SUPREME COURT OF QUEENSLAND

CITATION:	*A-G v Fardon* [2003] QSC 200
PARTIES:	**RODNEY JON WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	5346 of 2003
DIVISION:	Trial Division
PROCEEDING:	Civil Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	9 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2003
JUDGE:	Muir J
CATCHWORDS:	CONSTITUTIONAL LAW – THE NON JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION & LEGISLATIVE POWER – EXAMINATION OF VALIDITY OF LEGISLATION BY COURTS – where the Attorney-General for Queensland applied for a continuing detention order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) to be made against the respondent – whether s 8 of the Act is incompatible with Chapter III of the *Constitution* *Community Protection Act* 1994 (NSW) *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), ss 8, 13 *Penalties & Sentences Act* 1992 (Qld) *Sentencing Act* 1991 (Vic) *Chester v R* (1988) 165 CLR 611 *Chu King Lim v Minister for Immigration* (1992) 176 CLR 1 *Grollo v Palmer* (1994) 184 CLR 348 *Kable v DPP* (1996) 189 CLR 51 *R v Moffatt* [1988] 2 VR 229 *Nicholas v The Queen* (1998) 193 CLR 173 *Wilson v The Minister* (1996) 189 CLR 1

COUNSEL: R V Hanson QC together with RW Campbell and M Maloney for the applicant
T Martin SC for the respondent

SOLICITORS: C W Lohe Crown Solicitor for the applicant
Prisoners' Legal Service for the respondent

[1] **MUIR J:** On the hearing of the application by the applicant Attorney-General for orders under s 8(2) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 Mr Martin SC, who appeared for the respondent, argued in reliance on *Kable v Director of Public Prosecutions for the State of New South Wales*[1] that s 8 of the Act was void as a result of incompatibility with Chapter III of the *Constitution* and with the exercise by the Supreme Court of the judicial power of the Commonwealth. Consequently, it was submitted, the application should be dismissed. For reasons given by me on 27 June 2003, I made an order that day under s 8 of the Act and reserved my decision on the constitutional point.

The applicant's contentions

[2] Mr Hanson QC, who appeared with Mr R W Campbell and Miss M Maloney for the applicant, conceded that *Kable* was authority for the proposition that State legislatures may not vest in State courts functions incompatible with the operation and standing of State courts as repositories of the judicial power of the Commonwealth.

[3] It was argued, however, that *Kable* was distinguishable on the basis that it concerned "extraordinary circumstances" in which the legislation in question was directed to securing the continued incarceration of a particular individual and the use of a court "to execute a legislative plan by means far removed from the judicial process".

[4] The other arguments advanced were as follows. The question to be determined in order to resolve the question of the Act's validity is whether the function conferred on the court by the Act was incompatible with the proper discharge by the court of its responsibilities as an institution exercising judicial power".[2] Preventative detention is not necessarily incompatible with the requirements of Chapter III of the *Constitution* and the *Kable* principle.[3]

The Act does not infringe the principles under consideration as it does not direct the manner in which the court is to exercise its powers; the respondent to an application is to be afforded a fair hearing in according with "ordinary judicial processes"; and there is nothing inherently "incompatible with the exercise of judicial power in legislation designed to protect the community from predatory sexual offenders.

The basis on which a finding of invalidity could be made

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1 (1996) 189 CLR 51.

2 *Grollo v Palmer* (1994) 184 CLR 348 at 364-365 and *Nicholas v The Queen* (1998) 193 CLR 173 at 232.

3 *Chu King Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-29, 55; *Kable* at 121, 131 and *Moffatt* [1998] 2 VR 229.

[5] It is reasonably clear that the Queensland Parliament could, if it so desired, legislate to vest in the Executive powers of the nature of those vested in the Supreme Court by the Act.[4] Mr Martin did not argue to the contrary.

[6] It is also the case that a State Parliament, unlike the Federal Parliament in relation to Federal judges, may vest non-judicial powers and functions in the State judiciary.[5] Consequently, a finding that the functions conferred by s 8 of the Act on the Court are non-judicial in nature, and even substantially different in character from the normal functions of courts in criminal cases, would not, of itself, establish invalidity.

[7] If the provision under challenge is to be held invalid, it may only be because, to express it broadly, it purports to vest functions in the Supreme Court which are incompatible with the exercise by the Court of the judicial power of the Commonwealth. In *Kable*, the *Community Protection Act* 1994 (NSW) was held invalid on such grounds even though the legislation was that of the Parliament of New South Wales in respect of a resident of New South Wales.

[8] In order to identify the principle of law arising from *Kable* and its scope of operation, it is desirable to consider the majority judgments in some detail. Before doing so, however, it is useful to describe briefly the legislation under challenge in that case.

Kable v Director of Public Prosecutions for the State of New South Wales

[9] The *Community Protection Act* 1994 (NSW) empowered the Supreme Court of New South Wales on application under the Act, to order that "a specified person" be detained in prison if satisfied on reasonable grounds that such person is "more likely than not to commit a serious act of violence" and that the order is appropriate for the protection of a particular person or the community. It was expressly provided that the only person against whom such an order could be made was the appellant Kable. Whilst a provision in the Act required a court hearing the application to apply the rules of evidence, other provisions effectively negated that requirement by permitting the court to have regard to materials that would not have been admissible in criminal or even civil proceedings.

[10] The minority, Brennan CJ and Dawson J, would have upheld the validity of the legislation. Toohey, Gaudron, McHugh and Gummow JJ, who each delivered separate reasons, held it invalid.

[11] Toohey J concluded that the Act required the Supreme Court to perform a non-judicial function "of such a nature that the public confidence in the integrity of the judiciary as an institution … is diminished." His Honour said – [6]

> "The function offends that aspect because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt. On that ground I would hold the Act invalid."

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4 *Kable (supra)* at 98, 121 and *Chester v R* (1988) 165 CLR 611.
5 *Kable (supra)* at 85, 96, 118-119
6 At 98.

[12] Earlier, his Honour had contrasted the operation of the Act with the operation of the Criminal Law in which persons are punished after and in consequence of conviction of an offence.

[13] Gaudron J, in discussing whether the Act was repugnant to, or incompatible with, the exercise of the judicial power of the Commonwealth, drew attention to:

the confining of the operation of the Act to one person; the inapplicability in significant respects of the traditional laws of evidence and to the fact that the Act, if its provisions were satisfied, by requiring the making of an order which deprived a person of his liberty, not by virtue of having been convicted of an offence, but on the basis of a conclusion on the balance of probabilities about future conduct, operated in a way which was "the antithesis of the judicial process".

[14] Gaudron J's reasoning for the conclusion that the legislation would erode public confidence in the Supreme Court of New South Wales, is in part, as follows –

> "Moreover, when regard is had to the precise nature of the function purportedly conferred by s 5(1), the matters to be taken into account in its exercise and its contrariety to what is ordinarily involved in the judicial process, the effect of s 5(1) is, in my view, to compromise the integrity of the Supreme Court of New South Wales and, because that court is not simply a State court but a court which also exists to exercise the judicial power of the Commonwealth, it also has the effect of compromising the integrity of the judicial system brought into existence by Ch III of the Constitution.
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> The integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process. Particularly is that so in relation to criminal proceedings which involve the most important of all judicial functions, namely, the determination of the guilt or innocence of persons accused of criminal offences. Public confidence cannot be maintained in the courts and their criminal processes if, as postulated by s 5(1), the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so."
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> (footnotes omitted)

[15] McHugh J concluded that a State Parliament could not legislate in a way which might undermine the role of the State courts exercising Federal power as repositories of that power. Such undermining, in his view, would ensue unless such courts were and were perceived to be independent of the executive government.

[16] His Honour said – [7]

> "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

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[7] At 118-119.

> free of government influence in administering the judicial functions invested in the court."

[17] After discussing these principles, his Honour drew attention to various features of the Act including: its being directed to one person; the relaxation of the rules of evidence; the facility to make an *ex parte* interim order, and to its objective of bringing about a particular result, namely the continued incarceration of one person.

[18] In the latter regard, his Honour said – [8]

> "The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person.
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> The Act expressly removes the ordinary protections inherent in the judicial process.
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> …
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> The Act is thus far removed from the ordinary incidents of the judicial process. It invests the Supreme Court with a jurisdiction that is purely executive in nature. Indeed, the jurisdiction conferred on the Court is hardly distinguishable from those powers and functions, concerning the liberty of the subject, that the traditions of the common law countries have placed in Ministers of the Crown so that they can be answerable to Parliament for their decisions.
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> …
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> Having regard to the object of the Act, it is impossible to suppose that the Court has any discretion to refuse to imprison the appellant once it concludes that he is more likely than not to commit a serious act of violence."

[19] The conclusion his Honour drew from the singular features of that legislation and, in particular, its intention of securing a particular result in relation to a particular person and the lack of true judicial discretion was that – [9]

> "At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy."

[20] In the course of his reasons Gummow J said –

> "I have referred to the striking features of this legislation. They must be considered together. But the most significant of them is that, whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of

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8 At 122-123.

9 At 125.

> criminal guilt. Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree."

[21] His Honour then proceeded to discuss the authorities in the United States concerning the legitimacy of transfer by legislation of politically contentious executive functions to the judiciary. In the course of such discussion his Honour said -

> "The translation of what may be a politically difficult choice into what one distinguished United States judge called 'a grossly unjudicial chore' (*Hobson v Hansen* (1967) 265 F Supp 902 at 930, per J S Wright J) jeopardises the integrity of the federal or State court in question in the exercise in other cases of the judicial power of the Commonwealth. It saps the appearance of institutional impartiality and the maintenance of public confidence. The point was made by the Supreme Court of the United States in *Mistretta (Misretta v United Stated* (1989) 488 US 361 at 407):
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> 'The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.'"

[22] Referring to the appellant's submissions, his Honour said –

> "He submits that the appearance of institutional impartiality in administering that law, and in inflicting punishment for breach of it, is sapped to an impermissible degree by ad hominen legislation of the nature I have discerned in the Act and described earlier in these reasons. The Act requires the Supreme Court to inflict punishment without any anterior finding of criminal guilt by application of the law to past events, being the facts as found. Such an activity is said to be repugnant to judicial process. I agree."

[23] Such legislation, he concluded, would produce or tend to produce the result that the judiciary would be seen "…as but an arm of the executive which implements the will of the legislature. Thereby a perception is created which trenches upon the appearance of institutional impartiality to which I have referred."

[24] There are thus differences in the approaches of the members of the majority. The emphasis of McHugh and Gummow JJ was on the creation by the offending legislation of the perception that the Supreme Court was an instrument of executive government policy and lacking in independence. This, it was considered, would result in a loss of public confidence in the courts. The conferring on the court of a function which was more executive than judicial in character and which was antithetical to the traditional judicial role seemed to be a significant factor in the conclusion that the administration of the Act by the court would bring it into disrepute.

[25] Toohey J also based his reasoning in part on a perceived loss or lack of judicial independence. Both he and Gaudron J appeared to be 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. The extent of such departure was to be discerned in matters including the confining of the Act's operation to one person and, in the case of Gaudron J, in the relaxation of the rules of evidence. The major vice perceived in the legislation however, was that it sanctioned the imprisonment of a person without a determination after a fair trial that the person was guilty of a criminal offence.

[26] Although the *Community Protection Act* 1994 (NSW) contained provisions for the making of interim detention orders the appellant's challenge was to the validity of the Act as a whole or, at least, to the provisions for preventive detention and to the provisions which were ancillary to such provisions. For that reason there is no material discussion in the judgments of the Act's provisions for interim detention.

Decisions of the High Court subsequent to *Kable*

[27] In *Nicholas v The Queen*[10] Kirby J drew attention to the importance of the *Kable* principle. Referring to *Wilson v The Minister*[11] and *Kable* he said – [12]

> "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.
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> Maintaining public confidence in the independence of the courts is a common theme running through the majority opinions in *Wilson v The Minister, Kable v Director of Public Prosecutions (NSW)* and many other cases, recent and long in the past. Involved is no self-interested presumption on the part of the judges to maintain an uncontrollable judicial veto over the actions of the other branches of government. Still less is it a judicial caprice invoked in an impermissible departure from the judges' legal duty. What is involved is nothing less than a defence by the judiciary of the integrity of the branch of government which by the Constitution is placed in their charge. The history of invasions of the judicial power in less fortunate countries has seen too many instances where the judges supinely accepted the invasions, doing so silently and meekly. In Australia such incursions as there have been have been more modest and sometimes well intentioned. But it is the duty of the judiciary to defend the judicial branch of government as much against the latter as against the former." (footnotes omitted)

[28] Gaudron J, in the course of a discussion of the nature of judicial power in *Nicholas*, said – [13]

> "In my view, consistency 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

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10 *(supra)* at 256-257.
11 (1996) 189 CLR 1.
12 At 256-257.
13 At 208-209.

> 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."

Comparison of the provisions of the Act and the provisions of the *Community Protection Act* 1994 (NSW)

[29] There are significant differences between the New South Wales Act and the Act. The most obvious is that the latter is of general application, applying to all prisoners serving a period of imprisonment for "a serious sexual offence". Other significant differences are that under the Act, unlike the position under the New South Wales Act, the rules of evidence apply, the evidentiary onus is "to a high degree of probability" and a discretion is vested in the court as to whether, if satisfied of the existence of "an unacceptable risk that the prisoner will commit a serious sexual offence" the court will make "a continuing detention order", a "supervision order" or no order at all.

The relevant provisions and scheme of the Act

[30] In broad terms, the Act applies to persons serving a term of imprisonment for "a serious sexual offence". The Attorney-General may apply to the court for an order that such a person, either be detained in custody for an indefinite term for control, care or treatment or that the person be released from custody subject to conditions imposed by the court.[14] Orders of the former type are described as "continuing detention orders" and the latter are described as "supervision orders".

[31] When an application is made for the making of such an order, application may (or perhaps must) be made also for "orders of an interim nature". The Court is given power by s 8, if satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of an order of the type just mentioned, to set a date for the hearing of the application for final orders and to order that the prisoner be detained for a specified period.

[32] A continuing detention order remains in effect until revoked by court order and the person the subject of the order remains a prisoner.[15] Supervision orders are to be made for a definite term.[16]

[33] The court must give detailed reasons for the making of either kind of order under s 13.[17] All continuing detention orders must be reviewed annually by the court.[18] Prior to each review, unless the court otherwise orders, the chief executive of the

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14 s. 16
15 s. 14
16 s. 15
17 s. 17
18 s. 27

Department of Justice must arrange for the prisoner to be examined by 2 psychiatrists. The order may be continued or replaced by a supervision order only if the court finds that the prisoner is a serious danger to the community in the absence of such an order.[19] Either the Attorney-General or the prisoner may appeal against any decision by a court under the Act.

[34] Section 8 is as follows –

"**8 Preliminary Hearing**

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

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

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

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

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

(4) If the court sets a date for the hearing of the application for a division 3 order but the prisoner is released from custody before the application is fully decided, for all purposes in relation to deciding the application this Act continues to apply to the person as if the person were a prisoner.

[35] Subsections (1), (2), (5), (6) and (7) of s 13 provide as follows –

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

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

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

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19 s. 30

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

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

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

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

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

A "serious sexual offence" is defined as an offence of a sexual nature, whether committed in Queensland or outside Queensland –

(a) involving violence; or
(b) against children.

Section 8 of the Act and the challenge to its validity

[36] Mr Martin's arguments in relation to s 8 of the Act may be summarised as follows. An order may be made under s 8(1) 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" an order under division 3 of Part 2 of the Act. That involves a low standard of proof. Although an order under s 8 is a "preliminary order", its effect is to imprison a person who has served all his ordered term of imprisonment without being convicted of any further offence.

[37] The discretion purportedly conferred by s 8(2) is illusory as, once the criterion in s 8(1) is satisfied, the Court is compelled to order interim detention in custody. By an interim detention order the prisoner remains a prisoner and the *Bail Act 1980* (Qld) has no application. Moreover, an application under s 8 may be determined by evidence which would be inadmissible if it were not for the provisions of s 7(2).

[38] Because of the forgoing features, s 8 is repugnant to the judicial process and the criticisms made by the High Court of the legislation under consideration in *Kable* are applicable.

[39] Why the respondent seeks to challenge s 8 and not other provisions of the Act is understandable. That section was doubtless thought to be more vulnerable to challenge than s 13 and later sections which require proof "to a high degree of probability", involve no relaxation of the rules of evidence, require the giving of detailed reasons for the decision, and give the prisoner a right to be present at the

hearing. Also, by virtue of s 44 a Court hearing an application under s 8 may determine the matter on the papers.

[40] I accept that s 8, taken in isolation, is more open to the criticism than s 13, under which "continuing detention" and "supervision" orders may be made. But in giving relevant consideration to s 8, it is not permissible to disregard either the type of order sanctioned by it or its role in the scheme of the Act.

[41] The section permits the making of an "interim detention order" only for the purpose of securing the prisoner's detention in custody until the hearing of the application for a division 3 order. The date for that hearing must be set by the court when making the order under s 8. The section then confers power to make interim orders in aid of and as an adjunct to the powers conferred by s 13. The fact that such orders may be made only for a limited purpose and for a limited duration is surely a relevant consideration.

[42] The prisoner must be given notice of the application, be served with the evidence to be relied on in support of it and has a right to rely on affidavit evidence at the hearing. Although, as has been said, that hearing may take place on the papers, it will be by a judge of the Supreme Court who must ensure procedural fairness. That in itself provides a substantial safeguard that the prisoner's rights will be protected.

[43] Sub-section 7(2) permits hearsay evidence on the hearing of the application, but that is normal on interlocutory applications in civil matters. It is also permissible, as well as standard procedure, in applications for bail under the *Bail Act* 1980 (Qld).

[44] I do not accept that the discretions conferred on the Court by s 8 are illusory. The significance to the respondent's argument of the discretion being real or genuine is discussed below in relation to the discretion conferred by s 13 and, the reasons for my concluding that there is a real discretion conferred by s 13 are generally applicable to the discretion conferred by s 8. I will not repeat those discussions.

[45] It is apparent however that no order may be made under s 8 unless the Court is satisfied of the maters stated in sub-section (1). If the Court is so satisfied, it is not required to make either a "risk assessment order" or an "interim detention order". Sub-section (2) commences with the words –

> "If the Court is satisfied that under subsection (1), it may make either or both of the following orders-"

[46] A right of appeal exists in respect of any order made under s 8. This and the other matters discussed above do not suggest to me that the role of the court under s 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 perception that the court lacks independence or the capacity for independent judgment.

[47] I will now proceed to consider other provisions of the Act which impinge on the role and operation of s 8.

Does the Court have a true discretion under s 13?

[48] Mr Martin argued that there was in fact no discretion conferred on the court by s 13(5). Once it was determined that the prisoner was "a serious danger to the

community", he submitted, the expectation was "necessarily, that an order would be made". The submission gains support from s 13(6) which makes –

> "the need to ensure adequate protection of the community is the paramount consideration on the hearing of an application under s 13."

[49] It is assisted also by the inclusion in s 13(4) of paragraph (i) which requires the court, in deciding whether a prisoner is a serious danger to the community, to have regard to "the need to protect members of the community from that risk". How such a need could be relevant to a reasoned determination of whether "there is an unacceptable risk that" the prisoner in question "will commit a serious sexual offence" is difficult to understand.

[50] The question of whether a real, as opposed to illusory, discretion is conferred by s 13(5) is relevant for present purposes. If it is real it tends against the conclusion that the Legislature by the Act is directing the Court "as to the judgment or order which it might make in the exercise of jurisdiction conferred on it".[20]

[51] In *Nicholas v The Queen*[21] Brennan CJ said –

> "Some characteristics of a court flow from a consideration of this function, including the duty to act and to be seen to be acting impartially. We are not concerned with these characteristics in the present case, except in so far as the duty to act impartially is inconsistent with the acceptance of instructions from the legislature to find or not to find a fact or otherwise to exercise judicial power in a particular way. A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion." (footnotes omitted)

[52] Those observations were made in respect of a state court exercising federal jurisdiction but, plainly, are relevant to the question for determination in this case. Even Legislative directions which, ostensibly, concern matters of practice and procedure may be of such a nature as to direct the exercise of judicial power.[22] I do not, however, regard the subject provision as offending in such a way.

[53] I accept that the language of s 13(6) increases the likelihood that, if there is a finding in terms of sub-section (1), an order under sub-section (5)(a) or (5)(b) will be made. Nevertheless, I do not consider that there is no real discretion. Under s 13(5) the Court, if satisfied in terms of subsection (1), may order either indefinite detention or release subject to conditions. There is thus a significant discretion to be exercised.

[54] I consider also that the Court does have a genuine discretion as to whether to make any order under s 13. It is not difficult to envisage circumstances in which an order may be refused despite a finding in terms of s 13(1). A person may be a "serious danger to the community" for the purposes of s 13 even though there is little or no

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20 *Nicholas v The Queen* (1998) 193 CLR 173 at 186 per Brennan CJ.

21 (supra) at 188.

22 *Nicholas v The Queen (Supra)* at 225, 226

risk of the person's doing serious physical or mental harm to anyone, let alone inflicting life or health threatening physical injury. For example, the assaulting of a child by touching in a sexual and non-violent way outside his or her clothing comes within the definition of "serious sexual offence". By operation of s 13(2), such an offender would become, for the purposes of s 13(1), a "serious danger to the community" if there was non acceptable risk that such a person would commit similar offences if released from custody. It is not difficult to think of other such examples.

[55] Before a court can be satisfied under s 13(1) it must be satisfied under s 13(2) that "there is an unacceptable risk" that the prisoner will commit a serious sexual offence. The Attorney-General has the onus of proof and the assessment of what is or is not an unacceptable risk is left to the court. Those matters further support the conclusion that a real discretion is conferred by s 13(5).

Comparison of the Act with other functions conferred on Australian courts by legislation

[56] I return to a consideration of whether the vesting in the court of the functions under the Act (and, in particular, those in s 8) might bring the court into disrepute whether by undermining its independence, eroding the public perception of it as an institution independent of the Executive or by otherwise eroding public confidence. In making such an assessment it is appropriate, in my view, to consider the functions which State Supreme Courts have exercised traditionally and are fulfilling at present.

[57] By Part 10 of the *Penalties and Sentences Act* 1992 (Qld) the court is given power to impose an indefinite sentence on an offender convicted of "a violent offence" as defined in s 162 of the Act. A prerequisite to the imposition of such a sentence is that the court be satisfied that the offender "is a serious danger to the community". In making that determination the court must have regard, amongst other things, to "the risk of serious physical harm to members of the community if an indefinite sentence were not imposed" and "the need to protect members of the community from" such risk. Section 181 requires such a sentence to be reviewed by the court at specified periods, the first of which is fixed in relation to "the offender's nominal sentence". The court conducting the review need not be constituted by the judge who sentenced the prisoner. Unless the court is satisfied that the offender is still a serious danger to the community upon review it must order that the indefinite sentence be discharged. Consequently, on a review, the court must assess and have regard to the likelihood of an offender re-offending. The offender's past conduct, including the conduct which gave rise to the offences for which the offender was imprisoned, is merely an evidentiary consideration.

[58] Provisions in the *Sentencing Act* 1991 (Vic), similar to those in Part 10 of the *Penalties and Sentences Act*, were upheld by the Victorian Court of Appeal in *R v Moffatt*[23]. In the course of his reasons in that case, Winneke P drew attention to the fact that State Courts have traditionally been invested with power to impose "a sentence of preventive detention in one form or another". He referred also to the "habitual offenders" legislation which States had enacted in the past which

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23 [1988] 2 VR 229.

empowered courts to impose a term of preventive detention on persistent offenders.

[59] Addressing the appellant's argument that the review process under the legislation which called on a court, after the sentencing process had expired, to determine whether the prisoner was "still a serious danger to the community", his Honour concluded that such functions were not "incompatible with the exercise of judicial functions" and that they did not "demean the integrity of the judiciary". His Honour expressed the opinion that such provisions "are designed to ensure that a person upon whom an indefinite sentence has been imposed is invested with a right to have that sentence terminated in accordance with a process which is both open and fair". His Honour further concluded that even if the process could not be characterised "as an inseparable part of the judicial process of imposing the indefinite sentence", which he doubted, "it is nonetheless … a fair and appropriate adjunct to such process".

[60] The view was advanced that such a review process, which had its counterparts in legislation in Queensland, South Australia and the Northern Territory, was an appropriate means of addressing criticism of indefinite sentencing legislation such as that made by the court in the following passage from the judgment in *Chester v R* – [24]

> "The stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not by judicial, decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community …".

[61] In *Moffatt*, Hayne JA, considering the challenge to the review requirements of the legislation, (which the appellant argued impermissibly involved the court "in the continuing administration" of the sentence after conviction) concluded that even if such a function was not a judicial function, it was not "a task so antithetical to the exercise of judicial power as to lead to the conclusion that a State legislature may not validly pass an Act requiring the courts of the State to undertake such tasks". Both Hayne JA and Charles JA, the remaining member of the Court, also thought it significant that legislation providing for the imposition of preventive detention had had a long history in this country without there being any judicial finding that the imposition of an indefinite sentence was itself incompatible with the judicial function.[25]

[62] Discussing the challenge to the function of the court in reviewing an indefinite sentence, Charles JA said – [26]

> "It is, as Mr. Tehan submitted, no doubt true that the review of sentences is a function normally carried out by correctional authorities and parole boards. But the indefinite sentencing legislation is not directed at any one offender. The review process is clearly linked to the original sentence which was imposed in relation to the offender's past criminal conduct for which the prisoner was duly found guilty and convicted. In the conduct of that review process, the court is left with a clear discretion to be exercised upon

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24 (1988) 165 CLR 611 at 619.

25 See 258, 259 per Charles JA.

26 At 260.

> grounds which must be exposed in reasons and which are thereafter open to an appeal. In my view this power is properly characterised as a judicial function."

[63] His Honour concluded also that, far from weakening confidence in the court –

> "… it might well be thought that the process of review of an indefinite sentence by a court would be seen by the community as preferable and more fair to the offender than would making a sentence of indefinite duration terminable only at the ill-defined pleasure of the executive."

Do the provisions of s 8 of the Act infringe Chapter III of the *Constitution*?

[64] A significant feature of ss 8, 13 and other provisions of the Act is that a prisoner whose sentence has been served is exposed to further imprisonment without having been convicted of another offence. That is a consideration which weighed heavily with all members of the majority, and in particular, with Toohey and Gaudron JJ in *Kable*.

[65] But as the above discussion shows, there are very significant differences between the provisions of the Act and the legislation struck down in *Kable*. In particular, the Act requires the court to be satisfied of matters preliminary to the making of an order "to a high degree of probability", there is no relaxation of the rules of evidence in the case of a final order, the application if the Act is general and not confined to a specific person or specific persons and, it confers a discretion, not only as to the type of order but as to whether an order should be made.

[66] The authority of the decision in *Moffatt* was not called into question by Mr Martin and, in my respectful opinion, the result in that case and the reasoning supporting it were unexceptionable. Acceptance of the validity of the legislation there considered with its review procedures assists the conclusion that the Act is not beyond power as a result of the application of the *Kable* principle. Whilst the Act, unlike the legislation considered in *Moffatt*, does not require an indefinite detention order to have been imposed or initiated as a result of sentencing upon conviction, both Acts have significant common features. In both cases, the release of a prisoner at the expiration of his or her sentence is made dependent, not on completion of the term of imprisonment imposed for the prisoner's offence on sentence, but on a further assessment of the risk of the prisoner's re-offending and of the danger the prisoner might present to the community.

[67] The provisions of the Victorian legislation, like the provisions of the Act, infringe the common law requirement of proportionality in sentencing by sanctioning, in substance, an increase in a term of imprisonment for the purposes of protecting the community against possible future acts of the offender. Legislation, however, may and often does, override common law principles, even long established and cherished ones.

[68] That the Act permits orders to be made against a prisoner for the first time well after the conclusion of the sentencing process, whilst sanctioning conduct foreign to the normal operation of the judicial process in criminal matters, is, in my view, not something which, of itself, would tend to lead ordinary reasonable members of the public to the conclusion that the Supreme Court was acting as an instrument of executive government policy and lacking in independence.

[69] As the earlier discussion shows, no order under the Act, other than an interim order, may be made unless the pre-requisites for the making of orders are established to a high degree of probability by admissible evidence. The applicant bears the onus of proof and the Court has a discretion as to whether to make a supervision order or a continuing detention order. It may decline to make either form of order and any order made by a judge on the hearing of an application must be accompanied by detailed reasons and may be appealed against. The prisoner is entitled to be present at a hearing at which a continuing detention order may be made or continued and there is no reason why such a hearing would not take place in public. The procedures in the Act in that regard are thus consistent with normal judicial process. I earlier reached the same conclusion in relation to s 8.

[70] There will be those who question the compatibility of the central provisions of the Act with common law principles and with acceptable standards of fairness and justice. As well as the matters discussed in paragraphs 11 to 23 above, critics of the legislation may be concerned by the difficulties inherent, in most circumstances, in assessing a person's likely future conduct.[27] Also the Act seems to treat a prisoner subject to an order under s 8 or a continuing detention order as having the same status as a prisoner serving the sentence imposed after conviction, and as thus having no special rights or privileges.

[71] There will be others who place more weight on the protection of the community than on the preservation of individual rights and liberties and who will approve of the legislation, or at least its general thrust. Such conflicting views may be very strongly held.

[72] Nevertheless, it seems to me that ordinary reasonable members of the community, whatever their views on the legislation, would perceive it to be the act of the Parliament, not the Court and regard the Court as doing no more than fulfilling a duty imposed on it lawfully by Statute. It will be understood by such persons that in our democratic society, subject to the provisions of the *Constitution*, the Parliament has plenary powers to legislate for peace, order and good government. If laws are regarded as inappropriate or unjust, members of the public and interest groups may exert pressure on the Government to repeal or change them. If no change results, those disaffected have their avenue of redress in the electoral process.

[73] The exercise of discretions under the Act may necessitate the making of difficult judgments and may well give rise to public controversy. That is a factor which normally ought weigh against reposing such powers in the Supreme Court, but in this case any controversy likely to result from individual decisions is little different in nature from that which arises already from the exercise by courts of their powers in relation to sentencing and the grant of bail.

[74] There is much to be said also for the point of view that if Parliament is to enact legislation which interferes with personal liberty it is preferable, to adapt the language of Brennan CJ, Deane, Dawson and Toohey JJ in *Grollo v Palmer*[28], that the relevant decision be entrusted to "some impartial authority, accustomed to the dispassionate assessment of evidence" and the making of independent judgments uninfluenced by extraneous considerations.

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27 Such determination, however, are required to be made under the *Bail Act* 1980 for the purposes of deciding whether an accused persons should be granted bail.

28 [1995] 184 CLR 348 at 367]

[75] The following passage from the judgments in *Grollo*[29], although directed to the question of whether it was within the power of the Commonwealth Parliament to confer on federal judges the power to issue telecommunications interception warrants, is applicable in the context under discussion –

> "It is an eligible judge's function of deciding independently of the applicant agency whether an interception warrant should issue that separates the eligible judge from the executive function of law enforcement. It is the recognition of that independent role that preserves public confidence in the judiciary as an institution."

[76] For the above reasons, I do not consider that the exercise by the Supreme Court of powers under s 8 the Act would tend to create a perception that the court lacked independence or impartiality or that it would tend otherwise to erode public confidence in the Supreme Court as an institution. The challenge to the validity of s 8 therefore fails.

Summary of Reasons

[77] The question for determination is not whether it is beyond the power of the State Parliament to enact preventive detention legislation. It is not suggested that the Parliament lacks such power. The matter to be decided is whether s 8 of the Act, by conferring on the Supreme Court the power to make the interim preventive detention order contemplated by the section, infringes Chapter III of the *Constitution* by vesting in the Supreme Court functions incompatible with the court's role as a repository of judicial power of the Commonwealth.

[78] The respondent's argument is based on the decision of the High Court in *Kable v Director of Public Prosecutions for the State of New South Wales*. There are substantial differences, however, between the provisions of the Act and the provisions of the legislation struck down by the High Court in *Kable*. In particular, the Act, unlike the *Kable* legislation, is not directed towards securing the continued detention of one person. The Act has general application, rules of evidence apply, the Attorney-General has the onus of proof "to a high degree of probability" in respect of orders made under s 13 and the court has a discretion as to whether to make one of the orders specified in s 13(5) or no order at all. All continuing detention or supervision orders must be accompanied by detailed reasons and are subject to rights of appeal.

[79] Separate consideration was not given in *Kable* to the power in the *Community Protection Act* 1994 (NSW) to make interim orders. Accordingly, it is necessary to apply the general principles enunciated in *Kable* to the wording of s 8. That section does not require proof to a "high degree of probability" and permits hearsay evidence. Regard, however, must be had to its role as a provision for the making of orders of limited effect and duration in aid of and ancillary to the powers conferred by s 13. Traditionally, courts have accepted hearsay evidence on the hearing of interlocutory orders and, in some circumstances, such orders are made by the application of a balance of convenience test. I do not consider that it is appropriate, in making an assessment of this nature, to have regard to s 8 without reference to its place in the scheme of the Act. When considered as a provision for the making of

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29 (Supra) at 367

interlocutory orders in aid of or ancillary to the powers in s 13, it may be thought unlikely that (absent some singular defect, such as requiring the denial of natural justice) s 8 would be void unless s13 was void also.

[80] There are substantial similarities between provisions of the Act and some of the provisions of the *Sentencing Act* 1991 (Vic), the validity of which was upheld by the Victorian Court of Appeal. Also, there has been a substantial history of preventive detention in Australia without it being held that the imposition of an indefinite sentence was, in itself, incompatible with the judicial function.

[81] The processes required to be followed before any order may be made under the Act as well as the existence of a right to appeal ensure a fair and impartial determination. They are consistent with traditional judicial process. That observation applies to s 8 as well as to s13. Consequently there is not that degree of antithesis between the court's role and processes under the Act and its traditional role and processes which concerned the majority judges in *Kable.*

[82] Determinations under the Act may have the effect of subjecting a prisoner to an extended term of, or even indefinite, imprisonment, not as the result of a conviction for an offence, but on the basis that the court is satisfied that there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or if released from custody without a supervision order being made. There will be those who consider legislation of this nature an unacceptable departure from common law principles and as inconsistent with acceptable standards of fairness and justice. Others will have a contrary point of view. The legislation is thus likely to attract controversy as are decisions made under it from time to time.

[83] Despite these considerations, in my view, the court's role under ss 8 and 13 of the Act is not such as to tend to erode public confidence in it as an institution. Reasonable persons will appreciate that the court is doing no more than perform the functions required of it by statute. They will perceive, however, the desirability, if there is to be such legislation, of conferring the decision making powers on some impartial authority, accustomed to the dispassionate assessment of evidence and the making of independent judgments uninfluenced by extraneous considerations.

[84] Whilst the potential of decisions under the Act to cause controversy is a matter of concern, the decisions and discretions involved in ss 8 and 13 are similar to those made and exercised by courts on a daily basis in sentencing and determining bail applications. Consequently, any potential of s 8 and 13 of the Act to involve the court in controversy is not of particular moment for present purposes.

[85] The constitutional challenge to the validity of s 8 of the Act is thus unsuccessful.