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High Court upholds validity of *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)

On 1 October 2004, the High Court handed down a decision in Fardon v Attorney-General for the State of Queensland. Robert John Fardon, who was the subject of a continuing detention order under the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), had challenged the validity of the Act.

In a 6:1 majority, the High Court dismissed the appeal and upheld the validity of the Act.

This Research Brief examines the reasoning of the High Court. It also updates Research Brief 2004/02 published by the Queensland Parliamentary Library in March 2004 entitled "The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld): the High Court decision in Kable and applications under the Act".

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EXECUTIVE SUMMARY

This Research Brief updates a Research Brief published by the Queensland Parliamentary Library in March 2004 entitled "The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld): the High Court decision in *Kable* and applications under the Act" (**page 1**).

An appeal to the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('the Act') by Robert John Fardon, who was the subject of a continuing detention order under the Act, was heard by the High Court on 2 March 2004.

Fardon contended that the Act was invalid on the basis of a principle in the 1996 decision of the High Court in *Kable v Director of Public Prosecutions (NSW)* in which similar, but not identical, preventative detention legislation was held invalid.

On 1 October 2004, the High Court, in a 6:1 majority, dismissed Fardon's appeal and upheld the validity of the Act.

This Research Brief examines the reasoning of the High Court. Chief Justice Gleeson (**pages 2-5**) and Justices McHugh (**pages 5-8**), Gummow (**pages 8-13**), Hayne (**pages 13-14**), Callinan and Heydon (**pages 14-15**) constituted the majority. Justice Kirby (**pages 16-24**) delivered a dissenting judgment. Some implications of the decision that were raised shortly after it was delivered are also noted (**page 25**).

1 INTRODUCTION

In March 2004, the Queensland Parliamentary Library published a Research Brief entitled "The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld): the High Court decision in *Kable* and applications under the Act".[1] The Research Brief discussed:

- the background to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('the Act') and its key provisions;
- the 1996 decision of the High Court in *Kable v Director of Public Prosecutions (NSW)*;[2] and
- the applications that had been made under the Act to date.

At the time of publication, Robert John Fardon, who was the subject of a continuing detention order under the Act, had challenged the validity of the Act in an appeal that was heard by the High Court on 2 March 2004.

Fardon contended that the Act was invalid under Chapter III of the *Constitution* as it conferred on the Supreme Court of Queensland a function which was incompatible with the operation and standing of that Court as a repository of the judicial power of the Commonwealth, that function being repugnant to the Court's institutional integrity.[3] This argument was based on the principle derived from the earlier High Court decision in *Kable* in which similar, but not identical, preventative detention legislation in New South Wales[4] was held invalid.

On 1 October 2004, the High Court, in a 6:1 majority, dismissed Fardon's appeal and upheld the validity of the Act.[5]

This Research Brief examines the reasoning of the High Court, and notes some of the implications of the decision that were raised shortly after it was delivered.

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1 Renee Giskes, *The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld): the High Court decision in Kable and applications under the Act*, Queensland Parliamentary Library, Research Brief 2004/02, http://www.parliament.qld.gov.au/ConcordDocs/Q04/Q040319LA02.PDF.

2 (1996) 189 CLR 51; http://www.austlii.edu.au/au/cases/cth/HCA/1996/24.html.

3 *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, paragraph 1.

4 *Community Protection Act 1994* (NSW).

5 *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46, http://www.austlii.edu.au/au/cases/cth/high_ct/2004/46.html.

2 HIGH COURT DECISION

Chief Justice Gleeson and Justices McHugh, Gummow, Hayne, Callinan and Heydon constituted the majority. Justice Kirby delivered a dissenting judgment.

2.1 MAJORITY JUDGMENTS

2.1.1 Gleeson CJ

Complexity of the issues surrounding preventative detention

In recognising the complexity of the issues surrounding preventative detention, Gleeson CJ stated:[6]

> *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 … 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 in 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.*

In terms of the Supreme Court's role in the application of the Act, His Honour said:[7]

> *It cannot be a serious objection to the validity of the Act that the law which the Supreme Court … 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. … Courts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action.*
>
> …
>
> *[N]othing 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*

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6 Paragraph 12.

7 Paragraphs 21 and 23.

> *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.*

Appellant's contended ground of invalidity

Gleeson CJ noted the appellant's contended ground of invalidity[8] and that the constitutional objection to the Act was not based upon a suggested infringement of the appellant's human rights.[9] His Honour stated that the outcome of the appeal therefore depended upon this "relatively narrow point", rather than the "substantial questions of civil liberty" that arose.[10]

Gleeson CJ said that there was a "paradox" in the appellant's argument. A decision for continuing detention under the Act is made by a court (whose proceedings are in public, and whose decisions may be appealed), rather than by the executive (for example, a panel of psychiatrists or retired judges), which would not be open to challenge.[11] His Honour said:[12]

> *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.*

Further, in recognising that legislation exists in Queensland for indefinite detention at the time of sentencing,[13] His Honour said:[14]

> *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 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.*

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8 The appellant's contended ground of invalidity is mentioned in Part 1 of this Research Brief.

9 Paragraphs 1-2.

10 Paragraph 3.

11 Paragraphs 2 and 18.

12 Paragraph 20.

13 See section 163 of the *Penalties and Sentences Act 1992* (Qld).

14 Paragraph 2.

Finding that the Act is valid

In ultimately concluding that the Act is valid, Gleeson CJ made the following points in relation to the Act:[15]

- it is a general law authorising the preventative detention of a prisoner in the interests of community protection;[16]
- it authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character;
- 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;
- the onus of proof is with the Attorney-General;
- the rules of evidence apply;
- in deciding whether a prisoner is a "serious danger to the community", the Court must have regard to a list of matters;[17]
- there is a right of appeal;
- hearings are conducted in public and in accordance with ordinary judicial process;
- there is nothing to suggest that the Supreme Court acts as a mere instrument of government policy; and
- the outcome of each case is determined on its merits.

His Honour said:[18]

> *Unless it can be said that there is something inherent in the making of an order for preventative, 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.*

Gleeson CJ said that the existence of legislation allowing indefinite sentencing, or "sentences longer than would be commensurate with the seriousness of a particular

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15 Paragraphs 19 and 24.

16 As distinct from the legislation in *Kable* which, although drafted generally in some provisions, was clearly directed at only one person.

17 These matters are listed in section 13(4) of the Act. Note that Gleeson CJ also stated that the test under section 13(2), that a prisoner is a serious danger to the community if there is "an unacceptable risk that the prisoner will commit a serious sexual offence", "is not devoid of content and … does not warrant a conclusion that the decision-making process is a meaningless charade" (paragraph 22).

18 Paragraph 20.

offence, by way of response to an apprehension of danger to the community", made it "difficult to maintain a strict division between punitive and preventative detention".[19] His Honour also stated that "common law sentencing principles have long accepted protection of the community as a relevant sentencing consideration".[20]

2.1.2 McHugh J

In McHugh J's opinion, the principle in *Kable* did not govern the appellant's case[21] and the Act was valid.[22]

Distinguishing the Act from the legislation in Kable

McHugh J said that the legislation declared invalid in *Kable* "was extraordinary"[23] and that the differences between that legislation and the Act were "substantial".[24] His Honour noted the following differences:[25]

- The Act is not directed at a particular person, but at all prisoners who are serving a period of imprisonment for a serious sexual offence.
- When determining an application under the Act, the Supreme Court is exercising judicial power. It must determine, in accordance with the rules of evidence and on application of the Attorney-General, whether it is satisfied that "there is an unacceptable risk that the prisoner will commit a serious sexual offence" if released from custody. That standard is "sufficiently precise to engage the exercise of State judicial power".
- If the Court finds that the Attorney-General has satisfied the standard, it has discretion whether to make an order under the Act and, if so, the type of order to make (a supervision order or a continuing detention order).

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19 Paragraph 20.

20 Paragraph 20.

21 Paragraph 43.

22 Paragraph 25.

23 Paragraph 33.

24 Paragraph 34.

25 Paragraph 34.

- The Court must be satisfied of the standard "to a high degree of probability".
- The Act is not designed to punish the prisoner; instead, it seeks to protect the community against a particular class of prisoner.
- There is no suggestion that the jurisdiction conferred on the Supreme Court is "a disguised substitute for an ordinary legislative or executive function". There is also no suggestion that there might be a perception that the Supreme Court would be acting in conjunction with, rather than independently of, the Queensland legislature or executive government.

The Act does not compromise the institutional integrity of the Supreme Court

McHugh J stated that the Act does not give any ground for a finding that the jurisdiction it confers compromises the institutional integrity of the Supreme Court, or for a conclusion that the institutional capacity of the Supreme Court to exercise federal jurisdiction vested in it is impaired.[26]

His Honour said that nothing in the Act would "lead a reasonable person to conclude that the Supreme Court … , when exercising federal jurisdiction, might not be an impartial tribunal free of government or legislative influence or might not be capable of administering invested federal jurisdiction according to law".[27]

Guidance on the principle in Kable and the application of Chapter III of the Constitution to the States

McHugh J said that although the *Constitution* provides for an integrated court system, that does not prevent State courts from doing what federal courts cannot do.[28] His Honour noted the following statement by Gaudron J in *Kable*:[29]

> *[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.*

His Honour also noted that:[30]

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[26] Paragraph 35.

[27] Paragraph 35.

[28] Paragraph 36.

[29] Paragraph 40. The statement by Gaudron J was made in (1996) 189 CLR 51 at 106.

[30] Paragraphs 40-42.

> *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. That power is preserved by s 107 of the Commonwealth Constitution. Those words … 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. … 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. …*
>
> *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. …[I]t 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.*
>
> *… 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 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.*

McHugh J stated that the principle in *Kable* is "of very limited application" and "was the result of legislation that was almost unique in the history of Australia".[31] His Honour said that the "combination of circumstances which give rise to the perception in *Kable* is unlikely to be repeated".[32] In His Honour's opinion, the principle "if required to be applied in the 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".[33]

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[31] Paragraph 43.

[32] Paragraph 43.

[33] Paragraph 43.

In conclusion, McHugh J said that "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".[34]

2.1.3 Gummow J

Chapter III of the Constitution

Gummow J rejected submissions for the Federal Attorney-General that the Act did not contravene the principle in *Kable* because the Federal Parliament itself could have validly conferred on a federal court the functions contained in the Act. This was said to be the case despite the Act providing detention which was preventative, not punitive, in nature.[35]

His Honour said that the objectives of the sentencing process include the protection of society, deterrence, retribution and reform.[36] Further, Gummow J said that "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".[37] His Honour stated, however, that a continuing detention order under the Act is "not of the character" of indefinite imprisonment imposed at the time of sentencing as it does not "draw its authority from what was done" in the original sentencing of the prisoner.[38]

Gummow J also noted that the "double jeopardy" rule applies not only to the determination of guilt or innocence, but also to the quantification of punishment.[39] In His Honour's opinion, however, the appellant was not punished twice by the

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34 Paragraph 44.

35 Paragraphs 68-69. Kirby J also rejected this argument, agreeing with Gummow J's reasoning (paragraph 145).

36 Paragraph 69.

37 Paragraph 70 (emphasis added).

38 Paragraph 73.

39 Paragraph 74.

continuing detention order, nor was his punishment for the offences of which he had been convicted increased.[40]

Gummow J stated that, under the Federal Attorney-General's argument, the significance of this conclusion was that "a person may be held in detention in a corrective facility … by order of a court exercising federal jurisdiction and by reason of a finding of criminal propensity rather than an adjudication of criminal guilt".[41] In rejecting this argument, His Honour made the following points:

- The power to decide whether a person has engaged in criminal conduct and, if so, make a binding and enforceable declaration as to the consequences, is central to exclusive judicial power. A continuing detention order under the Act, however, depends upon whether there is an unacceptable risk that the person will commit a serious sexual offence, rather than a finding that the person has engaged in criminal conduct.[42]
- Apart from the detention of aliens with no legal title to enter or remain in Australia, or detention on the grounds of mental illness, infectious disease or another "exceptional case", "the involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[43] Due to "indeterminacies"[44] with this principle, Gummow J said that he preferred:[45]

  > *[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.*

In terms of the "exceptional cases" referred to above, Gummow J accepted that these categories are not closed, however His Honour then stated:[46]

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40 Paragraph 74.

41 Paragraph 75.

42 Paragraphs 76-77.

43 Paragraph 77. This passage is taken from *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

44 Paragraph 78. See also paragraphs 79, 81-82.

45 Paragraph 80.

46 Paragraph 83. A similar distinction is made in paragraph 85 with detention of accused persons in custody.

> *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.*

Gummow J stated:[47]

> *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 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.*

In explaining the principle in *Kable*, Gummow J said:[48]

> *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.*
>
> *… [T]he … doctrine … 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 … 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.*

The Act and judicial process

Gummow J considered the nature of the process provided for by the Act, stating that "[t]his process may ameliorate what otherwise would be the sapping of the institutional integrity of the Supreme Court".[49] His Honour made the following points:

- the Act does not exclude the rules of natural justice from the process of the Supreme Court;[50]
- the Attorney-General has a duty to disclose evidence or things in his possession, which is the same as the duty on the prosecution in a criminal proceeding;[51]

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47 Paragraph 85.

48 Paragraph 86-87.

49 Paragraph 90.

50 Paragraph 93.

- the prisoner is entitled to appear at the hearing of the application for a continuing detention order;[52]
- the procedure at the hearing of an application for a final order requires the Supreme Court to hear evidence called by the Attorney-General and the prisoner (if the prisoner elects to call evidence), the ordinary rules of evidence apply and, in making its decision, 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;[53]
- the Attorney-General has the onus of proving that the prisoner is a serious danger to the community;[54]
- to be satisfied that the prisoner is a serious danger to the community, the Supreme Court must be satisfied by acceptable, cogent evidence and to a high degree of probability;[55]
- in considering an application for continuing detention, the Supreme Court must have regard to a range of matters;[56]
- the Supreme Court must give detailed reasons for making a continuing detention order, at the time the order is made;[57] and
- provision is made for appeals by the Attorney-General or the prisoner.[58]

Kable

Gummow J accepted the following propositions regarding *Kable*:[59]

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[51] Paragraph 94. See section 25(2) of the Act.

[52] Paragraph 94. See section 49 of the Act.

[53] Paragraph 95.

[54] Paragraph 95.

[55] Paragraph 96. See section 13(3) of the Act.

[56] Paragraphs 98. These matters are listed in section 13(4) of the Act.

[57] Paragraph 99. See section 17 of the Act.

[58] Paragraph 99.

[59] Paragraphs 100-105.

- a particular combination of the features of the legislation in *Kable* led to its invalidity, including "the apparent legislative plan to conscript the Supreme Court of New South Wales to procure the imprisonment of [a person] by a process which departed in serious respects from the usual judicial process";
- the essential notion is that of repugnancy to, or incompatibility with, the institutional integrity of the State courts "which bespeaks their constitutionally mandated position in the Australian legal system";
- an important indication that a law has this character "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". Institutional integrity and public confidence are not distinct and separately sufficient considerations. "Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity"; and
- the notions of repugnancy and incompatibility appear elsewhere in constitutional doctrine.

Finding that the Act is valid

In concluding that the Act is valid (because, due to a combination of considerations, it had not been established that there was the necessary impairment to the institutional integrity of the Supreme Court by reason of repugnancy or incompatibility), Gummow J made the following points:[60]

- a reiteration that, although the outcome under the Act (the making of a continuing detention order) could not be attained in the exercise of federal jurisdiction by any court of a State, this circumstance itself does not result in a finding of repugnancy and incompatibility (and therefore invalidity);
- the preventative detention regime established by the Act does not bestow upon the Supreme Court a function which "is an integral part of, or closely connected with, the functions of the Legislature or the Executive Government". Instead, it is *sui generis* in nature and this supports the Attorney-General's argument that "no incompatibility in the necessary sense is to be found"; and
- several matters, when taken together with others, support a finding of the Act's validity, including:
  - the Act's application to a "prisoner", such that a connection remains between the operation of the Act "and anterior conviction by the usual judicial processes"; and

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[60] Paragraphs 106-113.

- if the Court is satisfied that the prisoner is a serious danger to the community in the absence of an order, it may grant a continuing detention order or a supervision order, and provision is made for annual reviews (which are not simply a "periodic formality" but require "deeply serious consideration upon specific criteria and to a high degree of satisfaction").

The application of the Act to a "prisoner", together with the requirement for annual review of continuing orders by the Supreme Court, support the "maintenance of the institutional integrity of the Supreme Court", as does the character of the judicial process under the Act which "makes special allowance by the standard of satisfaction required for the deprivation of liberty that is involved with a continuing detention order".[61] Further, in Gummow J's opinion, "the Supreme Court performs its functions under the Act independently of any instruction, advice or wish of the legislative or executive branches of government".[62]

2.1.4 Hayne J

Hayne J held that the Act was valid and, subject to one exception, agreed with the reasons of Gummow J.[63]

His Honour reserved his opinion about whether federal legislation similar to the Act would be invalid, stating:[64]

> *[N]o 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 … that protection of the community from the consequences of an offender's re-offending is a legitimate purpose of sentencing, 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 is that the statutes do not differ in*

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61 Paragraphs 114-115.

62 Paragraph 116.

63 Paragraph 196.

64 Paragraph 196.

substance or effect from a legislative regime providing for the confinement of some who suffer psychiatric disorder.

2.1.5 Callinan and Heydon JJ

Callinan and Heydon JJ delivered a joint judgment upholding the validity of the Act, stating that they were generally in agreement with the reasoning and conclusion of the majority in the Court of Appeal decision.[65]

Detention under the Act is for non-punitive purposes

Their Honours accepted that, in some circumstances, it is valid to confer powers on both judicial and non-judicial bodies to authorise detention, and that these circumstances are not closed. In this respect, their Honours noted the relevance of the second object of the Act (to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation) and stated that "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".[66]

In determining whether detention is punitive, Callinan and Heydon JJ stated that the relevant question is whether the legislation provides for detention as punishment or for some legitimate non-punitive purpose.[67] Their Honours said that "several features" of the Act indicate that the purpose of the detention is to protect the community rather than to punish. These features included the objects of the Act, the focus in deciding whether to make an order on whether the prisoner is a serious danger or an unacceptable risk to the community, and annual reviews of continuing detention orders.[68]

Their Honours also rejected the appellant's contention that the Act was a 'Bill of Pains and Penalties',[69] as its purpose is not to punish people for their past conduct.

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65 Paragraph 207. *A-G (Qld) v Fardon* [2003] QCA 416, http://www.courts.qld.gov.au/qjudgment/QCA%202003/QCA03-416.pdf.

66 Paragraph 214.

67 Paragraph 215.

68 Paragraph 216.

69 Paragraph 218. A 'Bill of Pains and Penalties' was described as a "legislative enactment which inflicts punishment without a judicial trial".

Instead, their Honours said that Act is a "protective measure" and provides for many of the safeguards of a judicial trial.[70]

Callinan and Heydon JJ said that the primary issue in *Kable* was "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".[71]

Their Honours then stated that the test, of whether, if a State enactment were a federal enactment it would infringe Chapter III of the *Constitution*, "is a useful one, [but] … not the exclusive test of validity. … 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".[72]

Callinan and Heydon JJ held that the "forms and procedures prescribed by the Act bear the hallmarks of traditional judicial forms and procedure"[73] and that it "can be seen … that careful attention has been paid in the drafting of the Act to a need for full and proper legal process in the making of decisions under it".[74]

In reaching this conclusion, their Honours noted many of the features of the Act that the other Justices in the majority noted.[75]

2.2 DISSENTING JUDGMENT

Kirby J delivered a dissenting judgment, holding that the Act is invalid.

His Honour stated that:[76]

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70 Paragraph 219.

71 Paragraph 219.

72 Paragraph 219.

73 Paragraph 220.

74 Paragraph 233.

75 These features are discussed in paragraphs 220-232.

76 Paragraph 191-192.

> *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 facilities for rehabilitation and therapy, divorced from the punishment for which prisons and custodial services are designed.*
>
> *In the present case, there was no attempt to observe this important constitutional distinction.*

Unreliability of predictions of criminal dangerousness

Kirby J noted the long recognised unreliability of predictions of criminal dangerousness[77] and said that "even with the procedures and criteria adopted, the Act ultimately deprives people … 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"".[78] In His Honour's opinion, the Act represented "a departure from past and present notions of the judicial function in Australia".[79]

Kirby J stated that:[80]

> *[The Act] sets a very bad example, which, unless stopped … will expand to endanger freedoms protected by the Constitution. In this country, judges do not impose punishment … 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" where "the purpose of the imprisonment is to achieve some legitimate non-punitive object". Despite some attempts to give the Act that appearance, that is not the true meaning and effect of its terms.*

The appellant

In relation to the appellant's circumstances since the making of the continuing detention order, Kirby J said:[81]

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77 Paragraph 124.

78 Paragraph 125.

79 Paragraph 125.

80 Paragraph 126.

81 Paragraph 130.

> *There was no evidence … 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 … stays in the very same cell in which he had served the sentences judicially imposed upon him as punishment upon his conviction for criminal offences.*

In terms of the appellant's grounds of argument, Kirby J noted that the appellant did not contend constitutional incompatibility "based upon an implied right to due process or equality derived from implications to be discovered in Ch III".[82] In His Honour's opinion, if such a contention had been explored it "might well have sustained the [same] conclusion" of invalidity.[83]

The principle in Kable

Kirby J said the following in relation to the principle in *Kable*:[84]

> *[T]he Kable principle has so far proved a weak protection against State legislation said to have intruded impermissibly into the judicial function. … What was seen at first to be an important assurance that the State judiciary in Australia … enjoyed many of the constitutional protections of the federal judiciary, has repeatedly been revealed as a chimera.*
>
> *I disagree with this approach. … 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.*

His Honour then went on to state that the only justification for a conclusion that legislation infringes the Constitution, and is for that reason invalid, can be the Constitution itself.[85] Further, His Honour stated:[86]

> *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. However, just as the legislators have their functions under the*

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82 Paragraph 131.

83 Paragraph 131.

84 Paragraphs 134-135.

85 Paragraph 139.

86 Paragraphs 139-143.

> *Constitution, so do the courts. If any branch of government neglects, or exceeds, its functions, the harmony envisaged by the Constitution is disturbed.*
>
> *Within the system of representative government created by the Constitution, legislators sometimes respond to waves of community fear and emotion, occasionally promoted by sections of the media. … [The High Court] 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.*
>
> *This is what I take Kable to require. It forbids attempts of State Parliaments to impose on courts … functions that would oblige them to act in relation to a person "in a manner which is inconsistent with traditional judicial process". It prevents attempts to impose on such courts "proceedings [not] otherwise known to the law" … . It proscribes parliamentary endeavours to "compromise the institutional impartiality" of a State Supreme Court. It forbids the conferral upon State courts of functions "repugnant to judicial process".*
>
> *… [E]xperience teaches that governments and parliaments can … 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 … a point will be reached when it is not, however popular the law in question may at first be. …*
>
> *Protection of the legal and constitutional rights of minorities in a representative democracy … is sometimes unpopular. … 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.*

Kirby J stated the following propositions regarding the ambit of the principle in *Kable*:[87]

- the circumstances that will invoke the principle of repugnance must be "extraordinary";
- although the legislation in *Kable* was directed at one person only, the principle will still be invoked where the impugned law applies to a small number of identifiable persons, singled out for special treatment;
- the importance of maintaining community confidence in the integrity of the courts is not a criterion for the application of the principle in *Kable*; instead, it is what will be lost if the considerations which the principle defends are neglected;
- possible repugnancy of a State law to Chapter III of the *Constitution* may be tested by asking whether, if enacted by the Federal Parliament, "its provisions would have passed muster in relation to a federal court". This, however, is not the exclusive test of validity of a State law under *Kable*. If

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[87] Paragraph 144.

the test is answered in the affirmative, the State legislation does not violate the principle in *Kable*. But if the same powers could not be conferred on a federal court, this assists the argument of the party who asserts that the legislation imposes functions on the State judiciary inconsistent with ("repugnant to") Chapter III of the *Constitution*.

Finding that the Act imposes functions repugnant to Chapter III of the Constitution

In Kirby J's opinion:[88]

> *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 … [that 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 a hypothesis of dangerousness.*

His Honour said the following five features of the Act, when combined, indicate a contravention of the principle in *Kable*:[89]

- the civil commitment of a person to a prison established for the reception of prisoners (properly so-called);
- 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;
- 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);
- 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 the judicial power exercised by it; and
- 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) complete at the time the second punishment commences.

Hi Honour's reasoning on each of these features is summarised below.

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88 Paragraph 147.

89 Paragraphs 148-149.

Civil commitment unknown to law

Kirby J stated that the involuntary detention of a person in custody by any agency of the state is generally viewed as penal or punitive in character. His Honour referred to a "fundamental principle" which requires officers of the Executive Government who deprive a person of liberty to bring that person promptly before the court for orders either authorising or terminating their continued detention. The operation of the writ of habeas corpus was also identified as "another assurance".[90] In light of this, Kirby J stated:[91]

> *So precious does our legal system regard 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.*
>
> …
>
> *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. … 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, … precisely because only the judiciary is authorised to adjudge and punish criminal guilt.*

In relation to the Act, Kirby J stated that:[92]

> *[T]he 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.*
>
> *Where a court is concerned with the constitutional character of an Act, its attention is addressed to actuality, not appearances. …*
>
> *… Invalidity does not depend on verbal formulae or the proponent's intent. It depends on the character of the law.*

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90 Paragraph 151.

91 Paragraphs 151 and 153.

92 Paragraphs 156, 157 and 159.

His Honour stated that the Act does not provide for civil commitment of a person who has completed a criminal sentence. If it did, His Honour would have expected commitment of that person to a different (non-prison) institution with different incidents, facilities, availability of treatment and support designed to restore the person as quickly as possible to liberty.[93]

His Honour concluded that:[94]

> *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. … Here there has been no offence; no charge; no trial. … [P]rovision 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 ….*

Preventative superadded imprisonment

Kirby J stated that it is fundamental (except in the case of the remand of accused persons awaiting trial who are not granted bail) that imprisonment follows final proof of crime, rather than anticipating crime.[95] His Honour said that to impose punishment in advance for crimes that are feared, and to require courts to impose a prison sentence in respect of perceived future risks, "is a new development … fraught with dangers and inconsistent with traditional judicial process".[96]

Kirby J said that:[97]

> *Simply calling the imprisonment by a different name ("detention") does not alter its true character or punitive effect. … Such an order, superimposed at the end of judicial punishment for past crimes, must be distinguished from an order imposing imprisonment for an indefinite 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. …*
>
> *… 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*

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93 Paragraph 159.

94 Paragraph 162.

95 Paragraph 163.

96 Paragraph 163.

97 Paragraphs 165-166.

> *confidence in the courts as places exhibiting justice to all, including those accused and previously convicted of serious crimes.*

Beyond mental illness orders

Kirby J asked whether predicted dangerousness of sexual offenders, based on past conduct, was sufficiently analogous to mental illness to allay constitutional concerns about the Act.[98]

After considering the provisions of the Act, His Honour said that the inquiry required of the Court simply focuses on the risk of re-offending and that nothing in the Act requires a diagnosis or finding of mental illness, abnormality or infirmity to justify the exercise of the Court's powers to grant an order.[99]

In comparison with detention under the *Bail Act 1980* (Qld), Kirby J said that "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".[100]

His Honour referred to decisions of the Supreme Court of the United States in relation to similar legislation in the United States for preventative detention, which require an additional finding that the subject is suffering from a mental illness, abnormality or infirmity, and that the detention must occur in hospitals or equivalent institutions which are segregated from prisons.[101] In comparison, His Honour said that:[102]

> *If the real objective of the Act was to facilitate rehabilitation of certain prisoners … under a continuing detention order, significant, genuine and detailed provisions would have appeared in the Act for care, treatment and rehabilitation. There are none.*

Kirby J said that these features demonstrate that the orders under the Act do not come within the exception of civil commitment for mental illness. Instead, His Honour said that "the deprivation can only be viewed as punishment. … 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

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98 Paragraph 167.

99 Paragraphs 168-169.

100 Paragraph 171.

101 Paragraph 172.

102 Paragraphs 173-174.

unjust guesswork with the authority of the judicial office. It is repugnant to the judicial process to do so".[103]

Highly selective punishment

Kirby J said that although the Act is not directed at any particular individual (as was the case in *Kable*), it is directed to a readily identifiable and small group of Queensland prisoners. It adds to their effective punishment and does not contain the procedural safeguards involved in a trial for a criminal offence carrying the risk of punishment by imprisonment. His Honour's view was that:[104]

> *Only on 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. …"Punishment is punishment"… [T]he continued imprisonment of the appellant … constitutes punishment. There are too many features of the Act to deny that classification … . … 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.*

Double and retrospective punishment

Kirby J asked whether it could "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".[105]

In His Honour's opinion, under the Act, a person is liable to further punishment which is based, at least in part, upon the criterion of his former conviction(s). Accordingly, His Honour said, the punishment constitutes an increase to the punishment already judicially imposed by reference to the earlier conviction(s) and final sentence(s) for the same crime(s). It involves a later judge essentially imposing new punishment beyond that fixed by an earlier judge, without any intervening offence, trial or conviction.[106]

Kirby J stated that, in his view:[107]

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[103] Paragraphs 174-175.

[104] Paragraphs 176-179.

[105] Paragraph 182.

[106] Paragraph 182.

[107] Paragraph 184.

> *[I]t is essential to the nature of 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 on 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.*

His Honour concluded that:[108]

> *Effectively, what is attempted involves the second court 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 … 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.*

3 IMPLICATIONS

The Prisoners Legal Service, which challenged the Act on Fardon's behalf, responded to the decision by saying that it highlighted the need for a Bill of Rights in Australia, and called on the Queensland Government to reconsider the Act.[109]

Mr Stephen Southwood QC, who represented Fardon, is quoted as saying:[110]

> *This case gives state parliaments the green light in lots of matters they might have had reservations about, such as who they can detain and in what circumstances. It is down to parliament to nominate whether the purpose of the detention is protection of the community rather than punishment.*

Australian Council for Civil Liberties president, Mr Terry O'Gorman, said:[111]

> *There is a real risk that Queensland and other state governments will use [the] … decision to keep other categories of prisoners beyond so-called dangerous sexual offenders in prison after their full-time prison release date.*

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[108] Paragraph 185.

[109] Kylie Stockdale, 'Serial rapist stays in jail', *Townsville Bulletin*, 2 October 2004, p 3.

[110] James Eyers, 'States can pass laws to detain suspects', *Australian Financial Review*, 2 October 2004, p 6.

[111] Chris Griffith, 'Court upholds sex offender law', *Courier Mail*, 2 October 2004, p 7.

There are reports that there are up to 24 cases due under the Act in the next 18 months.[112]

In the first application under the Act since the High Court's decision, Atkinson J of the Supreme Court of Queensland refused to grant a supervisory order in relation to a child-sex offender who was jailed for three and a half years for the indecent treatment of children in February 2001 (and who had previous convictions for molesting children in 1991 and 1994). Her Honour again criticised delays in the making of the application,[113] and stated that it was evident that there was an intention that a "less serious" category of offenders were to be dealt with under the Act. Atkinson J said the following in relation to the prisoner the subject of the application:[114]

> *He is no Fardon. I would assume that there are a large number of prisoners in Queensland jails who are serving sentences for similar types of offences to this man.*

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[112] Mark Oberhardt, 'Judge slams jail release delays', *Courier Mail*, 5 October 2004, p 5.

[113] Delays in the making of applications have previously been criticised and were discussed in the earlier Research Brief.

[114] Mark Oberhardt, 'Judge slams jail release delays'.

APPENDIX A – MINISTERIAL MEDIA STATEMENT

Hon. Peter Beattie MP, Premier and Minister for Trade

1 October 2004

High Court Upholds QLD's Dangerous Paedophiles & Sex Offenders Law

The Queensland Government today welcomed the landmark decision by the High Court to confirm the constitutional validity of the Dangerous Prisoners (Sexual Offenders) Act 2003 in the Fardon case.

Premier Peter Beattie and Acting Attorney-General and Minister for Justice Anna Bligh said the government charted new ground with this legislation to give Queenslanders the best possible protection under the law against the most dangerous paedophiles and other dangerous sex offenders.

"I am delighted with the near-unanimous decision of 6 out of 7 High Court judges to uphold Queensland's law in the Fardon case," Mr Beattie said.

"It's the right decision for the safety of Queenslanders - particularly children and women.

"Queensland's legislation reflects the community's abhorrence of paedophiles and other sex offenders, and the outrage expressed when predatory sex offenders are released from prison without being rehabilitated.

"Although these offenders may have completed the fixed term sentence imposed by the court, we cannot ignore the real possibility of them re-offending.

"It is a risk that concerns not only their victims and their families, but other families and children.

"It is a risk our government viewed as unacceptable, so we implemented this legislation," Mr Beattie said.

Ms Bligh said: "These new laws are being applied to only the most dangerous sex offenders in our prison system and there is a proper judicial process for making these determinations."

Under the legislation, the Attorney-General can apply to the Supreme Court for continuing detention to be imposed on a prisoner considered to pose an 'unacceptable risk' of reoffending.

"The Court assesses the risk and has the power to impose either continuing detention or an order requiring strict supervision upon release," Ms Bligh said.

"It takes into consideration the person's criminal history, any evidence that indicated the person poses an on-going risk and other expert medical evidence.

"Any continuing detention order must be reviewed by the Supreme Court every 12 months," Ms Bligh said.

Background to the case

The Attorney-General, Rod Welford, made an application for continuing detention of Robert John Fardon in June 2003, when Fardon was about to complete a 14-year sentence for the assault, rape and sodomy of a woman in 1988.

The offences were committed while he was on parole after serving 8 years for the rape and indecent dealing of a 12 year old girl and the wounding of her 15 year old sister.

Following the ruling, Fardon challenged the validity of section 8 of the Dangerous Prisoners (Sexual Offenders) Act 2003 on the basis of it being unconstitutional.

Section 8 allows a court to make an interim detention order continuing to detain the prisoner until the outcome of a final hearing.

In July 2003, in the Supreme Court, Justice Muir dismissed the challenge and found that section 8 of the legislation was constitutional and therefore valid.

Fardon then appealed the judgement to the Queensland Court of Appeal.

In late September 2003, the Queensland Court of Appeal dismissed the appeal and upheld the validity of the legislation.

Fardon then appealed to the High Court.

There have been seven applications to the Supreme Court under the Dangerous Prisoners (Sexual Offenders) Act 2003 since its introduction in June 2003.

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Premier's office - Fiona Kennedy 3224 4500

APPENDIX B – NEWSPAPERS ARTICLES

Title **Judge slams jail release delays**

Author **Mark Oberhardt**

Source **The Courier Mail**

Date Issue **5 October 2004**

Page **5**

The roar grew louder from the judicial bench yesterday over delays in making applications under a controversial new law allowing prisoners to be detained after their sentences had been served.

In the Supreme Court in Brisbane, Justice Ros Atkinson criticised the delays after she refused an application for a supervisory order on an inmate who had been held seven weeks after the completion of his sentence.

The order would have had strict controls on the man's release into the community but Justice Atkinson said she did not believe he was a danger to the public.

There are up to 24 cases due under the new Dangerous Prisoners (Sexual Offenders) Act 2003 in the next 18 months but judges are becoming increasingly upset about last-minute applications.

Justice Atkinson was ruling on an application for a supervisory order on a child-sex offender who was jailed for 3 1/2 years after pleading guilty to indecent treatment of children in February 2001.

The man had previous convictions for molesting children in 1991 and 1994.

The court was told the offences had been committed when the man became depressed in his marriage or a relationship with a partner.

The victims were his children or his stepchildren.

He was due for release in August but the Attorney-General Rod Welford successfully won an interim order detaining the man, who cannot be named, until a supervision order application could be made.

The application was the first since last Friday's decision by the High Court validating the new law which allows detention or a supervisory order for prisoners who have served their entire sentence.

The High Court found the detention of serial sex offender Robert John Fardon, the test case for the law, was legal.

However, Justice Atkinson said it was apparent from the case she was asked to deal with yesterday that other less serious criminals were to be dealt with under the law.

"He (the prisoner) is no Fardon.

I would assume there are a large number of prisoners in Queensland jails who are serving sentences for similar types of offences to this man," she said.

Justice Atkinson said the application to detain the man was not made until two days before he was due for release and it meant he was held in jail for another seven weeks.

She said those responsible for bringing the applications should make them in plenty of time before a prisoner's term was to end so they could be assessed by psychiatrists.

"I am not the only judge to make this comment but it does not seem to have had the desired effect," she said.

Justice Atkinson said she was sure it was not the intention of the law to have prisoners held in jail for months waiting for a supervisory order.

She also questioned why the man had not been offered the chance to undertake a sexual offenders' rehabilitation course while in jail.

Justice Atkinson said when released the man would live with a married couple who were both pastors of a church.

She said no children visited or lived with the couple.

She ordered the man be released immediately.

Title **Court upholds sex offender law**

Author **Chris Griffith**

Source **The Courier Mail**

Date Issue **2 October 2004**

Page **7**

The High Court has overturned a time-honoured belief that a convicted person will be free once they have completed their full jail sentence.

Six of seven High Court judges ruled yesterday as constitutionally valid a Queensland law that allows dangerous sex offenders to be jailed indefinitely after they had served their full sentence.

State Parliament passed the Dangerous Prisoners (Sexual Offenders) Act in 2003 because it was alarmed that a group of dangerous rapists, sexual predators, and pedophiles were about to be freed with their terms in prison up.

The Act was conceived after the public outcry in January 2003 when child rapist Dennis Raymond Ferguson, then 54, was freed.

It was originally designed to cover offenders sentenced before judges in Queensland were given an option to put them away indefinitely.

The law was not needed in Ferguson's case, as he was behind bars on fresh charges after reoffending in NSW.

However Attorney-General Rod Welford has applied to have seven dangerous sex offenders jailed indefinitely.

One of the first is Robert John Fardon, who has been convicted of rape twice.

In 1978 he raped a 12-year-old and bashed her 15-year-old sister.

Ten years later, just 20 days after he was released on parole from prison for the first crime, he raped, bashed and sodomised a 20-year-old woman.

He was due for release in June 2003 after completing a 14-year sentence for the second rape.

Premier Peter Beattie said he was delighted at the High Court's decision.

Mr Beattie said the State Government could not ignore the real possibility of sexual predators reoffending.

"It's the right decision for the safety of Queenslanders - particularly women and children," Mr Beattie said.

He urged civil libertarians not to oppose it.

However Australian Council for Civil Liberties president Terry O'Gorman expressed dismay at the decision.

"There is a real risk that Queensland and other state governments will use today's High Court decision to keep other categories of prisoners beyond so-called dangerous sexual offenders in prison after their full-time prison release date," Mr O'Gorman said.

Mr Beattie said the law would not be extended to other categories of offenders such as murderers.

Mr Welford had to argue to the Supreme Court that Fardon remained an unacceptable risk and get the court to agree to jail him indefinitely.

It did.

This saw the Prisoners Legal Service on Fardon's behalf challenge the validity of Mr Welford's law.

It challenged it first in the Queensland Court of Appeal and when it lost 2-11, secondly in the High Court.

The High Court's decision means Fardon will stay in jail subject to reviews of his indefinite sentence conducted through the court.

In his judgment, Chief Justice Murray Gleeson said concerns such as civil liberties were broader than what the High Court considered.

"This case, however, is not concerned with those wider issues ...the outcome turns upon a relatively narrow point," he said.

Justice Gleeson said the legal case was about whether the Queensland law impinged the integrity of the Supreme Court.

He concluded it did not.

In his dissenting judgment, Justice Michael Kirby said the Dangerous Prisoners (Sexual Offenders) Act was unique in Australia because it allowed a person to be detained because of a potential to break the law.

"Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness," he said.

"The Act deprives people ...of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists who can only be, at best, an educated or informed guess."

Title **States can pass laws to detain suspects**

Author **James Eyers**

Source **The Australian Financial Review**

Date Issue **2 October 2004**

Page **6**

State governments could pass laws to detain indefinitely a person who might commit a future criminal offence, including a terrorist act, following a landmark High Court decision on Friday.

The High Court upheld the validity of a Queensland parliament law that detained a convicted sex offender beyond the term of his original sentence for an indefinite period.

By a 6-1 majority, the court said the Dangerous Prisoners (Sexual Offenders) Act did not compromise the integrity of the courts and was not in breach of the constitution.

The decision has implications beyond the criminal law and legal experts suggest it may be possible for state parliaments to pass laws that detain suspected terrorists, so long as they specify the law's purpose is for community protection.

"It is an important case in establishing that states can legislate to detain a person when they pose a danger to the community and might commit a future offence," said George Williams, director of the Gilbert + Tobin Centre for Public Law at the University of NSW.

"There are a range of offences where a state government could think about introducing such a law, for example, someone thought to be about to commit a terrorist act."

Stephen Southwood, QC, who represented Robert John Fardon, who challenged the law, said: "This case gives state parliaments the green light in lots of matters they might have had reservations about, such as who they can detain and in what circumstances.

"It is down to parliament to nominate whether the purpose of the detention is protection of the community rather than punishment."

In a joint judgement, judges Ian Callinan and John Dyson Heydon said the Queensland legislation was "designed to achieve a legitimate, preventive, non-punitive purpose in the public interest, and to achieve it with due regard to a full and conventional judicial process".

But judge Michael Kirby disagreed, saying courts could impose punishment only for crimes that had been committed in the past.

"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," he said.

In a separate decision, the High Court upheld the validity of NSW's trust-in-sentencing legislation, passed in 2001, whereby parliament has the power to recommend that serious offenders are never released from jail.

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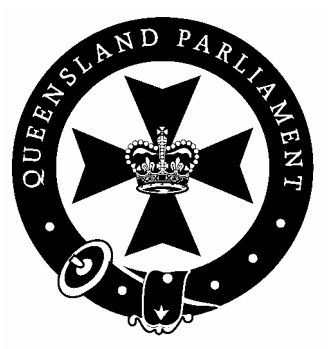

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