.2 RATIONALE FOR THE ACT

The Act was introduced in response to "growing community concern about the release of convicted sex offenders, not only because of the abhorrent nature of these offences, but because of the lack of evidence that some offenders have been rehabilitated, after refusing to participate in sexual offender treatment programs".¹¹

The government's view was that-

*Such concern is justified. Serious sex offenders who are not rehabilitated remain a significant risk to the community after their discharge from custody. These offenders have a high propensity to reoffend. The consequences of their offending are catastrophic for individual victims, victims' families and for the community. These dangers are elevated when a serious sex offender has been assessed as posing an unacceptable risk for supervised release in the community under a post-prison community based release order or for remission, and is subsequently released after having served their full sentence. Such offenders are currently released into the community without supervision at the conclusion of their sentence.*¹²

It was considered that there was a 'gap' in the law regarding the protection of the community from dangerous sex offenders who were not mentally ill for the purposes of detention under the mental health legislation and who had not committed a further offence warranting their continued detention.¹³

⁹ Janine O'Neill, 'Imprisoned paedophile screams at magistrate', *Courier Mail*, 25 November 2003.

¹⁰ Chris Taylor, 'Dirty business – paedophile set up enterprise aimed at children'.

¹¹ Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld), *Explanatory Notes*, p 1.

¹² *Explanatory Notes*, p 1.

¹³ *Explanatory Notes*, p 3.

3 EXISTING LEGISLATIVE MEASURES

Prior to the passage of the Act, a court could order the indefinite detention of an offender under Part 10 of the *Penalties and Sentences Act 1992* (Qld) ('PS Act') or section 18 of the *Criminal Law Amendment Act 1945* (Qld) ('CLA Act').

The Hon R Welford MP said that he would "give further consideration" to "clarifying the respective operation" of the new Act and the existing legislation, all of which "cover certain elements and operate according to slightly different principles".¹⁴

3.1 PENALTIES AND SENTENCES ACT 1992 (QLD)

The PS Act allows a court, instead of imposing a fixed term of imprisonment, to impose an indefinite sentence¹⁵ on an offender convicted of a violent offence (s 163).

'Violent offence' means-

- an indictable offence that, in fact, involves the use of, counselling or procuring the use of, or attempting or conspiring to use, violence against a person, for which an offender may be sentenced to life imprisonment; or
- an offence against the Criminal Code of unlawful sodomy, carnal knowledge with or of a child under 16 years of age, abuse of intellectually impaired persons, rape or sexual assault, for which an offender may be sentenced to life imprisonment (s 162).

An indefinite sentence may be imposed by the court, either on its own initiative or, with the consent of the Attorney-General, on an application by the counsel for the prosecution (ss 163 and 165). If counsel for the prosecution intends to make such an application, it must inform the court after the offender has been convicted, in which case the offender will be remanded in custody and not granted bail. The application for indefinite detention must be made within 15 business days after the conviction (s 164).

Before an indefinite sentence is imposed, the court must be satisfied-

¹⁴ Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld), *Queensland Parliamentary Debates*, 4 June 2003, p 2580.

¹⁵ 'Indefinite sentence' means a sentence of imprisonment for an indefinite term that must be reviewed and continues until a court orders that the indefinite term is discharged (s 162).

- that Part 6 of Chapter 7 of the *Mental Health Act 2000 (Qld)*¹⁶ does not apply; and
- the offender is a serious danger to the community because of the offender's antecedents, character, age, health or mental condition, the severity of the violent offence and any special circumstances (s 163(3)).

The matters the court must have regard to in determining whether the offender is a 'serious danger to the community' include-

- whether the nature of the offence is exceptional;
- the offender's antecedents, age and character;
- any medical, psychiatric, prison or other relevant report in relation to the offender;
- the risk of serious physical harm to members of the community if an indefinite sentence is not imposed; and
- the need to protect members of the community from such risk (s 163(4)).

An offender must be advised at, or shortly after, their conviction that the court may consider imposing an indefinite sentence (s 166). Before an indefinite sentence is imposed, the court must hear evidence called by the prosecution and any evidence the offender elects to give or call (ss 166 and 167(1)). In deciding whether an offender is a serious danger to the community, the court may have regard to anything relevant to the issue contained in the certified transcript of, or any medical or other report tendered in, any proceeding against the offender for a violent crime (s 167(3)).

The court may make a finding that an offender is a serious danger to the community only if it is satisfied by acceptable, cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to justify the finding (s 170).

An indefinite sentence must be periodically reviewed. If the sentence that would have been imposed in the absence of an indefinite sentence ('nominal sentence') is not life imprisonment, the first review must occur after 50% of the nominal sentence has been served. If the nominal sentence is life imprisonment, the first review must occur after 15-20 years have been served. Subsequent reviews must occur at intervals of not more than two years (s 171). An offender may also apply

¹⁶ Part 6 of Chapter 7 of the *Mental Health Act 2000 (Qld)* relates to an inquiry on reference to the Mental Health Court.

for the review of a sentence, provided leave of the court has been given on the ground that there are exceptional circumstances relating to the offender (s 172).

For a review, the court may require reports to be provided by the chief executive (corrective services) or the chief executive of the department administering the *Health Services Act 1991* (Qld), and such other reports it considers appropriate. These reports are in addition to any other evidence that may be placed before the court (s 176) and are distributed to the DPP, the offender's legal representative and, if directed by the court, the offender and any victim of the offence (s 172A).

Unless it is satisfied that the offender remains a serious danger to the community, the court must order the discharge of the indefinite sentence and impose a sentence for the violent offence the indefinite detention relates to (s 173).

3.2 CRIMINAL LAW AMENDMENT ACT 1945 (QLD)

Section 18 of the CLA Act allows for the indeterminate detention of a convicted sex offender, both at the time of their sentence and during their imprisonment. The Attorney-General may apply to the Supreme Court for a declaration that the offender is incapable of exercising proper control over his or her sexual instincts, and a direction that the offender be detained during Her Majesty's pleasure at the expiry of their term of imprisonment (s 18(4)).

Reports are required from two medical practitioners that the offender-

- is incapable of exercising proper control over his or her sexual instincts;
- such incapacity is capable of being cured by continued treatment; and
- for the purposes of such treatment, it is desirable that the offender be detained after the expiration of their sentence (s 18(4)).

These tests are considered "archaic and out of touch with community standards".¹⁷ The provisions do not apply to "a prisoner who is capable of exercising control over their sexual instincts, but chooses not to. It also assumes that the person can be cured with treatment".¹⁸ The government stated that indeterminate detention

¹⁷ Hon R Welford MP, Attorney-General and Minister for Justice, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 3 June 2003, pp 2484-2486, p 2484.

¹⁸ Explanatory Notes, p 2.

under the CLA Act “clearly does not accord with current evidence regarding paedophilia or for that matter, violent sexual offenders.”¹⁹

Introduction of the Act was seen as “updating [these] outmoded concepts”.²⁰

4 KEY PROVISIONS UNDER THE ACT

4.1 SCOPE AND OBJECTS

The Act applies to a prisoner detained in custody who is imprisoned for a ‘serious sexual offence’, irrespective of whether they were sentenced before or after the commencement of the Act (s 5(6)).

‘Serious sexual offence’ means an offence of a sexual nature that involves violence (including intimidation or threats) or is against children. The Act extends to prisoners who committed such offences outside Queensland and who have been transferred to a Queensland prison.

The objects of the Act are to provide for the-

- continued detention or supervised release of prisoners to whom the Act applies to ensure the adequate protection of the community; and
- continuing control, care or treatment of those prisoners to facilitate their rehabilitation (s 3).

4.2 APPLICATION BY THE ATTORNEY-GENERAL

The Attorney-General may apply to the Supreme Court for a risk assessment and/or interim detention order (‘preliminary order’), and a continuing detention or supervision order (‘final order’), in relation to a prisoner to whom the Act applies (s 5(1)-(2)).

The application period is restricted to the last six months of a prisoner’s term of imprisonment “to ensure that the prisoner is able to take full advantage of any opportunities for rehabilitation offered during the term of imprisonment”.²¹

¹⁹ Explanatory Notes, p 2.

²⁰ Explanatory Notes, p 3.

²¹ Explanatory Notes, p 5.

4.3 PRELIMINARY HEARING

Within 14 business days of filing, an application must come before the court for a preliminary hearing to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a 'serious danger to the community' in the absence of a final order (ss 5(3)-(4)).

A prisoner is a 'serious danger to the community' if there is an unacceptable risk that the prisoner will commit a serious sexual offence upon their-

- release from custody; or
- release from custody in the absence of a supervision order (s 13(2)).

In deciding whether a prisoner is a serious danger to the community, the court must have regard to-

- psychiatric reports prepared under the Act, and the prisoner's cooperation in the examinations by the psychiatrists;
- any other medical, psychiatric, psychological or other assessment relating to the prisoner;
- information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
- whether there is any pattern of offending behaviour by the prisoner;
- efforts by the prisoner to address the cause(s) of their offending behaviour, including participation in rehabilitation programs and any positive effect of such participation;
- the prisoner's antecedents and criminal history;
- the risk that the prisoner will commit another serious sexual offence if released;
- the need to protect members of the community from that risk; and
- any other relevant matter (s 13(4)).

If the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a final order, the court-

- must set a date for the final hearing; and
- may make either or both of the following-
 - a 'risk assessment order', requiring the prisoner to undergo examinations by two psychiatrists;²²

²² The psychiatrists are named by the court and must prepare independent reports. A report must be prepared even if the prisoner does not cooperate, or cooperate fully, in the examination (s 11(9)).

- an ‘interim detention order’, if the court is satisfied the prisoner may be released before the final hearing of the application (s 8).

The *Bail Act 1980* (Qld) does not apply to a prisoner detained under the Act (s 4).

4.4 PSYCHIATRIC EXAMINATIONS

The reports prepared by the psychiatrists under a risk assessment order must-

- indicate the psychiatrist’s assessment of the level of risk that the prisoner will commit another serious sexual offence if released from custody, or released in the absence of a supervision order; and
- give reasons for that assessment (s 11(2)).

For the purposes of preparing such a report, the chief executive (corrective services) must give each psychiatrist any medical, psychiatric, prison or other relevant report or information in relation to the prisoner which is in the chief executive’s possession or to which the chief executive has access (s 11(3)). Each psychiatrist must have regard to such reports or information (s 11(8)).

4.5 CONTINUING DETENTION AND SUPERVISION ORDERS

If, at the final hearing, the court is satisfied²³ the prisoner is a serious danger to the community in the absence of an order, it may order that the prisoner be-

- detained in custody for an indefinite term for control, care or treatment, until the order is rescinded by the court (‘continuing detention order’); or
- released from custody, subject to the conditions it considers appropriate and for the period stated in the order (‘supervision order’) (ss 13(5), 14, 15).

In deciding whether to make an order, the paramount consideration must be the need to ensure the adequate protection of the community (s 13 (6)). The court must also give detailed reasons for making the order (s 17).

An order under the Act that a prisoner be detained in custody for the period stated in the order is taken to be a warrant for committing the prisoner into custody for the *Corrective Services Act 2000* (Qld) (s 50).

²³ The court may decide that it is satisfied as required by this section only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the decision (s 13(3)).

4.5.1 Supervision Order

A supervision order must contain requirements that the prisoner-

- report to a corrective services officer at the place, and within the time, stated in the order and advise of the prisoner's current name and address;
- report to, and receive visits from, a corrective services officer as directed by the court;
- notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least two business days before the change occurs;
- be under the supervision of a corrective services officer;
- not leave or stay out of Queensland without the permission of a corrective services officer; and
- not commit an offence of a sexual nature during the period of the order (s 16(1)).

The supervision order may also contain any other order the court thinks appropriate to ensure the adequate protection of the community (e.g. that the prisoner not knowingly reside with a convicted sex offender or not, without reasonable excuse, be within 200 metres of a school) or the prisoner's rehabilitation, care or treatment (s 16(2)).

If a police officer or corrective services officer reasonably suspects a prisoner released under a supervision order is likely to contravene, is contravening, or has contravened, a condition of that order, the officer may, by a complaint to a magistrate, apply for-

- a summons requiring the prisoner to appear before the Supreme Court; or
- a warrant to arrest and bring the prisoner before the Supreme Court²⁴ (ss 20(1)-(2)).

If a prisoner is brought before the court under a summons or warrant, the Attorney-General may apply to the court-

- for a continuing detention order;
- to amend the conditions of the supervision order; or
- to make any other order the court considers appropriate to achieve compliance with the supervision order, or that is necessary to ensure the adequate protection of the community (ss 21-22).

²⁴ A warrant may be issued only if the complaint is under oath and the magistrate is satisfied the prisoner would not appear in answer to a summons (s 20(4)). The magistrate may also refuse to issue the warrant if the magistrate considers it would be unjust to do so (s 20(5)).

These further orders may be made if the court is satisfied, on the balance of probabilities, that the prisoner is likely to contravene, is contravening, or has contravened, the supervision order.

4.5.2 Continuing Detention Order

A prisoner's continuing detention must be reviewed one year after the order first has effect, and at subsequent intervals of not more than one year (s 27).

A prisoner may also apply to the court for the review of such an order at any time after the court's first review, provided the court gives leave for the review on the ground that there are exceptional circumstances that relate to the prisoner (s 28).

For the purposes of a review, the chief executive must arrange for the prisoner to be examined by two psychiatrists.

If, on hearing a review and having regard to the matters which the court must have regard to in deciding whether the prisoner is a serious danger to the community, the court affirms a decision²⁵ that the prisoner is a serious danger to the community in the absence of a continuing detention order or a supervision order, the court may order that the prisoner-

- continue to be subject to the continuing detention order; or
- be released from custody under a supervision order (s 30(3)).

In deciding which order to make, the paramount consideration is the need to ensure the adequate protection of the community (s 30(4)).

4.6 APPEALS

An appeal by a prisoner or the Attorney-General in relation to a decision under the Act is to the Court of Appeal, by way of a rehearing. The Court of Appeal-

- has all the powers and duties of the court that made the decision;
- may draw inferences of fact, not inconsistent with the findings of the court; and
- may, on special grounds, receive further evidence as to questions of fact (s 43).

²⁵ The court may affirm the decision only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to affirm the decision (s 30(2)).

4.7 HEARINGS

In making its decisions, the court may receive in evidence-

- the prisoner's antecedents and criminal history; and
- 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 (ss 44-45).

A prisoner may appear at all hearings, other than a preliminary hearing (s 49).

At a hearing for a final order, the Act provides that the ordinary rules of evidence apply (s 45(3)).

5 HIGH COURT DECISION IN *KABLE*

The 1996 decision of the High Court in *Kable v Director of Public Prosecutions (NSW)*²⁶ is authority for the principle that State legislatures may not vest in State courts functions which are incompatible with the operation and standing of those courts as repositories of the judicial power of the Commonwealth.

It is also the leading authority in examination of the constitutional validity of the Act.

5.1 BACKGROUND

Gregory Wayne Kable was convicted in 1990 of the manslaughter of his wife. He pleaded diminished responsibility and was sentenced to a minimum term of four years imprisonment with an additional term of one year and four months. Kable was due for release in early January 1995. His prison behaviour, particularly numerous threatening letters he had written to relatives of his deceased wife, caused serious concern that he might repeat similar violent conduct.

5.2 COMMUNITY PROTECTION ACT 1994 (NSW)

The *Community Protection Act 1994* (NSW)²⁷ commenced in December 1994. Broadly, it allows a single judge of the Supreme Court of New South Wales, on the

²⁶ 1996 (138) ALR 577; <http://www.austlii.edu.au/au/cases/cth/HCA/1996/24.html>.

²⁷ <http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>.

application of the DPP (s 8), to make “preventative detention orders” (s 5), “interim detention orders” (s 7) and issue arrest warrants (s 6).

Although the legislation is drafted generally in some provisions, it is clearly directed at only one person; Kable. The object of the legislation is “to protect the community by providing for the preventative detention ... of Gregory Wayne Kable” (s 3 (1)). It authorises the making of a detention order against Kable “and does not authorise the making of a detention order against any other person” (s 3(3)).

In the construction of the Act, the need to protect the community must be given paramount consideration (s 3(2)).

The Act empowers the Supreme Court to order, on more than one occasion, Kable’s detention in prison for a specified period (up to 6 months) if it is satisfied on reasonable grounds that-

- he is more likely than not to commit a “serious act of violence”;²⁸ and
- it is appropriate, for the protection of a particular person, persons or the community generally, that he be held in custody (ss 5(1)-(2), (4)).

A detention order can be made irrespective of whether the person is in lawful custody and irrespective of whether there are grounds on which the person may be held in lawful custody other than under a detention order provided by the legislation (s 5(3)). A detention order can also be made subject to such conditions as the court may determine, including a condition specifying the particular prison in which the person is to be detained (s 9(1)).

The court may issue a warrant for the arrest of a person against whom proceedings for a preventative detention order are pending (s 6(1)). An interim detention order, pending the determination of an application for a preventative detention order, may also be made, and its period extended, in the absence of the defendant (s 7).

A right of appeal to the Court of Appeal is available in relation to a preventative detention order, but not an interim detention order (s 25).

After a preventative detention order is made, the court must make a further order appointing one or more medical practitioners, psychiatrists or psychologists to observe and report on the detainee (s 11). The court may also make a further order directing the Commissioner of Corrective Services to make specified medical, psychiatric or psychological treatment available to the detainee (s 12). The

²⁸ “Serious act of violence” means as an act of violence, committed by one person against another, that has a real likelihood of causing death or serious injury to the other person or that involves sexual assault by reference to particular offences in the *Crimes Act 1900* (NSW).

legislation also requires reports to be prepared on a detainee's condition and progress (s 21).

The DPP must meet the civil standard of proof ('balance of probabilities') for a preventative detention order to be made (s 15). Despite statements that the rules of evidence apply (ss 14, 17(1)(a)), the legislation effectively negates their application by permitting the court to consider material that would otherwise be inadmissible.²⁹

5.3 APPLICATIONS PRELIMINARY TO HIGH COURT APPEAL

In February 1995, Justice Levine of the Supreme Court of New South Wales found that, on the balance of probabilities, Kable was "more likely than not" to commit a serious act of violence and detained him for a further six months. An appeal by Kable to the Court of Appeal was dismissed in May 1995.³⁰

Justice Grove of the Supreme Court ruled in August 1995 that, although Kable was potentially dangerous, he did not fit the criteria under the legislation for a preventative detention order and he was released from jail. By the time of his release, Kable had initiated an appeal to the High Court challenging the validity of the legislation.

5.4 CHAPTER III OF COMMONWEALTH CONSTITUTION

The key submission made by Kable was that the legislation was invalid under Chapter III of the *Commonwealth Constitution* because it vested in the Supreme Court of New South Wales functions which were incompatible with the operation and standing of that court as a repository of the judicial power of the Commonwealth.

Chapter III of the *Constitution* incorporates the doctrine of the separation of judicial power from executive and legislative powers. Section 71 vests the judicial power of the Commonwealth in the High Court "and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". Section 77(iii) empowers the Commonwealth to make laws "investing any court of a State with federal jurisdiction". Under s 39(2) of the

²⁹ Specifically, the court can order the production of medical records and reports; records and reports of any psychiatric in-patient service or prison; reports made to or by the Offenders Review Board; reports, records or other documents prepared or kept by any police officer; and the transcript of any proceedings before, and any evidence tendered to, the Mental Health Review Board (s 17(1)(b)).

³⁰ *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374.

Judiciary Act 1903 (Cth), the Commonwealth conferred federal jurisdiction, with certain exceptions and qualifications, upon the State courts.

In *Kable*, the Supreme Court of New South Wales was exercising federal jurisdiction because the question of the constitutional validity of the legislation was raised in *Kable*'s defence when orders were made against him under the legislation.

5.5 HIGH COURT DECISION

In late 1996, a 4:2 majority of the High Court held that the legislation was invalid.³¹

5.5.1 Majority Judgments

There were differences in the approaches of members of the majority, although all concluded that: "State Parliaments are constrained in their power to legislate with respect to their courts because they are vested with federal jurisdiction as part of an integrated system of Federal and State courts; State Parliaments may not vest their courts with functions incompatible with the operation and standing of State courts exercising the judicial power of the Commonwealth".³²

McHugh and Gummow JJ said the legislation created a perception that the court was an instrument of executive government policy and lacking in independence. This would result in a loss of public confidence in the courts because the court was exercising a function unaligned to the traditional judicial role.

Part of Toohey J's reasoning was based on a perceived loss or lack of judicial independence. Toohey and Gaudron JJ were of the view that loss of public confidence in the courts would flow from the nature and extent of the court's departure from its traditional functions in criminal matters. An important feature of the legislation leading to this conclusion was that its operation was confined to one person. Another feature of significance to Gaudron J was a relaxation of the rules of evidence. The major vice of the legislation, however, was that it sanctioned imprisonment without the determination of the guilt of a person after a fair trial.

³¹ *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577; <http://www.austlii.edu.au/au/cases/cth/HCA/1996/24.html>. Toohey, Gaudron, McHugh and Gummow JJ formed the majority and Brennan CJ and Dawson J were in the minority.

³² *A-G (Qld) v Fardon* [2003] QCA 416, p 14.

Toohy J

Kable's continuing detention was not due to the commission of his original offence. The legislation required the court to perform a non-judicial function of such a nature that it diminished the public's confidence in the integrity of the judiciary as an institution. Its extraordinary character, and the functions it required the court to perform, was underlined by its application to only one person.

By requiring the court to participate in the making of a preventative detention order where no breach of the criminal law was alleged, and no determination of guilt had been made, the legislation offended an aspect of the doctrine of separation of powers which required not only an independent judiciary but also that litigants have their case determined by a judge who is independent of the legislature and the executive.

The legislation was not part of a system of preventative detention with appropriate safeguards consequent upon, or ancillary to, the adjudication of guilt; nor did it fall within an 'exceptional category'³³ of circumstances allowing preventative detention.

Toohy J said that-

*If the Act operated on a category of persons and a defence to an application for a preventative detention order was confined to a challenge that the criteria [for making the order] had not been met, different questions might arise. In that situation, the judicial power of the Commonwealth might not be involved; that is something on which it is unnecessary to comment. But here the judicial power of the Commonwealth is involved, in circumstances where the Act is expressed to operate in relation to one person only ... and has led to his detention without a determination of his guilt for any offence. In that event, validity is at issue, not simply the reach of the Act in a particular case.*³⁴

Gaudron J

The effect of requiring the need to protect the community to be given paramount consideration in the construction of the legislation was to require a preventative detention order to be made if the conditions for making such an order were satisfied.

The legislation was confined to one person, the rules of evidence did not apply in significant respects and the legislation operated in a manner which was "the

³³ Refer to the discussion of *Chu Kheng Lim v Minister for Immigration* in Part 6 of this Research Brief and the 'exceptional categories' of circumstances allowing preventative detention.

³⁴ *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, p 609.

antithesis of the judicial process". It required an order to be made which deprived a person of his liberty, not because of their conviction for an offence but on the basis of a guess (even if an educated guess) whether, on the balance of probabilities, they would commit a serious act of violence.

A person's continued detention under a preventative detention order was substantially the same as the detention of a person who had been convicted of a criminal offence. The nature of the function the legislation conferred on the court, the matters to be taken into account by the court and the fact that the legislation was contrary to ordinary judicial process would erode public confidence in the court, and compromise the integrity of the court and the judicial system brought into existence by Chapter III of the *Constitution*.

McHugh J

States must not legislate in a way which might undermine the role of the State courts exercising Federal power as repositories of that power. Unless these courts are, and are perceived to be, independent of the executive government, such undermining will ensue.

McHugh J stated-

*A State may invest a State Court with non-judicial functions and its judges with duties that, in the federal sphere, would be incompatible with the holding of judicial office. But under the Constitution the boundary of State legislative power is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the State court as an institution was not free of government influence in administering the judicial functions vested in the court.*³⁵

The following features of the case were highlighted: the legislation was directed towards the continued incarceration of one person and timed in relation to that person's pending release from prison; the need to prove guilt beyond reasonable doubt was removed; the rules of evidence were relaxed; *ex parte* interim orders could be made and the proceedings were declared to be civil proceedings even though the court was not involved in determining the existing rights and liabilities of any party or parties.

McHugh J said that there was no reason to doubt the authority of the States to make general laws for preventative detention where those laws operated in accordance with the ordinary judicial processes of the State courts. In this case, however, the court was the instrument of a legislative plan, initiated by the executive government and vested with a jurisdiction purely executive in nature, for the imprisonment of one person by a process far removed from the ordinary judicial

³⁵ *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, p 624.

process for a person's imprisonment. An ordinary, reasonable member of the community could be expected to reasonably view the legislation as making the court a party to, and responsible for, implementing the political decision of the executive government.

Having regard to the object of the legislation, it was impossible to conclude that the court had any discretion to refuse to continue to detain Kable once it concluded that he was more likely than not to commit a serious act of violence.

Gummow J

The most significant feature of the legislation was that, although continued detention under an order was punitive in nature, it was not consequent upon any determination of criminal guilt by the court. Such an authority in the court was not only non-judicial in nature but "repugnant" to the judicial process "in a fundamental degree".³⁶ The legislation involved the transfer of a political choice into the judicial process, and this jeopardised the integrity of the court in the exercise in other cases of the judicial power of the Commonwealth.

5.5.2 Minority Judgments

Brennan CJ concluded that there was no "textual or structural foundation" for Kable's submissions.³⁷

Dawson J stated that-

It may be said at the outset that such an argument simply denies the proposition, hitherto accepted without question, that Ch III, and s 77(iii) in particular, treats State courts as existing institutions. The result is that, so long as they are in fact courts, Ch III is unconcerned with whether they comply with the requirements of Ch III for courts created by or under that chapter. State courts are not created by or under Ch III and, provided they are courts within the meaning of s 77(iii), it matters not for the purposes of Ch III what functions they perform in exercising the jurisdiction vested in them by State legislation. That is for the State legislature to determine. ... Clearly, a State court may exercise executive or legislative as well as judicial functions, where, as in the case of New South Wales, the State constitution does not require judicial power to be separated from executive and legislative power. In so doing the State court is exercising a function which may not be exercised by a federal court under Ch III. ... Once it is recognised that there is no requirement in the New South Wales Constitution that courts in that State perform solely judicial functions and that, notwithstanding that characteristic, they are

³⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, p 635.

³⁷ *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, p 584.

*nevertheless courts which may be invested with federal jurisdiction under s 77(iii) of the Commonwealth Constitution, any question of incompatibility with Ch III upon the ground that the State court is required to perform executive or legislative functions must disappear.*³⁸

5.6 HIGH COURT DECISIONS SUBSEQUENT TO KABLE

5.6.1 *Nicholas v R*

The importance of the principle in *Kable* was recognised in *Nicholas v R*.³⁹

Kirby J stated-

*Recent decisions of this Court illustrate the extent to which the Court will go to uphold and safeguard the independence and integrity of the federal and State courts so that they may continue to perform their judicial functions as the Constitution encourages and thereby to maintain public confidence for their impartiality. Such performance and such confidence would be lost if courts were seen to be no more than subservient agents bending to the will either of the Executive or the Parliament.*⁴⁰

In Gaudron J's opinion-

*[C]onsistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.*⁴¹

³⁸ *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, pp 596-597.

³⁹ *Nicholas v R* (1997-98) 151 ALR 312;
<http://www.austlii.edu.au/au/cases/cth/HCA/1998/9.html>.

⁴⁰ *Nicholas v R* (1997-98) 151 ALR 312, p 375.

⁴¹ *Nicholas v R* (1997-98) 151 ALR 312, pp 335-336.

5.6.2 *Silbert v DPP (WA)*

In December 2003, the Full Bench of the High Court refused special leave to appeal in *Silbert v DPP of Western Australia*.⁴² The matter involved the application of *Kable* to the expropriation of criminal property under the now repealed *Crimes (Confiscation of Property) Act 1988 (WA)* from a deceased person who had been charged, but not convicted, of a serious criminal offence. The Full Court of the Supreme Court of Western Australia had upheld the validity of this legislation in 1992.⁴³

In the proceedings, Kirby J made the following general statements regarding *Kable*-

*I think the position ... is that the State courts are not subject, except in one particular instance, to the separation of powers doctrine that is imposed on the federal courts by the Constitution. Kable is not a vehicle for importing into the State courts the whole separation of powers baggage. It is a failsafe ... that this Court has said in some extreme instances the Supreme Court will have imposed upon them functions which are so incompatible with the performance of the judicial power normally that that will be incompatible with the continued performance contemplated by the Constitution of the State courts of federal jurisdiction and thereby be invalid because you cannot do that to a court of that character in our integrated judicature under the Constitution. It is a failsafe. It is not a vehicle to bring the whole caravan of separation of powers doctrine into the State Supreme Courts.*⁴⁴

5.7 CONSIDERATION OF *KABLE* IN THE DRAFTING OF THE ACT

The Hon R Welford MP stated that the Act was-

... carefully drafted in recognition of the fact that there was legislation attempted in New South Wales and overturned in ... Kable. ... [The Act] is drafted broadly and it also allows maximum discretion for the court at a number of stages in the process to properly assess evidence on an objective basis before making a determination. Even

⁴² *Silbert v DPP for Western Australia* [2003] HCA 9, http://www.austlii.edu.au/au/cases/cth/high_ct/2004/9.html.

⁴³ *Silbert (As the Public Trustee on behalf of the Estate of the late Stephen Rettegny) v DPP (WA)* [2002] WASC 12; <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/wa/WASCA/2002/12.html?query=%7e+silbert>. Also see Peter Johnstone and Rohan Hardcastle, 'State court judges and *Kable* limitations: validity of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 (WA)', *Constitutional Law and Policy Review*, May 2001, Vol 4 No. 1, <http://www.parliament.qld.gov.au/ConcordDocs/A03/A030121KZ05.PDF>.

⁴⁴ *Silbert v DPP for Western Australia* [2003] HCATrans 515, p 24, <http://www.austlii.edu.au/au/other/HCATrans/2003/515.html>.

then it leaves open to the court a number of options in terms of the determination that it makes. ...So significant discretion is left to the court so as to ensure that this legislation does not run the constitutional risks that were evident in the New South Wales legislation.⁴⁵

6 CHU KHENG LIM

In the 1992 decision of *Chu Kheng Lim v Minister for Immigration*,⁴⁶ the High Court held invalid a provision of the *Migration Act 1958* (Cth) which directed, in effect, that no court could order the release from custody of a person who had been imprisoned by the executive.

The High Court said the following in relation to the acceptability of a statutory system of preventative detention-

[T]he 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. Every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else". ...

There are some qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch. III courts. The most important is ... the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts ... to order that a person committed to prison while awaiting trial be admitted to bail. Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, and putting to one side the traditional powers of the Parliament to punish for contempt and of military tribunals to punish for breach of military discipline, the citizens of this country enjoy ... a constitutional immunity from being imprisoned by

⁴⁵ Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld), *Queensland Parliamentary Debates*, 4 June 2003, p 2582.

⁴⁶ *Chu Kheng Lim v Minister for Immigration* (1992) 110 ALR 97; <http://www.austlii.edu.au/au/cases/cth/HCA/1992/64.html>.

*Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.*⁴⁷

According to Gaudron J, the categories of acceptable punitive detention were not closed-

Usually, people are detained in custody in consequence of an exercise of judicial power resulting in a determination that they have breached some law which requires or authorizes their imprisonment. But ... there are other situations in which persons may lawfully be held in custody. Detention pursuant to mental health legislation comes readily to mind, as does imprisonment on remand pending trial.

*Detention in custody in circumstances not involving some breach of the criminal law and not coming within well-accepted categories ... is offensive to ordinary notions of what is involved in a just society. But I am not presently persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch. III.*⁴⁸

McHugh J stated that-

*Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object. ... But if the imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.*⁴⁹

7 APPLICATIONS UNDER THE ACT

7.1 ROBERT JOHN FARDON

The first application under the Act related to Robert John Fardon, who was due for release on 29 June 2003 after serving a 14 year sentence for the assault, rape and sodomy of a woman in 1988. These offences were committed within 20 days of his

⁴⁷ *Chu Kheng Lim v Minister for Immigration* (1992) 110 ALR 97, pp 114-115 (Brennan CJ, Deane and Dawson JJ).

⁴⁸ *Chu Kheng Lim v Minister for Immigration* (1992) 110 ALR 97, p 136. Similarly, Gummow J in *Kruger v Commonwealth* (1997) 146 ALR 126 at 223-234 said that “the question whether a power to detain persons or 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”.

⁴⁹ *Chu Kheng Lim v Minister for Immigration* (1992) 110 ALR 97, p 149.

release on parole after an eight year sentence for the rape and indecent dealing of a 12 year old girl, and the wounding of her 15 year old sister.⁵⁰ Fardon failed to complete any rehabilitation program in prison and it was alleged that he had told prison officers he would “kill his next victim to ensure the courts put him back in jail”.⁵¹

7.1.1 Preliminary Hearing

An application for Fardon’s continuing detention was filed on 17 June 2003. Interim detention and risk assessment orders were granted on 27 June 2003 after a preliminary hearing before Justice Muir.⁵²

Arguments at the Preliminary Hearing

In accordance with *Kable*, Fardon argued that his continuing detention, after the completion of his sentence and while not facing or being convicted of further offences, was unconstitutional. Counsel for the Attorney-General argued that the Act could be distinguished from the legislation in *Kable*.⁵³

Finding

It was held that the Act is not incompatible with Chapter III of the *Constitution* or *Kable* as it does not direct the manner in which the Supreme Court exercises its powers. The prisoner the subject of an application under the Act must be afforded a fair hearing in accordance with ordinary judicial processes and there is nothing “inherently incompatible” with the exercise of judicial power in legislation which is designed to protect the community from predatory sexual offenders.

The Act was distinguished from *Kable* on the following grounds-

- it is of general application, applying to all prisoners serving a sentence for a “serious sexual offence” rather than just a particular prisoner;

⁵⁰ Fardon’s criminal history is discussed in *A-G v Fardon* [2003] QSC 331, pp 10-11 and *Attorney-General v Fardon* [2003] QSC 379, pp 9-11.

⁵¹ Sean Parnell, ‘Jailed rapist first target of laws to stop release, *Courier Mail*, 26 May 2003, p 6.

⁵² *A-G v Fardon* [2003] QSC 200, <http://www.courts.qld.gov.au/qjudgment/QSC%202003/QSC03-200.pdf>.

⁵³ *A-G v Fardon* [2003] QSC 200, p 2.

- there is no relaxation of the rules of evidence in the making of a final order;
- the evidentiary onus is “to a high degree of probability” in respect of the making of a final order;
- if satisfied of the existence of an unacceptable risk that the prisoner will commit a serious sexual offence, the court has a discretion whether to make a continuing detention order, a supervision order or no order at all; and
- all final orders must be accompanied by detailed reasons, and all preliminary and final orders may be appealed.

Muir J said that, in isolation, section 8 (which relates to preliminary hearings) is open to more criticism than section 13 (which relates to the making of continuing detention and supervision orders). He noted that the standard of proof for a preliminary order was low compared to the proof to a “high degree of probability” required for a final order. In addressing this concern, Muir J considered the interim nature of a preliminary order and the fact that it was “in aid of and as an adjunct to” a later order. A preliminary order was only for the purpose of securing a prisoner’s detention until the final hearing of an application, the date for which had to be set by the court when the order was made. In Muir J’s opinion, the limited purpose and duration of preliminary orders was “surely a relevant consideration”.⁵⁴

In noting that an application under section 8 could be determined by evidence that would otherwise be inadmissible, Muir J stated that this was normal on interlocutory applications in civil matters and was a permissible, standard procedure in bail applications. In contrast, the final hearing did not involve a relaxation of the rules of evidence, required detailed reasons for the decision and allowed the prisoner to be present.⁵⁵

The requirement for procedural fairness at the preliminary hearing was seen as “a substantial safeguard that the prisoner’s rights will be protected”. A prisoner could also appeal a preliminary order. Muir J did not agree that the court’s discretion whether to grant a preliminary order was “illusory”.⁵⁶

For these reasons, His Honour stated that he did not believe that “the role of the court under section 8, putting aside for the moment the type of order sanctioned, is foreign or antithetical to the normal judicial function or such as to tend to a

⁵⁴ *A-G v Fardon* [2003] QSC 200, p 11.

⁵⁵ *A-G v Fardon* [2003] QSC 200, pp 10-11.

⁵⁶ *A-G v Fardon* [2003] QSC 200, p 11.

perception that the court lacks independence or the capacity for independent judgment”.⁵⁷

Similarly for the making of a final order, Muir J did not believe that any discretion of the court in making the order was illusory. A significant discretion in whether or not to grant an order, and which order to grant, was retained. However, His Honour accepted that the language of section 13(6)⁵⁸ increased the likelihood of an order being made if the court was satisfied that the prisoner was a serious danger to the community in the absence of an order. Before the court could be satisfied that a prisoner posed a serious danger to the community, it had to be satisfied that there was an “unacceptable risk” that the prisoner would commit a serious sexual offence. The onus of proving this rests with the Attorney-General, and the assessment of what is or is not an unacceptable risk rests with the court. Muir J viewed this as further support for the conclusion that a real discretion exists in relation to the making of a final order.⁵⁹

Muir J referred to what he saw as comparable provisions in the indefinite sentencing available under Part 10 of the *Penalties and Sentences Act 1992* (Qld). Similar provisions in Victorian legislation were upheld in *R v Moffatt*.⁶⁰

His Honour considered that the Act would not, of itself, lead ordinary reasonable members of the public to conclude that the court was acting as an instrument of executive government policy and lacking in independence.⁶¹ Instead, ordinary reasonable members of the public, whatever their views on the legislation, would perceive it to be an act of the Parliament rather than the court, and regard the court as doing no more than fulfilling a duty imposed on it lawfully by statute.⁶² Any public controversy regarding decisions under the Act was likely to be similar to that associated with sentencing and granting bail.

⁵⁷ *A-G v Fardon* [2003] QSC 200, p 11.

⁵⁸ Section 13(6) provides that the need to ensure adequate protection of the community is the paramount consideration on the hearing of a final application.

⁵⁹ *A-G v Fardon* [2003] QSC 200, pp 12-13.

⁶⁰ *R v Moffatt* [1988] VR 229. These provisions are in the *Sentencing Act 1991* (Vic). *A-G v Fardon* [2003] QSC 200, pp 12-13.

⁶¹ *A-G v Fardon* [2003] QSC 200, p 15.

⁶² *A-G v Fardon* [2003] QSC 200, p 16.

7.1.2 Extension of Interim Detention Order

In late September 2003, Justice Atkinson ordered the extension of Fardon's interim detention.⁶³ Her Honour stated that-

- considering that what was at stake was the continued detention of a person not accused of committing any crime for which he was to be punished or tried, but detention against the prospect that he may commit future crimes; and
- recognising the common law protection of personal freedom and liberty,

a test to a "high degree of probability" applied to the court being satisfied at a preliminary hearing that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a final order.

In relation to the discretionary power at a preliminary hearing, Atkinson J said that it was "difficult to see in what circumstances such a discretion could be exercised".⁶⁴

7.1.3 Appeal against Preliminary Orders Dismissed by Court of Appeal

In late August 2003, a 2:1 majority of the Court of Appeal dismissed an appeal by Fardon against the preliminary orders.⁶⁵

In addition to the submissions made at the preliminary hearing, Fardon raised the following matters in support of an argument for the Act's invalidity-

- the Act seeks to divorce an order of imprisonment from a finding of criminal guilt;
- the goal of community protection to which the Act is directed does not come within the exceptions in *Lim* in which incarceration may occur other than in relation to criminal guilt; and

⁶³ *A-G v Fardon* [2003] QSC 331, <http://www.courts.qld.gov.au/qjudgment/QSC%202003/QSC03-331.pdf>.

⁶⁴ *A-G v Fardon* [2003] QSC 331, p 16.

⁶⁵ De Jersey CJ and Williams JA formed the majority and McMurdo P dissented. *A-G (Qld) v Fardon* [2003] QCA 416, <http://www.courts.qld.gov.au/qjudgment/QCA%202003/QCA03-416.pdf>.

- the Act is a legislative interference with the finality of the exercise of judicial power, insofar as it effectively operates to retrospectively lengthen a term of imprisonment.⁶⁶

In response, the Attorney-General submitted that “the imposition of non-punitive, involuntary detention protective of the community is not incompatible with the exercise of judicial power, noting the court’s obligation ... to apply ‘normal judicial process’”. It was also submitted that the Act allowed a prisoner to be newly detained “under protective legislation” and was not a retrospective lengthening of the original sentence.⁶⁷

Majority Judgments

Chief Justice de Jersey accepted the Attorney-General’s submissions and held that the Act was not invalid under *Kable*, for substantially the same reasons identified by Muir J. His Honour stated that it was “unsurprising that the Act would have been drafted with very careful regard to the reasoning expressed in *Kable*” and that it set up an “acceptable statutory system of preventative restraint”.⁶⁸

According to Williams JA, because of the “safeguards of the judicial hearing” (an unfettered judicial hearing to determine whether the prisoner was a serious danger to the community and judicial discretion as to what, if any, order was to be made), the court’s power to make an order under the Act did not infringe *Kable*.⁶⁹

The view was taken that, “in an historical sense”, a detention order under the Act was consequent upon conviction because the earlier conviction for a serious sexual offence placed the prisoner into the category of persons to whom the Act applied.⁷⁰

The Act was directed at ensuring the safety of the community. The interim and final orders that could be made, although denying personal liberty, were aimed at community protection rather than punishment.⁷¹

⁶⁶ *A-G (Qld) v Fardon* [2003] QCA 416, p 5.

⁶⁷ *A-G (Qld) v Fardon* [2003] QCA 416, p 5.

⁶⁸ *A-G (Qld) v Fardon* [2003] QCA 416, p 7.

⁶⁹ *A-G (Qld) v Fardon* [2003] QCA 416, pp 28, 29.

⁷⁰ *A-G (Qld) v Fardon* [2003] QCA 416, pp 6, 28.

⁷¹ *A-G (Qld) v Fardon* [2003] QCA 416, p 7.

After considering other forms of non-punitive detention, the majority considered the Act fell within the “exceptional category” recognised in *Lim* and *Kruger*. Williams JA noted that, in making its decision in *Lim*, it was not necessary for the High Court to consider all the situations in which involuntary detention was not penal or punitive.⁷²

De Jersey CJ said-

*That legislative provision for such orders may be made in relation to dangerous, criminally insane persons is accepted. One wonders why the community may not lawfully be protected, similarly, in the case of dangerous, violent criminals who are, nevertheless, sane. The emphasis should surely rest on the need for community protection in extreme cases from endemically dangerous criminals, not the particular circumstances giving rise to the danger.*⁷³

Williams JA stated that-

*Upon conviction for a sexual offence involving violence, the prosecution may ask the sentencing judge to impose an indefinite sentence under... the Penalties and Sentences Act 1992 (Qld). That would require the sentencing judge to be satisfied that the offender was a serious danger to the community. The material then available might raise serious concerns that the offender would be a serious danger to the community, but there may also be material suggesting that with rehabilitation whilst in custody that potential danger could be alleviated. In those circumstances a judge may well not feel comfortable in imposing an indefinite detention at the sentencing stage. Given the provisions of the Act, why could not that judge say in the course of passing sentence that indefinite detention was not justified on the material presently available, but the position should be monitored towards the end of the period in custody and if evidence was then available that the prisoner was a serious danger to the community the procedure provided for by the Act should be enlivened.*⁷⁴

Dissenting Judgment

President McMurdo stated that the scheme under the Act was not incidental to the sentence that Fardon had served or the finding of guilt for the offence to which the sentence related. Instead, it turned on the “notorious unreliability” of predictions about Fardon’s future conduct.⁷⁵ The scheme was restricted to serious sexual

⁷² *A-G (Qld) v Fardon* [2003] QCA 416, p 26.

⁷³ *A-G (Qld) v Fardon* [2003] QCA 416, p 7.

⁷⁴ *A-G (Qld) v Fardon* [2003] QCA 416, p 28.

⁷⁵ *A-G (Qld) v Fardon* [2003] QCA 416, p 22.

offenders and did not extend to other persons who may also pose a serious danger to the community in the absence of detention or supervision.⁷⁶

McMurdo P considered the stated application of the rules of evidence to be “of limited comfort or protection” because evidence which would ordinarily be inadmissible, and which essentially dealt with propensity, was admissible under the Act.⁷⁷

Her Honour said although the “may” is used in section 8, once a court was satisfied that there are reasonable grounds for believing that the prisoner is a serious danger to the community in the absence of a final order, it would be mandatory for the court to set a date for the final hearing. It was also mandatory for the court to have regard to the matters listed in sections 13(4)(a)-(j).⁷⁸ McMurdo P stated that it was “difficult to envisage a situation where, if the reports prepared under the Act clearly supported the conclusion that the prisoner was a serious danger to the community if not detained, a judge would refuse to make orders consistent with those reports”.⁷⁹ Her Honour was of the view that “the real effect of the scheme, as in *Kable*” was to “significantly curtail a true judicial discretion” and that “the scheme undermines the ordinary safeguards of the judicial process, making it highly likely that a prisoner within the class to whom the Act applies, would continue to be imprisoned beyond the prisoner’s sentenced term of imprisonment”.⁸⁰

In McMurdo P’s opinion, despite the stated objects of the Act, its effect was punitive and not within the exceptions in *Lim*.⁸¹ Gaudron J was “clearly of the view” that the legislation in *Kable* was not within the exceptions in *Lim*, and the other majority judges had reached similar conclusions.⁸² A prisoner held under a

⁷⁶ *A-G (Qld) v Fardon* [2003] QCA 416, p 22.

⁷⁷ *A-G (Qld) v Fardon* [2003] QCA 416, p 23.

⁷⁸ This includes the psychiatric reports ordered under the Act (and the extent of the prisoner’s cooperation in the preparation of those reports) and any other medical, psychiatric, psychological or other assessments relating to the prisoner, participation in rehabilitation programs and information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future.

⁷⁹ *A-G (Qld) v Fardon* [2003] QCA 416, p 23.

⁸⁰ *A-G (Qld) v Fardon* [2003] QCA 416, p 23.

⁸¹ *A-G (Qld) v Fardon* [2003] QCA 416, p 24.

⁸² *A-G (Qld) v Fardon* [2003] QCA 416, p 24.

detention order under the Act was subject to substantially the same regime of detention as prisoners who had been convicted of a criminal offence.

Her Honour said that the Act required the court to predict dangerousness by way of, at best, an “informed guess” which was notoriously dangerous and based largely on the opinion of psychiatrists.⁸³

McMurdo P stated-

Despite the efforts of the Queensland Parliament to distinguish the scheme under the Act from the invalid NSW Act in Kable by numerous cosmetic changes, it remains “the antithesis of the judicial process”, which is to protect the individual from the arbitrary interference of rights other than in consequence of the fair and impartial application of the law to properly ascertained facts. The Act requires the Supreme Court of Queensland to exercise the judicial power of the Commonwealth in a manner inconsistent with traditional judicial process. Ordinary reasonable members of the public could well reasonably see the Act as making the Supreme Court of Queensland a party to, and responsible for, implementing the political decisions of the executive government that unpopular prisoners should be imprisoned beyond the expiry of their sentenced terms of imprisonment without the benefit of the ordinary processes of law.... Both sections 8 and 13 infringe the requirements of Ch III of the Constitution.⁸⁴

7.1.4 Granting of Continuing Detention Order

On 6 November 2003, Justice White ordered Fardon’s continuing detention.⁸⁵

7.1.5 Appeal to the High Court

The validity of the Act is currently being challenged in the High Court. On 12 December 2003, at an expedited hearing, the High Court granted Fardon special leave to appeal.⁸⁶

The appeal was heard on 2 March 2003.⁸⁷ The judgment has not yet been delivered.

⁸³ *A-G (Qld) v Fardon* [2003] QCA 416, p 25.

⁸⁴ *A-G (Qld) v Fardon* [2003] QCA 416, p 25.

⁸⁵ *Attorney-General v Fardon* [2003] QSC 379,
<http://www.courts.qld.gov.au/qjudgment/QSC%202003/QSC03-379.pdf>.

⁸⁶ *Fardon v Attorney-General for the State of Queensland* [2003] HCA Trans 488,
<http://www.austlii.edu.au/au/other/HCATrans/2003/533.html>.

The Commonwealth, South Australia, Western Australia, New South Wales and Victoria intervened in the appeal in support of arguments for the validity of the Act.

7.2 DAVID GREGORY WATEGO

David Gregory Watego had a history of convictions for sexual and non-sexual offences and was due for release on 31 October 2003 after serving a 10 year sentence for the rape of a nine year old girl in 1990.⁸⁸

On 24 October 2003, the Attorney-General applied for a continuing detention order in relation to Watego.

7.2.1 Application Dismissed by Supreme Court

On 31 October 2003, Justice Muir dismissed the application on the grounds of natural justice because Watego had not been given enough time to defend it.⁸⁹ The decision was, however, stayed until the appeal by the Attorney-General to the Court of Appeal was heard.

The application was served on Watego at 5pm on 24 October 2003. Approval for Legal Aid funding was not obtained until midday on 28 October 2003. This effectively gave Watego about one clear day to deal with “issues of considerable scope and complexity”. He was further constrained in his ability to provide an effectual response to the application by his limited intellectual capacity and incarceration.⁹⁰

Muir J said that it was implicit in the Act, and the rules of natural justice required, that a prisoner have sufficient time to consider and, if necessary, respond to the Attorney-General’s material and present to the court reasons against the making of

⁸⁷ *Fardon v Attorney-General for Queensland* [2004] HCATrans 39, <http://www.austlii.edu.au/au/other/HCATrans/2004/39.html>.

⁸⁸ This history is listed in *A-G v Watego* [2003] QSC 367, <http://www.courts.qld.gov.au/qjudgment/QSC%202003/QSC03-367.pdf>, pp 4-5.

⁸⁹ *A-G v Watego* [2003] QSC 367. It was noted, however, that Watego’s solicitors had not applied for an adjournment. There were also deficiencies in the inadmissibility of evidence tendered on behalf of the Attorney-General.

⁹⁰ *A-G v Watego* [2003] QSC 367, p 10.

such an order. This opportunity would not be afforded where a party had inadequate time to prepare his case.

Despite the hearing being only preliminary in nature, the consequences of an adverse outcome were “grave” because it could result in a prisoner’s indefinite detention.⁹¹

7.2.2 Appeal Dismissed by Court of Appeal

In November 2003, the Court of Appeal, in a unanimous decision, dismissed the Attorney-General’s appeal.⁹²

The Court of Appeal stated that-

Once the respondent was served with the application and supporting material, he was entitled to expect the benefit of a hearing for which he had adequate time to prepare. What is not explained anywhere is why, knowing that the respondent was due to be released on 31 October 2003 and having almost four months from [the date the Act was passed] within which to do so, the application was not instituted until ... four business days before it was heard. ... Why the decision to institute the proceedings was left as late as the last week before the respondent’s release is not accounted for; which is all the more surprising in view of the strictures on that subject that were delivered by Mackenzie J in the ... Director of Public Prosecutions v Ferguson When these and the other consequences of the delay are included, it is difficult to escape the judge’s conclusion in this case that there was a denial of natural justice.⁹³

On appeal however, the real problem for the Court of Appeal was that there was “simply no affirmative finding by the Judge of satisfaction that there were reasonable grounds for believing that the respondent was or would be a serious danger to the community in the absence of” a final order.⁹⁴

⁹¹ *A-G v Watego* [2003] QSC 367, p 11.

⁹² *A-G v Watego* [2003] QCA 512, <http://www.courts.qld.gov.au/qjudgment/QCA%202003/QCA03-512.pdf>. Justices McPherson, Davies and Mullins delivered judgment.

⁹³ *A-G v Watego* [2003] QCA 512, pp 3-4.

⁹⁴ *A-G v Watego* [2003] QCA 512, p 4.

7.3 WAYNE MICHAEL NASH

On 30 October 2003, the Attorney-General applied for interim orders and a supervision order in relation to Wayne Michael Nash, who was due for release on 6 November 2003.

The Attorney-General submitted that Nash could be released from prison subject to appropriate orders for his supervision and treatment and, with these orders, would represent “no more than a moderate risk of re-offending”.⁹⁵ Nash submitted that he had been denied natural justice by not being given sufficient notice of the application to allow him with an appropriate opportunity to present his case.

On 5 November 2003, Justice McMurdo dismissed the application. His Honour stated that “but for” Nash’s pending release, any unfairness to him could have been avoided by an adjournment. Further, an application could have been made any time after the passage of the Act in June 2003. The reasons for the delay were “completely unexplained. There is no suggestion that there is any matter which has recently arisen which has prompted this application”.⁹⁶

The decision was not appealed.

8 NOTIFICATION OF RELEASE OF CERTAIN PRISONERS

Guidelines were established to put in place an ‘early warning system’ to ensure that six months notice would be given of serious offenders whose sentences would expire and that prison authorities could “make appropriate provision for any transitional arrangements that are required”.⁹⁷

In response to the decisions in *Watego* and *Nash*, new guidelines were established to extend the early warning system from six months to one year. In addition, Crown Law must advise the Attorney-General of any potential applications under the Act at least three months prior to a prisoner’s scheduled release date.

⁹⁵ *A-G v Nash* [2003] QSC 377, p 2,
<http://www.courts.qld.gov.au/qjudgment/QSC%202003/QSC03-377.pdf>.

⁹⁶ *A-G v Nash* [2003] QSC 377, p 5.

⁹⁷ The Hon R Welford MP, Attorney-General and Minister for Justice, *Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld)*, *Queensland Parliamentary Debates*, 4 June 2003, p 2580.

It was expected that the changes would “ensure there is adequate time to prepare the strongest possible case against dangerous prisoners”.⁹⁸

⁹⁸ Hon R Welford MP, Attorney-General and Minister for Justice, ‘Revised measures strengthen protection from dangerous prisoners’, *Media Statement*, 19 November 2003.

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