SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Fardon* [2003] QCA 416
PARTIES:	**RODNEY JON WELFORD, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/respondent) **v** **ROBERT JOHN FARDON** (respondent/appellant)
FILE NO/S:	Appeal No 6596 of 2003 SC No 5346 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2003
JUDGES:	de Jersey CJ, McMurdo P and Williams JA Separate reasons for judgment of each member of the Court, de Jersey CJ and Williams JA concurring as to the order made, McMurdo P dissenting
ORDER:	**Appeal dismissed**
CATCHWORDS:	CONSTITUTIONAL LAW – THE NON JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION & LEGISLATIVE POWER – EXAMINATION OF VALIDITY OF LEGISLATION BY COURTS – where learned primary judge granted orders under provisions of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) detaining appellant in custody – whether s 8 of the Act is constitutionally invalid and infringes Ch III of the Constitution *Chu Kheng Lim v Minister for Immigration and Local Government and Ethnic Affairs* (1992) 176 CLR 1, followed *Grollo v Palmer* (1995) 184 CLR 348, considered *H A Bachrach Pty Ltd v The State of Queensland & Ors* (1998) 195 CLR 547, followed *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51, distinguished *Kruger & Ors v The Commonwealth; Bray & Ors v The Commonwealth* (1996-1997) 190 CLR 1, followed

Nicholas v R (1998) 193 CLR 173, followed
Veen v R [No 2] (1987-1988) 164 CLR 465, considered

Criminal Law Amendment Act 1945 (Qld), s 18
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Div 1, Div 3
Penalties and Sentences Act 1992 (Qld), Pt 10

COUNSEL: S Southwood QC, with P Keyzer, for the appellant
P A Keane QC, with R V Hanson QC and R W Campbell, for the respondent

SOLICITORS: Prisoners Legal Service for the appellant
Crown Law for the respondent

[1] **de JERSEY CJ**: The issue in this appeal is whether the enactment of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") fell within the legislative competence of the Queensland Parliament. The appellant, who is the subject of orders made under the Act, contends it did not.

[2] On 27 June 2003 a learned Judge made these orders: pursuant to s 8(2)(b) of the Act, that the appellant be detained in custody until 4.00pm on 4 August 2003; pursuant to s 8(2)(a), that the appellant undergo examinations by two nominated psychiatrists; and pursuant to s 8(1), appointing 31 July 2003 as the date for the hearing of the application for a Division 3 order. That date was subsequently extended.

[3] In 1989 the appellant was convicted of rape, sodomy and assault occasioning bodily harm, and sentenced to 14 years imprisonment. That term expired on 29 June 2003. Division 3 of the Act authorizes the Supreme Court to order, in respect of a prisoner serving imprisonment for a 'serious sexual offence' (s 5(6)), that the prisoner be detained in custody for an indefinite term, or that upon release, the prisoner be subject to continuing supervision in certain respects (s 13(5)). (The Act is expressed to operate whether the sentencing preceded or occurred after its commencement (s 5(6).)

[4] The court may make such an order only if satisfied the person would, absent the order, constitute a "serious danger to the community" s 13(1), meaning there would be "an unacceptable risk … the prisoner (would) commit a serious sexual offence" (s 13(2)). That category of offence comprises offences of a sexual nature "involving violence … or against children" (Schedule to Act). The onus of establishing the prisoner would constitute a serious danger to the community rests on the Attorney-General (s 13(7)), to be discharged "by acceptable, cogent evidence" establishing the relevant consideration "to a high degree of probability" (s 13(3)). The court must give "detailed reasons" for any order made (s 17). There is provision for appeal to the Court of Appeal (Part 4) and for periodic subsequent review of any continuing detention order (Part 3).

[5] The order made on 27 June 2003, which is the subject of this appeal, was not made under Division 3: it was of a preliminary character, made under s 8. Under s 8, if the court is satisfied there are reasonable grounds for believing the prisoner "is a serious danger to the community" in the absence of an order under Division 3, the court may, in respect of a prisoner who would or may otherwise be released, make

an order for detention, for a specified period (s 8(2)(b)); the court may order that the prisoner undergo psychiatric examination (s 8(2)(a)); and the court must set a date for the hearing of the application for a Division 3 order (s 8(1)).

[6] Such orders were made in this case on 27 June 2003. In consequence, the prisoner remained a prisoner for all relevant purposes, notwithstanding the completion of his 14 year term of imprisonment (s 8(3)).

[7] The orders were made on the application of the Attorney-General (s 5(1)), on notice to the appellant (s 5(5)), with an opportunity for the appellant to file material in response (s 6) and to be heard. Affidavit material filed in such cases must comply with the usual requirements regulating interlocutory applications (s 7). It is the right of appeal accorded by Part 4 which the appellant is now exercising.

[8] Before the primary Judge, the appellant (then the respondent) contended, substantially in reliance on the High Court's decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, that s 8 of the Act was beyond the legislative competence of the Queensland Parliament. The learned Judge rejected that contention. His reasoning led to the conclusion that both s 8 and s 13 are constitutionally valid.

[9] In *Kable*, the High Court held invalid the New South Wales *Community Protection Act* 1994, because it was incompatible with Chapter 3 of the Commonwealth Constitution by effectively requiring a Judge of the Supreme Court of New South Wales to make an order depriving a named person of his liberty at the expiration of his term of imprisonment. The learned primary Judge identified points of material distinction between the scheme set up by the New South Wales legislation, and the mechanisms established under the Queensland Act.

[10] The Justices comprising the majority in *Kable* considered the New South Wales legislation compromised the integrity of the judicial system established by Chapter 3, essentially by obliging the Supreme Court of New South Wales, a court which might exercise the judicial power of the Commonwealth, to act non-judicially when exercising State jurisdiction, such as possibly, in McHugh J's terms (pp 118-119), to "lead ordinary reasonable members of the public to conclude that the State court as an institution was not free of government influence in administering the judicial functions invested in the Court".

[11] Their Honours were particularly influenced by the circumstance that the operation of the New South Wales legislation was confined to one person – as put by McHugh and Gummow JJ (pp 121, 134), it was "ad hominem" legislation, setting up what McHugh J styled "a legislative plan, initiated by the executive government, to imprison (Mr Kable) by a process … far removed from the judicial process … ordinarily invoked when the court is asked to imprison a person" (pp 122); by the feature that the rules of evidence were relaxed, with the court also having power to make an interim order on an ex parte basis; Gaudron J observing (p 107) that:

> "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."

[12] The essentials of the reasoning in *Kable* were referred to again in *Nicholas v R* (1998) 193 CLR 173 (see, for example, pp 208-9 and 256-7).

[13] Contrasting the Queensland Act with the New South Wales legislation, the learned primary Judge pointed out that it is of broad application, and not directed to the continued detention of one particular, named individual; that evidentiary requirements relevant to an application under s 8, although permitting evidence on information and belief, did not relax the usual requirements beyond those applicable to interlocutory applications and proceedings under the *Bail Act* 1980; that insofar as the evidentiary regime applicable to an application under s 8 was more liberal than that applying to s 13, interim orders under s 8 "may be made only for a limited purpose and for a limited duration"; and that the conclusion that a prisoner was "a serious danger to the community" did not mean the court would be obliged to make an order under s 13(5).

[14] The discretion apparently accorded by that provision was not, His Honour held, illusory (as had been submitted), and he offered this example of a situation in which the court might nevertheless decline to make such an order:

> "… A person may be a "serious danger to the community" for the purposes of s 13 even though there is little or no 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 an non-unacceptable risk that such a person would commit similar offences if released from custody."

[15] His Honour summarized the points of distinction in this way:

> "… 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 of 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."

[16] The learned Judge went on to note what he saw as the court's broadly comparable power under Part 10 of the *Penalties and Sentences Act* 1992 to impose an indefinite sentence upon an offender convicted of a "violent offence" (s 16) if satisfied the offender is "a serious danger to the community" (s 163(3)(b)), with provision for periodic subsequent review (s 171). He referred to the decision of the Victorian Court of Appeal in *R v Moffatt* [1988] 2 VR 229 upholding the validity of similar Victorian legislation, citing the following observations by Charles JA (p 260):

> "… 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…
>
> …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."

[17] In the result, the learned Judge dismissed the constitutional challenge to the Queensland Act.

[18] The appellant relied again on appeal on the submissions made to the learned primary Judge. In addition, it was submitted for the appellant that the Act is invalid "because it seeks to divorce an order of imprisonment from a finding of criminal guilt"; because the goal of community protection to which it is directed (see, for example, s 13(6)), does not position the mechanism within the exceptional category, as with mental illness, in which incarceration may be effected other than following and directly related to a finding of criminal guilt, (cf. *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1); and because it amounts to legislative "interference with the finality of an exercise of judicial power", insofar as it effectively operates to lengthen, retrospectively, the term of imprisonment imposed following conviction. (There was also reference to the possible difficulty of determining whether a person is "a serious danger to the community", but any difficulty in reaching a view on that aspect on the facts of a particular case could hardly bear upon the validity of the legislation.)

[19] In response, it was submitted for the Attorney-General that the "imposition of non-punitive, involuntary detention protective of the community is not incompatible with the exercise of judicial power", noting the court's obligation under these provisions to apply what might be characterized as "normal judicial process"; and that to suggest orders made under these provisions retrospectively lengthen the imprisonment originally imposed ignores the reality that following the expiration of that term of imprisonment, the appellant will have been newly detained, "under protective legislation". I accept those submissions.

[20] The Queensland Parliament has complete power to make laws "for the peace welfare and good government" of the State (s 2 *Constitution Act* 1867), subject only to the Commonwealth Constitution and territorial limitation. Such laws may adversely affect the interests and rights of persons, whether prospectively or retrospectively (*McCawley v R* (1918) 26 CLR 9, 54-5, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 533-40).

[21] The constraint affirmed in *Kable* does not operate to invalidate this legislation, substantially for the reasons assigned by the learned primary Judge in the course of his contrasting of the New South Wales and Queensland legislative regimes. The principal features of significance are the general application of the Queensland Act, the conferring of genuine discretionary power, that the criterion informing the exercise of the discretion is community protection rather than punishment, and the applicability to the court process of the rules of evidence.

[22] By contrast, the legislation before the court in *Kable* was remarkable for its being "directed at one person only" (p 89), and for its denying the court any ultimate discretion. As put by McHugh J (p 123):

> "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."

[23] In addition, the procedures it established were far removed from the normal judicial process. Of that, Gaudron J said (p 108):

> "In truth, the proceedings contemplated by s 5(1) are unique with unique procedures and with rules which apply only to the appellant. They are proceedings which the Act attempts to dress up as proceedings involving the judicial process. In so doing, the Act makes a mockery of that process and, inevitably, weakens public confidence in it."

[24] The circumstances to which I referred earlier relevantly and substantially distinguish this Act from the *Kable* legislation.

[25] This Act does not share with the *Criminal Proceeds Confiscation Act* 2002 the vulnerability which recently led the Court of Appeal to invalidate certain provisions of that legislation [2003] QCA 249. The provisions struck down effectively commanded the court to hear certain applications for orders affecting property rights in the absence of interested parties. Williams JA observed they made "a mockery of the exercise of the judicial power in question", in directing the court "to hear the matter in a manner which ensures the outcome will be adverse to the citizen and deprives the court of the capacity to act impartially".

[26] The submission for the appellant before us concentrated on the contention a court cannot legitimately be required to order detention unless in consequence of a finding of guilt of a criminal offence. That submission gains basic support from some of the statements made in *Kable*, for example this statement of Gummow J (p 132):

> "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 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."

[27] In an historical sense, a detention order made under s 8 or s 13 is consequent upon conviction, because it is the earlier conviction for a "serious sexual offence" which places the particular prisoner into the category of prisoner to which the Act applies. It may also be acknowledged that a prisoner being sentenced for what amounts, under the Act, to a "serious sexual offence", would have to be taken to appreciate the possible application of the Act come the expiration of the term of imprisonment imposed.

[28] But the Solicitor-General, who appeared for the respondent, did not seek to support the Act by endeavouring to link the orders made to the finding of guilt involved in the conviction. He sought to place the legislation into the category of exceptional case in which the court might order detention other than in direct immediate consequence of a finding of guilt.

[29] It is necessary, first, to identify the purpose of orders made under the Act.

[30] As s 13(6) provides, the "paramount consideration" affecting the exercise of the discretion whether or not to order detention is "the need to ensure adequate protection of the community". That is stated in s 3 as the first object of the Act. The second is "to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation", but rehabilitation, one draws from reading the Act in its entirety, which is directed towards ensuring the safety of the community. Although this community protection is to be achieved through the denial of personal liberty, the object of orders under ss 8 and 13 is plainly not punishment, but community protection.

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

[32] The possibility of a legitimate statutory mechanism to secure such protection was acknowledged by Deane J in *Veen v R [No 2]* (1988) 164 CLR 465, 495:

> "[T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence."

[33] In my view, this Act does set up an "acceptable statutory system of preventive restraint", or in the words of Sir Maurice Byers QC in Counsel's submissions in *Kable* (p 62), "a carefully calculated legislative response to a general social problem". It is unsurprising that this Act would have been drafted with very careful regard to the reasoning expressed in *Kable*.

[34] To what extent have the limits of what Deane J styled that "acceptable statutory system of preventive restraint" been described in the High Court?

[35] In *Lim*, that Court held invalid a provision of the *Migration Act* 1958 which directed, in effect, that no court might order the release from custody of a person imprisoned by the executive. The Court considered the legislation derogated from the constitutional jurisdiction of the High Court and removed ultra vires executive acts from the court's control. Brennan, Deane and Dawson JJ expressed as follows (pp 27-8) the primary relationship between involuntary detention and an adjudication of criminal guilt:

> "In exclusively entrusting to the courts designated by Ch. III the function of the adjudgment and punishment of criminal guilt under a

> law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else." (footnotes omitted)

[36] But the prospect of a degree of detachment between an adjudication of guilt and the making of an order for involuntary detention will not necessarily render constitutionally invalid a law which authorizes the court to make such an order. Their Honours went on to recognize an exceptional category of case (pp 28-9):

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

[37] Their Honours should not be seen as having thereby closed the category of exceptional cases. Gaudron J, who agreed in the result, left the category open (p 55):

> "Usually, people are detained in custody in consequence of an exercise of judicial power resulting in a determination that they have breached some law which requires or authorizes their imprisonment. But, as is well known, there are other situations in which persons

> may lawfully be held in custody. Detention pursuant to mental health legislation comes readily to mind, as does imprisonment on remand pending trial.
>
> Detention in custody in circumstances not involving some breach of the criminal law and not coming within well-accepted categories of the kind to which Brennan, Deane and Dawson JJ. refer is offensive to ordinary notions of what is involved in a just society. But I am not presently persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch. III."

[38] McHugh J focused on whether or not the object of the detention was punitive (p 71):

> "Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object. Thus, imprisonment while awaiting trial on a criminal charge is not punitive in nature because the purpose of the imprisonment is to ensure that the accused person will come before the courts to be dealt with according to law. Similarly, imprisonment of a person who is the subject of a deportation order is not ordinarily punitive in nature because the purpose of the imprisonment is to ensure that the deportee is excluded from the community pending his or her removal from the country. Likewise, the lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.
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> Certainly, Div. 4B deprives designated persons of the right to seek their release from custody. But they have been deprived of that right not because the Parliament wishes to punish them but because it wishes to achieve the non-punitive object of ensuring that aliens who have no entry permit or visa are kept under supervision and control until their claims for refugee status or entry are determined."

[39] Similarly here, although the appellant is denied his liberty, the object of the order is not punishment, but community protection.

[40] In *Kruger v Commonwealth* (1996-7) 190 CLR 1, Gummow J similarly concentrated on the issue whether or not the object of the involuntary detention was punitive. He said (pp 161-2):

> "A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth.
>
> The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract

> the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed."

[41] For the view expressed in the last sentence of that passage, Gummow J relied for support, apparently, on the passage extracted above (para [37]) from the reasons of Gaudron J in *Lim*. Toohey J in *Kable* plainly recognized that the category is not closed, in saying (p 98) that the situation covered by the New South Wales legislation did not fall within the "exceptional cases" mentioned in *Lim*, "directly or by analogy".

[42] Against that background, my own views on the critical issues may be briefly stated. The Act contemplates involuntary detention which should be characterized as non-punitive. The detachment of the making of an order for such detention from the original adjudication of criminal guilt does not warrant the conclusion the relevant legislation is beyond legislative power. That is because the situation contemplated by this legislation falls naturally into the exceptional category recognized in *Lim* and *Kruger*. That category is not closed, and just as it extends to the protection of the community from the mentally ill, there is no reason why, by analogy, it should not also be seen to include community protection against violent criminals who, although sane, would, if at liberty, constitute a serious danger to the community. The process established by the Act sufficiently conforms to normal judicial processes. The legislation should accordingly be regarded as constitutionally valid.

[43] The appeal should be dismissed.

[44] **McMURDO P:** On 30 June 1989 the appellant was convicted of rape, sodomy and assault occasioning bodily harm. He was sentenced to 14 years imprisonment. He committed this offence 20 days after his release on parole having served about 8 years of a 13 year sentence for a previous conviction of rape imposed on 8 October 1980.

[45] On 26 June 2003 the Queensland Attorney-General applied to the Trial Division of the Supreme Court for orders that under s 8(2)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act") the appellant undergo examinations by two psychiatrists named by the court to prepare independent reports in accordance with s 11 of the Act; under s 13(5)(a) of the Act the appellant be detained in custody for an indefinite term for care, control and treatment; and under s 8(2)(b) of the Act the appellant be detained in custody until such time as the court determines the application under s 13(5)(a) of the Act. The appellant contested the validity of the Act contending it did not comply with Ch III of the Commonwealth Constitution.

[46] On 9 July 2003, the primary judge granted the orders sought under s 8(2)(a) of the Act and directed that under s 8(2)(b) of the Act the appellant be detained in custody until 4 pm on 4 August 2003 unless otherwise ordered and adjourned the final hearing of the application.

[47] The appellant appeals against those orders on the grounds that s 8 of the Act is constitutionally invalid and infringes Ch III of the Constitution by vesting in the Supreme Court of Queensland functions incompatible with the court's role as a repository of judicial power of the Commonwealth; interferes with the court's

traditional role and processes; directs the exercise of judicial power; fetters the court's genuine discretion; and the court's role under ss 8 and 13 of the Act is such as to erode public confidence in it as an institution. The appellant also contends s 13 of the Act is invalid.

[48] The appellant seeks an order setting aside those made at first instance, a declaration that s 8 of the Act is invalid and costs.

[49] On 31 July 2003 another judge further adjourned the final hearing and ordered that the appellant be detained in custody under the Act until 3 October 2003 or such earlier date as may be appointed. The appellant has been in custody under the Act since the expiry of his more recent sentence on about 30 June 2003.

Chapter III of the Constitution

[50] Whether the Act is, as the appellant contends, unconstitutional, turns particularly on the principles discussed by the High Court in the following three cases.

(a) *Chu Kheng Lim v Minister for Immigration*[1]

[51] In *Chu Kheng Lim*, the High Court considered Ch III of the Commonwealth Constitution in the context of the validity of sections of the *Migration Act* 1958 (Cth) ("the Migration Act"). Section 54L relevantly provided:

> "(1) Subject to sub-section (2), after commencement, a designated person must be kept in custody.
>
> (2) A designated person is to be released from custody if, and only if, he or she is:
>
> (a) removed from Australia under section 54P; or
>
> (b) given an entry permit … ."

[52] Section 54N relevantly provided:

> "(1) If a designated person is not in custody immediately after commencement, an officer may, without warrant:
>
> (a) detain the person; and
>
> (b) take reasonable action to ensure that the person is kept in custody or the purposes of section 54L."

[53] Section 54R relevantly provided:

> "A court is not to order the release from custody of a designated person."

[54] The Migration Act defined "designated person" as:

> "… a non-citizen who:
>
> (a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and
>
> (b) has not presented a visa; and
>
> (c) is in Australia; and
>
> (d) has not been granted an entry permit; and
>
> (e) is a person to whom the Department has given a designation by:
>
> (i) determining and recording which boat he or she was on; and

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1 (1992) 176 CLR 1.

> (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;
>
> and includes a non-citizen born in Australia whose mother is a designated person."

[55] All seven High Court judges found that ss 54L and 54N did not infringe Ch III of the Constitution; Brennan, Deane, Dawson and Gaudron JJ found that s 54R was also invalid.

[56] In a joint judgment, Brennan, Deane and Dawson JJ noted that Ch III of the Constitution incorporates the doctrine of the separation of judicial from executive and legislative powers. The grant of legislative powers under s 51 of the Constitution does not extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power inconsistent with the essential character of a court or with the nature of judicial power.[2] The judgment and punishment of criminal guilt is essentially and exclusively judicial in character and cannot be vested in the executive.[3] It is beyond the legislative power of Parliament to invest the executive with arbitrary power to detain citizens in custody notwithstanding that the power is conferred in terms seeking to separate the detention from punishment and criminal guilt because, absent exceptions, 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.[4] One non-punitive exception is arrest and detention on remand of those accused of crime pending trial or sentence on criminal charges, a power which remains subject to the supervisory jurisdiction of the courts to grant bail. Another exception is involuntary detention in cases of mental illness, which is also non-punitive in character and does not necessarily involve the exercise of judicial power. Other examples are the power of Parliament to punish for contempt and of military tribunals to punish for breach of military discipline.[5] Otherwise Australian citizens enjoy a constitutional immunity from being imprisoned by Commonwealth authority except under an order of a court in the exercise of the judicial power of the Commonwealth.[6] The powers of detention in custody conferred under ss 54L and 54N are incidents of the executive powers of exclusion, admission and deportation of aliens; they are not part of the judicial power of the Commonwealth[7] and do not offend Ch III of the Constitution. Section 54R, however, would direct in unqualified terms that no court, including the High Court, shall order the release from custody of a person whom the executive of the Commonwealth has imprisoned. It purports to derogate from the direct vesting of judicial power and to remove ultra vires acts of the executive from the control of the High Court of Australia; it manifestly exceeds the legislative powers of the Commonwealth. It is inconsistent with Ch III and invalid because it is not merely the Parliament granting or withholding the courts'

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2 Supra, 26-27.
3 Supra, 27.
4 Supra, 27-28. See also *Kruger v The Commonwealth* (1996-1997) 190 CLR 1, Gummow J 161-162.
5 Supra, 28.
6 Supra p 28-29.
7 Supra p 34.

jurisdiction; it is an attempt by Parliament to direct the courts as to the manner and outcome of the exercise of their jurisdiction.[8]

[57] Gaudron J recognised that although people are usually detained in custody in consequence of an exercise of judicial power following a determination that they have breached a law which requires or authorises their imprisonment, there are other situations in which people may lawfully be held in custody, for example, detention under mental health legislation or imprisonment on remand pending trial; detention in custody in other circumstances not within the categories referred to by Brennan, Deane and Dawson JJ is offensive to ordinary notions of what constitutes a just society. Her Honour was not however persuaded that legislation authorising detention in circumstances involving neither a breach of the criminal law nor within accepted categories of exemption is necessarily and inevitably offensive to Ch III of the Constitution.[9]

(b) *Grollo v Palmer*[10]

[58] In *Grollo v Palmer* the High Court considered the constitutionality of the conferral of the power to issue telecommunication interception warrants upon federal judges under the *Telecommunications (Interception) Act* 1979 (Cth). Brennan CJ, Deane, Dawson and Toohey JJ held that the power to issue warrants is not part of the judicial power of the Commonwealth because it does not involve an adjudication to determine the rights of parties. The power to confer non-judicial functions on judges as designated persons is not necessarily inconsistent with the separation of powers required by Ch III of the Constitution if conferred on individual judges detached from the court of which they are a member, subject to the following. First, the conferral must be consented to by the judge and, second, the function must not be incompatible either with the judge's performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.[11] Conferral of such functions must not be incompatible with judicial status and independence, the exercise of judicial power or the maintenance of public confidence in its exercise. Considerations relevant to the question of incompatibility with the judicial function include whether the extra-judicial function makes the further performance of substantial judicial functions impracticable; whether it compromises the capacity of the judge to perform his or her judicial functions with integrity and whether it diminishes public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity.[12]

(c) *Kable v Director of Public Prosecutions*[13]

[59] Kable had been convicted of the manslaughter of his wife and sentenced to a minimum term of four years imprisonment with an additional term of one year and four months imprisonment. His prison behaviour caused serious concern that he may repeat similar violent conduct, especially as he wrote threatening letters to relatives of his deceased wife.

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8 Supra pp 36-37.
9 Supra 55.
10 (1995) 184 CLR 348.
11 Supra, 364-365.
12 Supra 365.
13 (1995-1996) 189 CLR 51.

[60] The New South Wales Parliament passed the *Community Protection Act* 1994 (NSW) ("the NSW Act"), s 5(1) of which empowered the Supreme Court of New South Wales to order the detention of Kable in prison for a specified period if satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence and that it was appropriate for the protection of a particular person or the community generally that Kable be held in custody for a maximum period of six months. Kable could be subject to more than one application and a detention order could be made only against Kable and no one else.[14] The object of the NSW Act was to protect the community by providing for the preventive detention of a single individual, Kable. The majority, Toohey, Gaudron, McHugh and Gummow JJ, found the Act invalid: State Parliaments are constrained in their power to legislate with respect to their courts because they are vested with federal jurisdiction as part of an integrated system of State and Federal courts; State Parliaments may not vest their courts with functions incompatible with the operation and standing of State courts exercising the judicial power of the Commonwealth.[15]

[61] Toohey J observed that the preventive detention of Kable under the NSW Act as a prisoner within the meaning of the *Prisons Act* 1952 (NSW) was not an incident of the judicial function of judging and punishing criminal guilt, nor was it part of a system of preventive detention with appropriate safeguards consequent upon or ancillary to the adjudication of guilt; nor did it fall within the exceptional cases mentioned in *Chu Kheng Lim* directly or by analogy.[16] The NSW Act required a Supreme Court to exercise the judicial power of the Commonwealth in a manner which was inconsistent with traditional judicial process. His Honour was concerned as to the extraordinary character of the legislation, especially as it operated against one named person only. The NSW Act was incompatible with the performance of non-judicial functions such that public confidence in the integrity of the judiciary as an institution would be diminished. The function exercised by the Supreme Court under the NSW Act offended Ch III of the Constitution because it required the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law was alleged and where there had been no determination of guilt. As it was not possible to sever s 5, the NSW Act was invalid.

[62] Gaudron J was concerned that the NSW Act allowed for the receipt of documents including medical, psychiatric and other reports from an offender's review board, a police officer, or the mental health review tribunal, even if such reports were not admissible in law[17]. Her Honour also noted that, once the matters set out in s 5(1) were satisfied, the NSW Act provided for the detention of Kable in prison and subjected him to substantially the same regime as those convicted of criminal offences. The NSW Act deprived Kable because an opinion had been formed on the basis of material, not necessarily admissible in legal proceedings, that he is more likely than not to breach a law by committing a serious act of violence as defined.[18] The proceedings under the NSW Act were not proceedings known to the law; despite attempts in the legislation to dress them up as such, they do not involve the resolution of a dispute between parties as to legal rights and obligations:

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14 Section 3(3), the NSW Act.

15 (1995-1996) 189 CLR 51, 96-98, 103-104, 116-118, 139-142.

16 Supra, 98.

17 Supra 105; ss17(i) and 17(3), the NSW Act.

18 Section 4, NSW Act.

> "Instead, the proceedings are directed to the making of a guess – perhaps an educated guess, but a guess nonetheless – whether, on the balance of probabilities, the appellant will commit an offence of the kind specified in the definition of 'serious act of violence'."[19]

Her Honour described the scheme under the NSW Act as "the antithesis of the judicial process",[20] which essentially involves protecting the individual from arbitrary punishment and ensuring that punishment follows from a fair and impartial application of the relevant law to properly ascertained facts. The power purported to be captured under s 5(1) of the NSW Act was not a judicial function. It compromised the integrity of the Supreme Court of New South Wales: public confidence cannot be maintained in courts required to deprive persons of their liberty, not because they have breached any law but because an opinion has been formed that they may in the future breach a law, by reference to material which may not be admissible in legal proceedings.

[63] McHugh J's concerns about the validity of the NSW Act included that its object was to detain Kable, not for what he had done but for what the executive government feared he might do; Parliament expected that Kable would be detained on an interim basis before the Supreme Court had the opportunity to decide whether it was satisfied that the appellant was more likely than not to commit a serious act of violence.[21] McHugh J referred to the standard of proof under the NSW Act, which was not proof beyond reasonable doubt.[22] His Honour determined that the object of the NSW Act, (that it related only to one named individual) the grounds for and method of proof of the s 5 order and the provision for interim orders, demonstrated that the legislators intended that the NSW Act would continue the imprisonment of Kable after the expiration of his sentence for his wife's manslaughter.[23] The NSW Act and its procedures compromised the institutional impartiality of the Supreme Court and were inconsistent with Ch III of the Constitution. Central to his Honour's concern was that the NSW Act undermined the ordinary safeguards of the judicial process and made it highly likely that Kable would be imprisoned. The NSW Act involved the Supreme Court of New South Wales in the exercise of non-judicial functions in providing for punishment of Kable by way of imprisonment for what he was likely to do rather than for what he has done, virtually ensuring that he will be imprisoned by the Supreme Court when his sentence for manslaughter expires; it made the Supreme Court of New South Wales the instrument of a legislative plan, initiated by the executive government, to imprison Kable by a process far removed from the judicial process ordinarily invoked when a court is asked to imprison a person. The proceedings under the NSW Act bore very little resemblance to the ordinary processes and proceedings of the Supreme Court in that they did not involve a contest as to whether Kable had breached any law or legal obligation; they were not directed to a determination or order resolving an actual or potential controversy as to existing rights or obligations.[24] The powers under the NSW Act were comparable to the jurisdiction conferred on Ministers of the Crown during war time.[25] The NSW Act required the Supreme Court to speculate whether, on the

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19 Supra 106.
20 Supra p 106.
21 Supra, 120.
22 Ibid.
23 Supra, 121.
24 Supra, 121-122.
25 Supra, 122.

balance of probabilities, it was more likely than not the appellant would commit a serious act of violence; predicting dangerousness is notoriously difficult and can at best be but an informed guess of the court. Because of the preventive object of the NSW Act, once the court concluded that Kable was more likely than not to commit a serious act of violence, the court had no real discretion to refuse to imprison him.[26] Ordinary reasonable members of the public might reasonably see the NSW Act as making the Supreme Court a party to, and responsible for, implementing the political decision of the executive government; the appellant could be imprisoned without the benefit of the ordinary processes of law and the public could infer that the Supreme Court was an instrument of executive government policy, impairing confidence in the impartial administration of the judicial functions of the Supreme Court and infringing Ch III of the Constitution.[27]

[64] Gummow J referred to the use of the empowering term "may" in s 5(1) which in context also indicated the circumstances in which the power conferred by that sub-section was to be exercised. His Honour was concerned that s 5 proleptically gave jurisdiction to the Supreme Court to deal with substantive liabilities in presenting criteria which required the Court to decide whether it was more likely than not that Kable was likely to act in a particular fashion. The section dealt only with one individual, applied the criminal law in anticipation of criminal conduct, determined the case by a civil standard and provided directly for detention in prison, without any determination of guilt by applying the law to established facts. As a consequence the legislature was employing the Supreme Court to carry into effect its determination that Kable be deprived of his liberty once he met specified criteria.[28] His Honour referred with approval to the observations in *Chu Kheng Lim* of Brennan, Deane and Dawson JJ[29] and Gaudron J[30] as to the separation of judicial power from the executive and legislature. His Honour considered the most significant of the striking features of the NSW Act was that, whilst imprisonment under a Supreme Court order is punitive in nature, it is not consequent upon any judgment by the court of criminal guilt. Such authority could not be conferred upon a State court exercising federal jurisdiction; it was non-judicial in nature and fundamentally repugnant to the judicial process.[31] His Honour was concerned that the NSW Act used a State Supreme Court as an essential and determinative part in a scheme to incarcerate an individual in a penal institution otherwise than for breach of the criminal law.[32] It was repugnant to the judicial process[33] to require the Supreme Court to inflict punishment without any prior finding of criminal guilt by application of the law to past events; such a requirement was likely to result in the judiciary being seen as an arm of the executive implementing the will of the legislature to the damage of its institutional impartiality.[34] His Honour distinguished legislation such as the *Inebriates Act* 1900 (NSW) which provided for the care, control and treatment of inebriates, including placing them in institutions

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26 Supra, 122-123.
27 Supra, 124.
28 Supra, 130-131.
29 Supra, 27-28.
30 Supra, 55.
31 Supra, 132.
32 Supra, 133.
33 Supra, 134.
34 Supra.

for their reception, control and treatment for up to 12 months, but determined that such legislation was quite removed in nature and scope from that in *Kable*.[35]

The legislative scheme of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld)

[65] To determine whether the Act offends Ch III of the Constitution, it is necessary to consider the operation and effect of the Act, for, self-evidently, it is that which determines its constitutional character: *H A Bachrach Pty Ltd v Queensland*.[36]

[66] The objects of the Act are to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community;[37] and to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.[38] The *Bail Act* 1980 (Qld) does not apply to a person detained under the Act.[39] The Attorney-General may apply to the Trial Division of the Supreme Court for an order for a preliminary hearing or for an order under Division 3 of the Act;[40] the application must be made during the last six months of the prisoner's period of imprisonment[41] and come before the court within 14 days after filing the application[42] by way of a preliminary hearing to decide whether 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.[43] The term "prisoner" means a prisoner detained in custody serving a period of imprisonment for a serious sexual offence (an offence of a sexual nature whether committed in Queensland or outside Queensland involving violence or against children).[44] The Attorney-General must file affidavits in support of the application[45] and the prisoner may file affidavits for the purposes of the preliminary hearing.[46] An affidavit is ordinarily confined to the evidence the person making it could give if giving evidence orally, although the affidavit for use in a preliminary hearing may contain hearsay statements if the source of the information and the grounds for the belief are stated.[47]

[67] Section 8 provides:

> "**8. Preliminary hearing.**
>
> (1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
>
> (2) If the court is satisfied as required under subsection (1), it may make either or both of the following orders –
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> (a) an order that the prisoner undergo examinations by 2

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35 Supra, 134.
36 (1998) 195 CLR 547, 563.
37 Section 3(a).
38 Section 3(e).
39 Section 4.
40 Section 5(1).
41 Section 5(2)(c).
42 Section 5(4).
43 Section 5(3).
44 Schedule Dictionary.
45 Section 5(2)(b).
46 Section 6.
47 Section 7.

psychiatrists named by the court who are to prepare independent reports (a **"risk assessment order"**);

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

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

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

[68] A risk assessment order authorises the examination of the prisoner by two psychiatrists who must then prepare a report[48] indicating the psychiatrists' assessment of the level of risk that the prisoner will commit another serious sexual offence if released from custody or if released from custody without a supervision order and the reasons for the assessment.[49] Copies of the psychiatric reports must be given to the Attorney-General within seven days of completion and the Attorney-General must give a copy of each report to the prisoner on the next business day after the Attorney-General receives the report.[50]

[69] Section 13 provides:

"**13. Division 3 orders.**

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

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

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

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

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

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

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

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

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

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48 Section 9.

49 Section 11.

50 Section 12.

(b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
(c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;
(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;
(g) the prisoner's antecedents and criminal history;
(h) the risk that the prisoner will commit another serious sexual offence if released into the community;
(i) the need to protect members of the community from that risk;
(j) any other relevant matter.

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

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (**"continuing detention order"**); or
(b) that the prisoner be released from custody subject to the conditions it considers appropriate that are stated in the order (**"supervision order"**).

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

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

[70] A continuing detention order takes effect from the time it is made or at the end of the prisoner's period of imprisonment, whichever is the later, and until rescinded by the court's order.[51] The person subject to the continuing detention order remains a prisoner.[52] A supervision order takes effect from the time it is made or at the end of the prisoner's period of imprisonment, whichever is the later,[53] and for the period stated in the order.[54] The conditions for supervised release are set out in s 16 and are analogous to those applicable to a probation order. A court making a continuing detention order or a supervision order must give detailed reasons for making the order.[55]

[71] The Act imposes a duty on the Attorney-General to disclose evidence or things in the Attorney's possession as in the prosecution of a criminal proceeding.[56] A

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51 Section 14(1).
52 Section 14(2).
53 Section 15(a).
54 Section 15(b).
55 Section 17; Division 4 of the Act deals with amendment of supervision orders, Division 5 with their contravention and Division 6 with the return to custody of released prisoners on supervision orders.
56 Section 25(2).

prisoner's detention under a continuing detention order is subject to regular review.[57]

[72] A continuing detention order must be reviewed at the end of one year and thereafter annually.[58] A prisoner may apply to the court for a review of the continuing detention order at any time after the court makes its first review if the court gives leave to apply because of special circumstances.[59] The Chief Executive must arrange for the prisoner to be examined by two psychiatrists for the purposes of a review.[60] On the review, the court may affirm the original decision only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to affirm the decision.[61] The court may then order that the prisoner continue to be subject to the continuing detention order or be released from custody subject to a supervision order.[62] The paramount consideration for the court is the need to ensure adequate protection of the community.[63]

[73] The Attorney-General or a prisoner may appeal from a decision under the Act.[64]

[74] The court may decide whether to make orders in a preliminary hearing or to amend supervision orders entirely or partly from considering documents filed without the prisoner or witnesses appearing or the prisoner consenting to, or being heard on, the matter being decided in that way.[65] It 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.[66] For other hearings under the Act, including an application for a Division 3 order, the ordinary rules of evidence apply[67] but 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.[68]

[75] The prisoner is entitled to appear at hearings under Division 3 and for orders contravening a supervision order or a periodic review.[69]

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

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57 Part 3, s 26.
58 Section 27(i)
59 Section 28.
60 Section 29.
61 Section 30(2).
62 Section 30(3).
63 Section 30(4).
64 Part 4, s 31.
65 Section 44(1).
66 Section 44(2).
67 Section 45.
68 Section 45(4).
69 Section 49.

Does the Act offend Ch III of the Constitution?

[77] The Queensland Parliament has broad general legislative power to make laws for the peace, order and good government of the State,[70] subject to territorial and Commonwealth constitutional limitations. Community protection is clearly a legitimate legislative concern but citizens must not be detained in a manner which offends the doctrine of the separation of powers recognised by the Commonwealth Constitution. It is that tension which is central to this case. The Supreme Court of Queensland is a court within Ch III of the Constitution and since *Kable* it has been recognised that such courts cannot be authorised to exercise powers or functions incompatible with the separation of judicial power effected by Ch III. Non-judicial power cannot ordinarily be conferred on a court or a judge of a court exercising Ch III jurisdiction unless the power is ancillary to the judicial power,[71] for example, fixing a minimum term of imprisonment,[72] or unless the power is voluntarily accepted by individual judges detached from the court of which they are members and the function conferred is not incompatible with the judicial function.[73]

[78] The notion of sentencing persistent or dangerous offenders to an indeterminate period of detention is not new and is within the traditional and important judicial function of judging and punishing criminal guilt. See, for example, the scheme under the *Criminal Law Amendment Act* 1945 (Qld), s 18 of which gives power to Queensland courts to order that those found guilty of a sexual offence upon a child under 16 be subject to the preparation of medical reports as to whether they are incapable of exercising proper control over their sexual instincts. If the medical reports support the order, the sentencing judge may either, in addition or instead of imposing any other sentence, declare the offender to be so incapable and direct the offender be detained in an institution during Her Majesty's pleasure. Part 3A of that Act allows for conditional release of such offenders. Part 4 allows Queensland sentencing courts to order offenders convicted of a sexual offence upon a child under 16 years to report to authorities beyond any sentenced term of imprisonment, where the court is satisfied there is a risk that the offender will commit a further offence of a like nature. Part 10 of the *Penalties and Sentences Act* 1992 (Qld) also establishes a scheme for the imposition of indefinite sentences on offenders convicted of violent offences where the *Mental Health Act* 2000 (Qld) Ch 7 Pt 6 does not apply and the offender is a serious danger to the community within s 163 of that Act. That Act also provides for periodic reviews after notional parole eligibility and community reintegration programs

[79] The Supreme Court of Victoria in *R v Moffatt*[74] held that the indefinite sentence of offenders convicted of serious offences under sub-division 1A of Div 2 of Pt III of the *Sentencing Act* 1991 (Vic) (a scheme broadly comparable with the Queensland schemes discussed above), was not inconsistent with the judicial function under Ch III of the Constitution. It is not surprising that special leave to appeal to the High Court of Australia was refused on 13 February 1998 as the Victorian scheme applied to judges exercising the important, traditional judicial function of imposing a penalty after a criminal conviction, a function entirely consistent with Ch III of the Constitution.

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70 See s 2, *Constitution Act* 1867 (Qld).

71 *Leeth v The Commonwealth* (1991-1992) 174 CLR 455, 469-470.

72 Ibid.

73 *Grollo v Palmer*, 365.

74 [1999] 2 VR 229.

[80] The scheme under the Act is quite different. It requires a judge of the Supreme Court of Queensland to order the detention of someone convicted and sentenced for a criminal offence, who has satisfied the penalty imposed at sentence, without any further determination of criminal guilt justifying the use of judicial power. *Moffatt* is not authority for the proposition that the conferral of such a power on a court within Ch III of the constitution is valid.

[81] Nor can it be said that the scheme under the Act is incidental to the sentence imposed on the appellant on 30 June 1989: cf *Leeth v The Commonwealth*.[75] The scheme does not turn on that sentence or finding of guilt but on a subsequent prediction as to the prisoner's future conduct.

[82] The scheme under the Act cannot be treated as part of the sentencing process for prisoners convicted of a serious sexual offence as defined. As the sentencing judge noted on the appellant's most recent sentence, he could not impose a term of imprisonment extending the period society would be protected from the risk of the appellant's recidivism beyond what was proportionate to the crime committed: *Veen v The Queen*.[76] As Murphy J observed in *Veen*, if the protection of society required Veen be removed from the community when his imprisonment ended because he was dangerous, it should only be done, if it could be done lawfully, by methods outside the criminal justice system.[77]

[83] The Queensland Parliament in passing the Act has introduced a scheme with many differences from that in *Kable*. These differences have been discussed fully in the reasons for judgment of the Chief Justice, Williams JA and the primary judge and include the following.

[84] All members of the majority in *Kable* were concerned that the scheme there related only to the named individual, Kable. The Act, however, applies to a determinate class of persons, namely those prisoners convicted of and serving a term of imprisonment for a serious sexual offence as defined[78] and as to whom there are reasonable grounds for forming a belief that they are a serious danger to the community[79] in the absence of a Division 3 order (for interim orders under s 8) or who, the court is satisfied, are an unacceptable risk of being a serious danger to the community within s 13 (Division 3 orders under s 13). The class of persons to whom the Act applies is determined by regard to a prediction about future conduct, something which is notoriously unreliable[80] and includes only those serving a period of imprisonment for a serious sexual offence (as defined) and not all members of the community who may also be a serious danger in the absence of detention or supervision.

[85] A further concern in *Kable* was that the standard of proof under the NSW Act was the civil standard. The standard of proof under s 8 of the Act requires the court only to be satisfied of a belief on **reasonable** grounds that the prisoner is a serious danger to the community before making orders; an order under s 13 of the Act may be made only if the court is satisfied **to a high degree of probability** that a prisoner

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75 (1991-1992) 174 CLR 455, 469-470.
76 (1978-1979) 143 CLR 458; approved in *Veen v The Queen [No 2]* (1987-1988) 164 CLR 465, 477.
77 Supra, 496.
78 See Schedule Dictionary.
79 See s 13(2).
80 *Kable*, Gaudron J 106; McHugh J 122-123.

is a serious danger to the community.[81] This is a higher standard than under the NSW Act but does not reach the standard preferred by McHugh J in *Kable* of proof beyond reasonable doubt.[82] The scheme under the Act does not remove the concern about the standard of proof expressed by Gaudron, McHugh and Gummow JJ in *Kable* as to orders under s 8 and nor does the scheme completely remove the concern in respect of Division 3 orders.

[86] In *Kable* the ordinary rules of evidence did not apply to applications under the NSW Act whilst under the Act the ordinary rules of evidence are said to generally apply.[83] In deciding an application to make a Division 3 order under the Act, the court must receive evidence as to the matters set out in s 13(4), and may receive evidence of the prisoner's antecedents, criminal history and relevant matters 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.[84] Evidence of these matters, which deal essentially with propensity, would not ordinarily be admissible in this form in a judicial trial about a finding of guilt. As a result, the stated application of the rules of evidence is of limited comfort or protection to those subject to the Act.

[87] The removal of any real judicial discretion under the NSW scheme was a further concern in *Kable*. The use of "may" in the Act gives the appearance of a judicial discretion but, under s 8, once a 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 hearing the application for a Division 3 order and may make either or both risk assessment or interim detention orders. Additionally, in making a Division 3 order the court **must** have regard to the matters set out in s 13(4)(a)-(j); the first three of these include psychiatric reports ordered under the Act and the extent to which the prisoner cooperated; any other medical, psychiatric, psychological or other assessments relating to the prisoner and information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future. If the court is satisfied the prisoner is a serious danger to the community in the absence of a Division 3 order, then the court may make a continuing detention order, a supervision order or, by inference, refuse to make an order. In deciding these questions, the paramount consideration is the need to ensure adequate protection of the community.[85] It is difficult to envisage a situation where, if the reports prepared under the Act clearly supported the conclusion that the prisoner was a serious danger to the community if not detained, a judge would refuse to make orders consistent with those reports. Despite the use of "may", the real effect of the scheme, as in *Kable*, is to significantly curtail a true judicial discretion; the scheme undermines the ordinary safeguards of the judicial process, making it highly likely that a prisoner within the class to whom the Act applies, would continue to be imprisoned beyond the prisoner's sentenced term of imprisonment.

[88] The essence of the majority's concern in *Kable* was that the NSW Act required a judge to exercise the judicial power of the Commonwealth in a manner inconsistent with traditional legal process and outside the exceptions discussed in *Chu Kheng*

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81 Section 13(3).
82 Supra, 120.
83 Section 13(3)(a) and s 45(3).
84 Section 44(2).
85 Section 13(6).

Lim. The involuntary detention of a citizen in custody by the Supreme Court of Queensland is penal or punitive in character unless within those exceptions, which are not closed. Examples of legitimate exceptions can be found within the laws of Queensland, including the detention of the mentally ill,[86] the isolation, treatment and detention of those suffering from notifiable diseases[87] and those convicted of offences but in need of detention for treatment for drug addiction.[88] Gummow J observed that such legislation was removed in nature and scope from that in *Kable*.[89] In *Chu Kheng Lim* Gaudron J was not persuaded that legislation authorising detention in circumstances involving neither a breach of the criminal law nor within accepted categories of exemption was necessarily and inevitably offensive to Ch III of the Constitution, but her Honour was clearly of the view that the legislation establishing the scheme in *Kable* was not within those exceptions and so was offensive to Ch III. Toohey, McHugh and Gummow JJ reached similar conclusions.

[89] Deane J, considering a quite different issue in *Veen v The Queen [No 2]*,[90] observed in obiter that the protection of the community obviously warrants the introduction of some acceptable statutory scheme of preventive restraint to deal with those who have been convicted of violent crime and who, though not legally insane, might represent a grave threat to the safety of others by reason of a mental abnormality if released at the end of serving their proper punitive sentence.[91] The Act does not purport to base any decision on a defined "mental abnormality" but rather on the uncertain predictions of a prisoner's future conduct. Deane J's observations did not suggest that any such statutory scheme be by way of conferring non-judicial powers on State courts contrary to Ch III of the Constitution or that a scheme such as this was within the exceptions subsequently discussed in *Chu Kheng Lim*.

[90] The proceedings under the Act are plainly not civil proceedings between parties to protect the public and to rehabilitate the prisoner. The Act does not apply generally to members of the community who may present a risk of serious danger but only to prisoners, (as defined), within that category serving a sentence.[92] Once a detention order is made, whether under s 8 or s 13, the prisoner is subject to substantially the same regime of detention as if convicted of a criminal offence but without being charged with or tried for an offence against the criminal law of Queensland; the prisoner's release will no longer turn on the completion of a sentenced term of imprisonment consequent on a finding of guilt but on future predictions of dangerousness. Despite the stated objects of the Act, (to protect the public and to rehabilitate the prisoner), the effect of the Act is punitive and not within the exceptions referred to in *Chu Kheng Lim*.

[91] Prisoners subject to the Act are those convicted of serious sexual offences involving violence or perpetrated against children; they will almost inevitably be unpopular with the community and the media who can be expected to take considerable

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86 *Mental Health Act* 2000 (Qld), ss 57-59, 61-63, 68-69, 101, 273 and 288 and cf *Kansas v Hendricks* 117 S Ct 2072, where the United States Supreme Court upheld the constitutional validity of the Sexually Violent Predator Act (Kansas), which allowed the detention of those with a mental abnormality or personality disorder likely to engage in predatory acts of sexual violence.

87 *Health Act* 1937 (Qld), ss 36, 37.

88 *Health Act* 1937 (Qld), s 130B.

89 At p 136.

90 Supra, 495.

91 Cf *Kansas v Hendricks* 117 S Ct 2072, discussed in fn [86].

92 Sections 3 and 5(b).

interest in orders of the type sought under the Act. The Act empowers judges to deprive these prisoners of their liberty, not because they have committed an offence or breached the civil law, but because opinions have been formed, probably on material which would not be admissible in a legal proceeding and on a standard other than beyond reasonable doubt, that they will commit a serious sexual offence as defined if released from custody, or at least unsupervised custody, after completing their sentenced terms of imprisonment. The Act requires the Supreme Court of Queensland to predict dangerousness by way of, at best, an informed guess, something which is notoriously unreliable and which must be based largely on opinions of psychiatrists.[93] Despite the efforts of the Queensland Parliament to distinguish the scheme under the Act from the invalid NSW Act in *Kable* by numerous cosmetic changes, it remains "the antithesis of the judicial process",[94] which is to protect the individual from the arbitrary interference of rights other than in consequence of the fair and impartial application of the law to properly ascertained facts. The Act requires the Supreme Court of Queensland to exercise the judicial power of the Commonwealth in a manner inconsistent with traditional judicial process.[95] Ordinary reasonable members of the public could well reasonably see the Act as making the Supreme Court of Queensland a party to, and responsible for, implementing the political decisions of the executive government that unpopular prisoners should be imprisoned beyond the expiry of their sentenced terms of imprisonment without the benefit of the ordinary processes of law. The powers sought to be given to the Supreme Court of Queensland under the Act compromise the integrity of this Court and of the judicial system effected by Ch III of the Constitution.[96] A judge cannot consent to the receipt of non-judicial power in such circumstances.

[92] Both ss 8 and 13 of the Act infringe the requirements of Ch III of the Constitution that the Supreme Court of Queensland only exercise the judicial power of the Commonwealth consistently with the doctrine of the separation of powers. This is not an instance where the offending sections of the Act can be read down or severed as the entire scheme established by the Act is invalid.

[93] It follows that I would allow the appeal, set aside the judgment and orders made at first instance and on 31 July 2003 and instead declare that s 8 of the Act is invalid. I would also order that the respondent pay the appellant's costs of the appeal and of the proceedings below.

[94] **WILLIAMS JA:** Though I agree with the reasons of the Chief Justice for concluding that the appeal should be dismissed, because of the importance of the issues raised it is desirable I articulate my own reasons for arriving at that conclusion.

[95] The *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act") applies to prisoners who have been convicted of a "serious sexual offence" which is defined in the Schedule as "an offence of a sexual nature … (a) involving violence; or (b) against children." The Act empowers the Attorney-General to apply to the court for an order that such a prisoner be detained in custody for an indefinite term for

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93 See *Kable*, Gaudron J at p 106; McHugh J at pp 122-123.

94 Gaudron J, *Kable*, at p 106.

95 Supra, 106-107.

96 107. See also McHugh J at 121-124 and the observations of Kirby J in *Nicholas v The Queen* (1998) 193 CLR 173, 256-257.

control, care or treatment after the expiration of the finite term of imprisonment imposed by way of initial sentence. In order to enliven that jurisdiction the Attorney-General must satisfy the court at a preliminary hearing that "there are reasonable grounds for believing the prisoner is a serious danger to the community" if released at the expiration of that initial sentence. The appellant's principal submission, addressed to the learned judge at first instance and again on appeal, is that the Act is outside the legislative competence of the Queensland Parliament because its provisions offend the principle derived from the reasoning of the High Court in *Kable v The Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. That decision was based on legislation which is clearly distinguishable from the Act; the New South Wales legislation in question applied only to a named prisoner and effectively directed the court to make an order detaining that person in custody. In formulating the question for consideration by the High Court Sir Maurice Byers, senior counsel for Kable, said at 62: "The question is not about preventive detention in general terms but the preventive detention of one person and the intrusion of the legislature into the judicial process. The Act is not a carefully calculated legislative response to a general social problem." But though the judgments concentrated on answering that narrow question, the reasoning clearly establishes that a State court cannot be invested with jurisdiction incompatible with that court exercising jurisdiction pursuant to Chapter III of the Constitution. The decision of this court in *Re Criminal Proceeds Confiscation Act* 2002 [2003] QCA 249 is a recent example of the application of that principle, and that case further demonstrates that this court will strike down legislation of the Queensland Parliament which breaches the *Kable* principle.

[96] The critical submission advanced before this court by senior counsel for the appellant was that detention in custody, being penal or punitive in character, could only lawfully be imposed as part of the exercise of judicial power if the order was made as part of the process of adjudging and punishing criminal guilt. In support of that submission reference was made to the passage in the judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27:

> "In exclusively entrusting to the courts designated by Ch. III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".

[97] When it is recognised that the specific statutory provision held in that case to be invalid (s 45R of the *Migration Act* 1958 which provided that a "court is not to order the release from custody of a designated person") it becomes clear that it was not necessary for the court in arriving at its decision to consider all situations in which involuntary detention was not penal or punitive. In that context it is of significance to note the observations of Gaudron J at 55: "But I am not presently

persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch. III." To similar effect is an observation of McHugh J at 71:

> "Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object. Thus, imprisonment while awaiting trial on a criminal charge is not punitive in nature because the purpose of the imprisonment is to ensure that the accused person will come before the courts to be dealt with according to law. Similarly, imprisonment of a person who is the subject of a deportation order is not ordinarily punitive in nature because the purpose of the imprisonment is to ensure that the deportee is excluded from the community pending his or her removal from the country. Likewise, the lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character."

[98] Gummow J addressed that question in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 161-2 where he said:

> "A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth.
>
> The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed."

[99] A good illustration of the fact that the categories of non-punitive, involuntary detention are not closed is provided by the reasoning of Deane J in *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 495; there his Honour said:

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

> preventative indeterminate gaol sentences in a context which lacks the proper safeguards which an adequate statutory system must provide and in which, where no non-parole period is fixed, the remaining hope of future release ultimately lies not in the judgment of experts but in the exercise of a ministerial discretion to which political considerations would seem to be relevant".

[100] That passage was cited with approval by Dawson J in *Kable* at 88. To my mind the statement of McHugh in *Kable* at 121 that "there is no reason to doubt the authority of the State to make general laws for preventive detention when those laws operate in accordance with the ordinary judicial processes of the State courts" reflects the approach adopted by Deane J.

[101] The Act in question has been so drafted that essentially it provides for non-punitive, involuntary detention of persons where the court is satisfied that the prisoner would be a serious danger to the community in the absence of such a detention order. Detention pursuant to the Act is non-punitive. It is designed to protect the community and to afford an opportunity to provide further care and treatment to a person found by the court to be a serious danger to the community if not detained. Given the safeguards of the judicial hearing to which I will refer subsequently, empowering the Supreme Court to make such an order does not infringe the *Kable* principle.

[102] Another submission advanced by senior counsel for the appellant is essentially a variant of that discussed above. It was said that a detention order pursuant to the Act was not dependant upon the court determining criminal guilt and therefore the making of such an order was not an incident of the judicial function of adjudging and punishing criminal guilt. Essentially a prisoner made subject to a detention order pursuant to the Act was deprived of liberty not because he breached any criminal law.

[103] To my mind it is significant that there is an historical link between the prisoner's conviction of a serious sexual offence and the making of an order pursuant to the Act. At least where the conviction for the serious sexual offence occurs after the Act came into force, it can be said that one of the consequences of conviction is that the offender is liable not only to immediate finite punishment, but may also be subject at a later time to an order made pursuant to the Act. An example which I put to counsel in the course of argument demonstrates the point. Upon conviction for a sexual offence involving violence the prosecution may ask the sentencing judge to impose an indefinite sentence pursuant to s 163 of the *Penalties and Sentences Act* 1992. That would require the sentencing judge to be satisfied that the offender was a serious danger to the community. The material then available might raise serious concerns that the offender would be a serious danger to the community, but there may also be material suggesting that with rehabilitation whilst in custody that potential danger could be alleviated. In those circumstances a judge may well not feel comfortable in imposing an indefinite detention at the sentencing stage. Given the provisions of the Act, why could not that judge say in the course of passing sentence that indefinite detention was not justified on the material presently available, but the position should be monitored towards the end of the period in custody and if evidence was then available that the offender was a serious danger to the community the procedure provided for by the Act should be enlivened. Senior counsel for the appellant submitted that it would be wrong for a

sentencing judge to so reason, whilst the Solicitor-General responded by saying that that would be a proper course for the court to adopt. As the latter put it: "Courts should refrain from guessing when they can know". It seems to me that the response of the Solicitor-General is correct. Looked at in that way there is a clear link between adjudgment of criminal guilt and the making of an order under the Act. That reasoning, to my mind, reinforces the conclusion that the legislation is not caught by the principle derived from *Kable*.

[104] But the Act does not only apply to offenders convicted of a serious sexual offence after the coming into operation of the Act; it applies to offenders so convicted prior to the Act coming into force (the appellant is in that situation). Senior counsel for the appellant did not submit that the retrospective operation of the Act was such as to bring the legislation within the *Kable* principle. The Solicitor-General relied on cases such as *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 533-640 and *R v Kidman* (1915) 20 CLR 425 to support the valid retrospective operation of the legislation. Given that the Act can only be invoked after a conviction for a serious sexual offence there is, even when the conviction was recorded before the Act came into force, a link with the adjudgment of criminal guilt.

[105] Finally, in contrast to the legislation in issue in *Kable*, the Act provides for an unfettered judicial hearing in order to determine whether the prisoner in question is a serious danger to the community, and then whether, in the exercise of a judicial discretion, a continuing detention order, or supervision order, or indeed no order, should be made. There must be "acceptable, cogent evidence", satisfying the court to a "high degree of probability" before a detention order or supervision order could be made.

[106] The Act provides that the prisoner must be served with a copy of the application for a "preliminary hearing" and the prisoner is expressly given the right to file affidavits in response to material relied on by the Attorney-General. If at that preliminary hearing the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a detention or supervision order, it may order the prisoner to undergo examination by two psychiatrists. The Solicitor-General conceded that the prisoner would have the right to advance the name or names of psychiatrists to undertake the risk assessment. It was also expressly conceded by the Solicitor-General that if the prisoner was dissatisfied with the two psychiatrists named in the court order, or dissatisfied with the content of those reports, the prisoner would have the right to obtain a report from a psychiatrist of his choosing also placed before the court at the subsequent hearing. The Solicitor-General also said that any psychiatrist so chosen by the prisoner would have a right of access to the material referred to in s 11(3) of the Act.

[107] The Act is not specific on the procedure to be followed on the application for a Division III order, but it seems clear (there was no suggestion to the contrary by the Solicitor-General) that the prisoner would be able to place material before the court and where appropriate the makers of all psychiatric reports would be available for cross-examination. It is clear that once the application was lodged the court could give all such procedural directions as would ensure that in the circumstances of the particular case there was a full and fair hearing in the process of determining to the high degree of probability required whether a basis for making a detention or supervisory order had been made out.

[108] I can see nothing in the legislation which would result in the Supreme Court of Queensland not being an appropriate court to exercise jurisdiction conferred on it pursuant to Ch. III of the Constitution. That is particularly so because the legislation is the response to a general social problem making the detention primarily for the protection of the community and not punitive, and the making of the detention or supervisory order is linked to the original adjudgment of criminal guilt.

[109] As already indicated I am of the view that the appeal should be dismissed.