SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Lawrence* [2013] QCA 364
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **MARK RICHARD LAWRENCE** (respondent)
FILE NO/S:	Appeal No 7468 of 2007 SC No 7468 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Case Stated
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2013
JUDGES:	Holmes, Muir and Fraser JJA Judgment of the Court
ORDERS:	**Question (a)** **Is the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the *DPSOA*"), or parts thereof, invalid as a consequence of the enactment of the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 in that the *DPSOA* now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution?** **Answer: No.** **Question (b)** **Is the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 invalid in that it has the consequence that the *DPSOA* now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial**

power pursuant to Chapter III of the Commonwealth Constitution?

Answer: Sections 3 and 6 of the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 are invalid in that they would have the consequence that the *Dangerous Prisoners (Sexual Offenders) Act* 2003 now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution.

CATCHWORDS: CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – EXERCISE OF JUDICIAL POWER – JUSTICIABLE MATTERS – where the Attorney-General made an application in the Trial Division pursuant to s 27 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the *DPSOA*") to review the continuing detention of the respondent – where the primary judge stated a case for the opinion of the Court of Appeal as to the constitutional validity of both the *DPSOA* and the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 (Qld) ("the Declarations Act") – where sections 3 and 6 of the Declarations Act amended the *Criminal Law Amendment Act* 1945 (Qld) ("the *CLAA*"), including by inserting new Parts 4 and 4A into the *CLAA* ("the amendments") – where the amendments apply only to persons subject to a continuing detention order or a supervision order under the *DPSOA* – where the amendments empower the executive to declare that a relevant person be detained if it is satisfied that detention of that person is in the public interest – where the respondent argued that the amendments infringed the *Kable* doctrine – where the Attorney-General contended that the Court should not exercise jurisdiction to decide the questions stated as the answers would not quell any controversy about any "immediate right, duty or liability" of the respondent – whether the respondent has a "sufficient material interest" which would be prejudiced by the operation of the Declarations Act – whether the Court should adjudicate upon the questions stated

CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION AND LEGISLATIVE POWERS – EXAMINATION OF VALIDITY OF LEGISLATION BY COURTS – GENERALLY – where, in the alternative, the

Attorney-General argued that, if the Court found it necessary to address the validity of the Declarations Act or the *DPSOA*, none of the legislation in issue is invalid – where the respondent submitted that the second question stated to the Court of Appeal should be answered in the affirmative, in that the amendments made by the Declarations Act have the consequence that the *DPSOA* now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court – where the Attorney-General contended that the *Kable* doctrine is limited to the legislative conferral of powers or functions upon State courts and that the amendments made by the Declarations Act do not confer any function or power upon the Court – where the effect of the Declarations Act is to allow the executive to undermine the authority of orders of the Supreme Court under the *DPSOA* otherwise than by appeal to the Court of Appeal or the High Court – where the respondent did not otherwise present arguments in favour of an affirmative answer to the first question stated, that the *DPSOA* or parts thereof are invalid as a consequence of the enactment of the Declarations Act – whether the enactment of the Declarations Act invalidated the *DPSOA* or parts thereof – whether the Declarations Act effects the fact and appearance of the independence and impartiality of the Supreme Court – whether the Declarations Act is repugnant to or incompatible with the institutional integrity of the Supreme Court as a repository of federal judicial power

Acts Interpretation Act 1954 (Qld), s 33(2)
Commonwealth Constitution (Cth), Chapter III, s 73, s 76(i), s 77(iii)
Criminal Law Amendment Act 1945 (Qld), Pt 4, Pt 4A
Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld)
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)
Judiciary Act 1903 (Cth), s 39, s 78B
Uniform Civil Procedure Rules 1999 (Qld), r 483(2)

Air Caledonie International v The Commonwealth (1988) 165 CLR 462; [1988] HCA 61, cited
Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458; [2013] HCA 7, applied
Baker v The Queen (2004) 223 CLR 513; [2004] HCA 45, considered
Croome v Tasmania (1997) 191 CLR 119; [1997] HCA 5, considered
Crump v New South Wales (2012) 247 CLR 1; [2012] HCA 20, considered
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, applied

Federal Commissioner of Taxation v Clyne (1958) 100 CLR 246; [1958] HCA 10, cited
Forge v Australian Securities and Investments Commission (2006) 228 CLR 45; [2006] HCA 44, considered
Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532; [2008] HCA 4, cited
Haskins v The Commonwealth (2011) 244 CLR 22; [2011] HCA 28, cited
Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330; [1909] HCA 36, considered
ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140; [2009] HCA 51, applied
In re Judiciary and Navigation Acts (1921) 29 CLR 257; [1921] HCA 20, considered
International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319; [2009] HCA 49, cited
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, applied
K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501; [2009] HCA 4, cited
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, cited
Lay v Employers Mutual Ltd (2005) 66 NSWLR 270; [2005] NSWCA 450, considered
MZXOT v Minister for Immigration and Citizenship (2008) 233 CLR 601; [2008] HCA 28, cited
R v Carroll (2002) 213 CLR 635; [2002] HCA 55, cited
R v Humby; Ex parte Rooney (1973) 129 CLR 231; [1973] HCA 63, cited
South Australia v Totani (2010) 242 CLR 1; [2010] HCA 39, cited
Wainohu v New South Wales (2011) 243 CLR 181; [2011] HCA 24, cited

COUNSEL: P J Davis QC, with G Del Villar and J Rolls, for the applicant
J J Allen for the respondent

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the respondent

[1] **THE COURT:** A judge in the Trial Division has stated the following case for the opinion of the Court of Appeal pursuant to r 483(2) of the *Uniform Civil Procedure Rules* 1999:

> "1. The applicant, the Attorney-General for the State of Queensland, has made application, pursuant to s 27 of the *Dangerous Prisoners (Sexual Offenders) Act 2003*, that the continuing detention of the respondent, Mark Richard Lawrence be reviewed.
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> 2. The respondent has given notices to the Attorneys-General of the Commonwealth and other States and Territories,

pursuant to Section 78B of the *Judiciary Act* 1903 (Cth), that this proceeding involves a matter arising out of the Commonwealth Constitution or involving its interpretation. Such notices describe the constitutional issue that arises as:

(a) whether the *Dangerous Prisoners (Sexual Offenders) Act 2003* '(the DPSOA'), or parts thereof, are invalid as a consequence of the enactment of the *Criminal Law Amendment (Public Interest Declarations) Act 2013*[1] in that the DPSOA now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution; and/or

(b) whether the *Criminal Law Amendment (Public Interest Declarations) Act 2013* is invalid in that it has the consequence that the DPSOA now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution.

3. The questions in paragraphs 2(a) and 2(b) above are stated for the opinion of the Court of Appeal separately to the hearing and determination of the remaining issues in the Attorney-General's application referred to in paragraph 1 above."

[2] For ease of reference these reasons refer to the potential ground of invalidity described in those questions as "the *Kable* doctrine". That doctrine was first formulated in *Kable v Director of Public Prosecutions (NSW)* (*Kable*)[2] and it was later considered and applied by the High Court in *Fardon v Attorney-General (Qld)* ("*Fardon*"),[3] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* ("*Gypsy Jokers*"),[4] *K-Generation Pty Ltd v Liquor Licensing Court* ("*K-Generation*"),[5] *International Finance Trust Co Ltd v New South Wales Crime Commission* ("*International Finance*"),[6] *South Australia v Totani* ("*Totani*"),[7] *Wainohu v New South Wales* ("*Wainohu*"),[8] and *Assistant Commissioner Condon v Pompano Pty Ltd* ("*Pompano*").[9] In *Pompano*, Hayne, Crennan, Kiefel and Bell JJ described the *Kable* doctrine in the following passage:[10]

> "The relevant principles have their roots in Ch III of the *Constitution*. As Gummow J explained in *Fardon*, the State courts (and the State

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1 The correct name of the Act is the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013.

2 (1996) 189 CLR 51.

3 (2004) 223 CLR 575.

4 (2008) 234 CLR 532.

5 (2009) 237 CLR 501.

6 (2009) 240 CLR 319.

7 (2010) 242 CLR 1.

8 (2011) 243 CLR 181.

9 (2013) 87 ALJR 458.

10 *Pompano* at [123]-[126] (Hayne, Crennan, Kiefel and Bell JJ), footnotes omitted.

Supreme Courts in particular) have a constitutionally mandated position in the Australian legal system. Once the notion is rejected, as it must be, that the *Constitution* 'permits of different grades or qualities of justice', and it is accepted that the State courts have the constitutional position that has been described, it follows that 'the Parliaments of the States [may] not legislate to confer powers on State courts which are *repugnant to or incompatible with* their exercise of the judicial power of the Commonwealth' (emphasis added). As Gummow J further pointed out, and as is now the accepted doctrine of the Court, 'the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'.

Three further points must be made about this 'essential notion'. First, 'the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes'. Second, the repugnancy doctrine 'does not imply into the *Constitutions* of the States the separation of judicial power mandated for the Commonwealth by Ch III'. Third, content must be given to the notion of institutional integrity of the State courts, and that too is a notion not readily susceptible of definition in terms which will dictate future outcomes.

Something more must be said about the second and third points. Independence and impartiality are defining characteristics of all of the courts of the Australian judicial system. They are notions that connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence. In particular, the courts cannot be required to act at the dictation of the Executive. In this respect, clear parallels can be drawn with some aspects of the doctrines that have developed in relation to federal courts. But because the separation of judicial power mandated by Ch III does not apply in terms to the States, and is not implied in the constitutions of the States, there can be no direct application to the State courts of all aspects of the doctrines that have been developed in relation to Ch III. More particularly, the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth.

Two related consequences follow from these propositions and should be noted. First, in applying the notions of repugnancy and incompatibility it may well be necessary to accommodate the accepted and constitutionally uncontroversial performance by the State courts of functions which go beyond those that can constitute an exercise of the judicial power of the Commonwealth. Second, the conclusions reached in this matter cannot be directly translated and applied to the exercise of the judicial power of the Commonwealth by a Ch III court. As pointed out by this Court in *Bachrach (HA) Pty Ltd v Queensland*, the 'occasion for the application of *Kable* does not arise' if the impugned State law would not offend Ch III had it been

> enacted by the Commonwealth Parliament for a Ch III court. But because '[n]ot everything by way of decision-making denied to a federal judge is denied to a judge of a State', that a State law does not infringe the principles associated with *Kable* does not conclude the question whether a like Commonwealth law for a Ch III court would be valid. It is not necessary for the resolution of this case to pursue those matters further."

[3] A challenge to the constitutional validity of the *DPSOA* was rejected by the High Court in *Fardon*. There were some subsequent amendments to the *DPSOA* before the enactment of the Declarations Act but it was not submitted that those amendments had any bearing on the constitutional validity of the *DPSOA*. Rather, Mr Lawrence contended that the Declarations Act infringed the *Kable* doctrine and that the Declarations Act affected functions of the Supreme Court under the *DPSOA* in such a way that the *DPSOA* also must be regarded as infringing the *Kable* doctrine.

[4] The Court heard argument on the stated case together with argument on a notice of contention by Mr Fardon in an appeal under the *DPSOA* by the Attorney-General against a supervision order made in relation to Mr Fardon. In that appeal senior counsel for Mr Fardon contended that the Declarations Act was invalid and he argued that its enactment rendered the *DPSOA* invalid as an infringement of the *Kable* doctrine on grounds which included the grounds invoked by Mr Lawrence. Counsel for Mr Lawrence advanced arguments in support of affirmative answers to the questions in the stated case and also adopted the arguments advanced for Mr Fardon. Senior counsel for the Attorney-General argued that the Court should not answer the questions in the stated case. In the alternative, he argued that the *DPSOA* and the Declarations Act were not invalid on the grounds articulated in the stated case or on any of the additional grounds advanced for Mr Fardon.

***Dangerous Prisoners (Sexual Offenders) Act* 2003**

[5] The *DPSOA* commenced on 6 June 2003. Its stated objects 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" and "to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."[11] Section 5(1) empowers the Attorney-General to apply to "the court", which is defined to mean the Trial Division of the Supreme Court, for a "Division 3" order in relation to prisoners detained in custody who are serving a period of imprisonment for a "serious sexual offence". "Serious sexual offence" is defined to mean an offence of a sexual nature involving violence or against children. A "Division 3 order" is an order "that the prisoner be detained in custody for an indefinite term for control, care or treatment" (a "continuing detention order")[12] or an order "that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order" (a "supervision order").[13] At a preliminary hearing, the court must set a date for the hearing of the application for a Division 3 order if the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the

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11 *DPSOA*, s 3.
12 *DPSOA*, s 13(5)(a).
13 *DPSOA*, s 13(5)(b).

absence of a Division 3 order.[14] Provision is made for the examination of the prisoner by psychiatrists with a view to producing reports which indicate each psychiatrist's 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 being made.[15]

[6] Section 13 vests jurisdiction in the court to make a Division 3 order if the court is satisfied that "the prisoner is a serious danger to the community in the absence of a division 3 order…".[16] The rules of evidence apply, subject to the court's power to receive documentary evidence of the prisoner's antecedents and criminal history and reports tendered in any proceeding against the prisoner for a serious sexual assault.[17] A prisoner is a serious danger to the community "if there is an unacceptable risk that the prisoner will commit a serious sexual offence … if the prisoner is released from custody … or … if the prisoner is released from custody without a supervision order being made."[18] The *DPSOA* imposes upon the Attorney-General the onus of proving that a prisoner is a serious danger to the community[19] and permits the court to decide that it is satisfied "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."[20]

[7] If the court is so satisfied, a discretion is conferred on the court to make a continuing detention order or instead to make a supervision order.[21] Section 16 sets out requirements that must be contained in a supervision order and confers a discretion upon the court to impose other requirements which the court considers appropriate to ensure adequate protection of the community or for the prisoner's rehabilitation or care or treatment. The court and a "relevant appeal court" (the definition of which includes the Court of Appeal) must give detailed reasons for making an order under the *DPSOA* at the time the order is made.[22]

[8] The stated case refers to an application by the Attorney-General for a review of the continuing detention of Mr Lawrence under s 27 of the *DPSOA*. Section 27 requires that the hearing for the first review, and all submissions for the hearing, must be concluded within two years after the day the order first had effect, and it requires subsequent annual reviews while the order continues to have effect, each of which must be started within 12 months after the completion of the hearing for the last review.[23] Section 27(2) imposes upon the Attorney-General an obligation to make any application that is required to be made to cause the reviews to be carried out. At the hearing of a review, the court is empowered to affirm a decision that the prisoner is a serious danger to the community in the absence of a Division 3 order, but only if the court is then satisfied "by acceptable cogent evidence" and "to a high degree of probability" that the evidence is of sufficient weight to affirm the

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14 *DPSOA*, s 8(1).
15 *DPSOA*, ss 8(2)(a), 11 and 12.
16 *DPSOA*, ss 13(1), (5).
17 *DPSOA*, s 45.
18 *DPSOA*, s 13(2).
19 *DPSOA*, s 13(7).
20 *DPSOA*, s 13(3).
21 *DPSOA*, s 13(5).
22 *DPSOA*, s 17.
23 *DPSOA*, ss 27(1), (1A), (1B), and (1C).

decision. In that event, the court may order that the prisoner either continue to be subject to the continuing detention order or be released from custody subject to a supervision order.[24] The considerations relevant to the making of such orders mirror those applicable in the hearing of the original application for a Division 3 order under s 13.

[9] Part 4 of the *DPSOA* vests jurisdiction in the Court of Appeal to hear an appeal by the Attorney-General or by a prisoner in relation to whom a decision of the court under that Act has been made.[25] Such an appeal is by way of rehearing and the Court of Appeal's powers include all of the powers and duties of the court that made the decision under appeal.[26]

***Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013**

[10] Sections 3 and 6 of the Declarations Act, which commenced on 29 October 2013, purport to amend the *Criminal Law Amendment Act* 1945 (the "*CLAA*") by adding new Pts 4 and 4A and changing the long title of the *CLAA* to reflect that addition. (The other amendments are not inseparably connected with the amendments made by ss 3 and 6 and are inconsequential for present purposes.) The new Pts 4 and 4A of the *CLAA* provide that the executive government may make a "public interest declaration" in relation to a "relevant person", a term which is defined to mean a person subject to a continuing detention order under the *DPSOA* or a person subject to a supervision order under the *DPSOA* if the person was subject to a continuing detention order immediately before the supervision order was made.[27] The power is conferred by s 21:

> "(1) On the recommendation of the Minister, the Governor in Council may, by gazette notice, declare that a relevant person must be detained under division 3 if the Governor in Council is satisfied the detention of the person under the division is in the public interest.
>
> (2) The Governor in Council can not make a public interest declaration for a relevant person unless—
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> (a) any appeal, under DPSOA, part 4, against the DPSOA order for which the person is a relevant person has been finally dealt with;
> or
>
> (b) if there is no appeal, under DPSOA, part 4, against the DPSOA order for which the person is a relevant person—the period within which an appeal against the DPSOA order may be started under DPSOA, part 4 has ended."

[11] The "Minister" is the Minister responsible for the administration of that provision.[28] That Minister is currently the Attorney-General.

[12] In Division 3, s 22B provides:

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24 *DPSOA*, ss 30(1), (2), and (3).
25 *DPSOA*, s 31.
26 *DPSOA*, ss 43(1), (2)(a).
27 Declarations Act, s 19 Definitions for Pt 4.
28 *Acts Interpretation Act* 1954 (Qld), s 33(2).

"(1) A public interest declaration has effect for the detained person—

(a) on and from the day it takes effect under section 22A; and

(b) until a relevant event happens for the person.

(2) While a public interest declaration has effect for the detained person—

(a) DPSOA does not apply to the person; and

(b) the person must no longer be detained, or subject to supervised release, under DPSOA; and

(c) this part operates in relation to the person despite any other Act; and

(d) the person must be detained in an institution; and

(e) the person is a prisoner for the purposes of the *Corrective Services Act* 2006 other than the following provisions of that Act—

(i) chapter 2, part 2, division 10 or 11;

(ii) chapter 5.

Note—

See division 5 for what happens when a public interest declaration ends or does not apply to a person.

(3) However, the person may be detained in a watch-house until the person can be conveniently taken to an institution.

(4) If the person is not being detained in an institution or watch-house under DPSOA when the public interest declaration is made, the person may be arrested without warrant by a police officer and taken to an institution or watch-house for detention under this section."

The provisions of the *Corrective Services Act* 2006 identified in s 22B(2)(e) concern conditional release and parole of prisoners sentenced to terms of imprisonment.

[13] Section 22A provides that a public interest declaration takes effect from when notice of the declaration together with a copy of Division 3, or a summary of the effect of the declaration under Division 3, is personally served upon the relevant person.

[14] The Minister's power to make the recommendation referred to in s 21 is conferred by s 22:

"(1) The Minister may recommend that the Governor in Council make a public interest declaration for a relevant person if the Minister is satisfied the detention of the person under division 3 is in the public interest.

(2) The Minister may recommend that the Governor in Council make a public interest declaration for a person subject to a continuing detention order without giving the person prior notice of the proposed recommendation.

(3) The Minister may recommend that the Governor in Council make a public interest declaration for a person subject to a supervision order only if—

(a) at least 14 days before the recommendation is made, the person is personally served with a written notice stating the following—

(i) the Minister intends to recommend that the Governor in Council make a public interest declaration for the person;

(ii) the grounds on which the Minister considers the detention of the person under division 3 is in the public interest;

(iii) that the person may, within 10 days after the notice is served on the person, make written submissions to the Minister about why the declaration should not be made; and

(b) the Minister has regard to any submissions made under paragraph (a)(iii).

(4) However, the Minister may recommend that the Governor in Council make a public interest declaration for a person subject to a supervision order without complying with subsection (3) if the Minister considers it is necessary to make the declaration without compliance with the subsection because of urgent circumstances."

[15] Division 3 of the *CLAA* makes provision for the annual examination of a detained person at least once every year by two psychiatrists appointed by the Chief Executive (Corrective Services).[29] The psychiatrists' reports must be given by the Chief Executive (Corrective Services) to the Minister,[30] whose duties are then set out in s 22E:

"(1) The Minister must, as soon as practicable after receiving a report about a detained person under section 22D—

(a) consider the report; and

(b) make a recommendation to the Governor in Council to make, or not to make, a declaration under section 22F.

(2) The Minister may recommend that the Governor in Council make a declaration under section 22F if satisfied that detaining the person under this division is no longer in the public interest.

(3) Before making a recommendation under this section, the Minister—

(a) must decide whether the continued detention of the person under this division is in the public interest; and

(b) must have regard to the report, and any other report about the person previously given to the Minister under section 22D; and

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29 Declarations Act, s 22C.

30 Declarations Act, s 22D.

> (c) must give the person a reasonable opportunity to make submissions about the Minister's recommendation, and have regard to any submissions made."

[16] Under s 22F, if the Governor-in-Council is satisfied on the recommendation of the Minister that detaining a detained person under Division 3 is no longer in the public interest, the Governor-in-Council may, by Gazette notice, declare that Division 3 no longer applies to the person. Section 22F(4) provides that "[t]he continuing detention declaration stops applying to the person when the declaration is gazetted."

[17] Division 5 deals with the effect of the ending of detention under Division 3. Section 22G(1) provides:

> "If a relevant event happens for a detained person—
>
> (a) the person is no longer to be detained under division 3; and
>
> (b) the DPSOA order for which the person was a relevant person revives, unless it is a supervision order and the period for which the order had effect, as stated in the order, has passed."

[18] Division 5 contains other provisions regarding the interaction between orders under the *DPSOA* and public interest declarations under the *CLAA*, including for the counting of the period for which the person was detained under Division 3 of the *CLAA* as part of the period for which a supervision order revived under s 22G(1)(b) has effect,[31] provisions designed to ensure that there is no hiatus between revived orders under the *DPSOA* and the ending of detention under the Declarations Act,[32] and provisions relating to the expiry of time limits and orders under the *DPSOA*.[33]

[19] Decisions of the Minister to recommend that the Governor-in-Council make a public interest declaration, decisions of the Governor-in-Council to make a public interest declaration, decisions of the Minister to recommend that the Governor-in-Council not make a declaration to end detention under s 22F, and decisions of the Governor-in-Council not to make a declaration under s 22F are "final and conclusive", "can not be challenged, appealed against, reviewed, quashed, set aside or called in question in any other way, under the *Judicial Review Act 1991* or otherwise", and are "not subject to any declaratory, injunctive or other order of the Supreme Court, another court, a tribunal or another entity on any ground".[34] Section 22K(4) preserves the jurisdiction of the Supreme Court to make orders under Part 5 of the *Judicial Review Act* 1991 to the extent that any of those decisions is affected by jurisdictional error.

Mr Lawrence's argument

[20] Mr Fardon's argument, which Mr Lawrence adopted, involved four propositions about the effect of the *DPSOA* in the context of the Declarations Act:

> "(a) It interposes an executive process upon decisions of the Supreme Court; and/or
>
> (b) Decisions of the Supreme Court are not final, in the sense that a decision of the Court pursuant to the [*DPSOA*] is then able to be reviewed by the executive government; and/or

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31 Declarations Act, s 22G(2).

32 Declarations Act, ss 22I(3), 22J(5).

33 Declarations Act, ss 22H-22J.

34 Declarations Act, s 22K(1)-(3).

(c) Imprisonment is permitted as a result of something other than a judicial process; and/or

(d) It constitutes a Bill of Pains and Penalties."

[21] Mr Fardon sought to relate the propositions in (c) and (d) to the *Kable* doctrine, but those propositions invoke different principles and they fall outside the terms of the stated case. For that reason they are not considered in this judgment. Mr Fardon's argument in support of the interrelated propositions in (a) and (b) did fall within the terms of the stated case. To that extent his argument is comprehended within the following summary of Mr Lawrence's arguments.

[22] The amendments made by the Declarations Act formed part of the surrounding circumstances which bear upon the question whether the *DPSOA* now requires the Supreme Court to exercise powers which are repugnant to or incompatible with the institutional integrity of the Supreme Court. The amendments: operate only with respect to persons who are subject to a continuing detention order or supervision order made by the Supreme Court pursuant to the *DPSOA*; they provide for declarations by the executive government which result in the imprisonment of such persons; they provide for such non-judicial imprisonment based on the criterion of what the executive determines to be in the public interest, divorced from any statutory criteria such as those which are required to be applied by the Supreme Court in determining whether a *DPSOA* order should be made; they expressly contemplate that such orders can be made after the appeal process provided by the *DPSOA* has run its course; they provide for a review of the continued imprisonment of persons not by a court, but by the executive based upon reports from psychiatrists not appointed by a court but by a senior public servant; and they expressly restrict judicial review of decisions of the Minister and Governor-in-Council to decisions affected by jurisdictional error.

[23] The Supreme Court was now to be used as an essential aspect of a legislative scheme to incarcerate persons otherwise than for breach of the criminal law or pursuant to the judicial process under the provisions of the *DPSOA*. This amounted to enlisting the Supreme Court (through the preliminary step of continuing detention orders under the *DPSOA*), in effecting the continuing detention of "relevant persons". The Declarations Act established a statutory scheme under which the Supreme Court decided whether an order should be made under the *DPSOA*, the executive was then vested with the power to make a declaration under the provisions enacted by the Declarations Act, and such a declaration overruled the Supreme Court's decision. The result of the scheme was that it could no longer be said that there was nothing in the *DPSOA* or the surrounding circumstances "that might lead to the perception that the Supreme Court, in exercising its jurisdiction under the Act, is acting in conjunction with, and not independently of, the Queensland legislature or executive government."[35] Furthermore, members of the High Court in *Fardon* who upheld the constitutional validity of the *DPSOA* attributed significance to the provisions of the *DPSOA* conferring rights of appeal[36] and annual reviews by the Supreme Court of continuing detention orders,[37] features which are not secured by the current legislative scheme.

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35 *Fardon* at [34] (McHugh J).

36 Gleeson CJ at [19], Gummow J at [99], Hayne J at [196], and Callinan and Heydon JJ at [232] and [234].

37 Gummow J at [110]-[113], Hayne J at [196] and Callinan and Heydon JJ at [231].

[24] In *Huddart, Parker & Co Pty Ltd v Moorehead* Griffith CJ held that the "power to give a binding and authoritative decision (whether subject to appeal or not)"[38] in deciding controversies between subjects or between the sovereign authority and its subjects; that described one of the "defining characteristics which mark a court apart from other decision-making bodies".[39] Those attributes of judgments of the Supreme Court were undermined by the *CLAA* as amended by the Declarations Act because that Act empowered one litigant in proceedings under the *DPSOA*, the Attorney-General, to override the Supreme Court's judgment by executive order and imprison the other litigant until further order of the executive; in the result, orders of the Supreme Court under the *DPSOA* were now provisional, being liable to be overruled at the whim of the executive, thereby making a mockery of the judicial process under the *DPSOA*. The Declarations Act was "an impermissible executive intrusion into the processes or decisions of the Supreme Court" pursuant to the *DPSOA*. It damaged both the appearance and reality of the "decisional independence" of the Supreme Court, such independence being one of the defining characteristics of all of the Courts within the Australian judicial system.[40]

[25] Counsel for Mr Lawrence acknowledged in the course of his oral argument that there was generally no impediment to the legislature enacting a rule to reverse the effect of judicial decisions with which the legislature did not agree, but he submitted that there was a distinction between the rule making power of the legislature and "ad hominem" legislation of the kind held to be constitutionally invalid in *Kable*. He submitted that it was impermissible for the legislature to authorise the executive to reverse the effect of a particular judicial decision with which the executive did not agree.

[26] It followed, according to Mr Lawrence's argument, that the "legislative scheme" constituted by the relevant provisions of the *DPSOA* and Parts 4 and 4A of the *CLAA* was constitutionally invalid. However Mr Lawrence did not adopt Mr Fardon's argument that the *DPSOA* should be declared to be invalid. Mr Lawrence submitted that the appropriate remedy was for the Court to declare that the sections which made the relevant amendments to the *CLAA*, ss 3 and 6 of the Declarations Act, are invalid or that the amendments themselves, Parts 4 and 4A of the *CLAA*, are invalid.

[27] It was also submitted that the provisions of the *CLAA* as amended by the Declarations Act, which empowered the executive government to act, in effect, as an appellate tribunal in relation to decisions of the Supreme Court, were inconsistent with the provision in s 73 of the Commonwealth Constitution which conferred upon the High Court of Australia jurisdiction "to hear and determine appeals from all judgments, decrees, orders, and sentences … (ii) … of the Supreme Court of any State …" and to give "final and conclusive" judgments in all cases.

The Attorney-General's argument

[28] The Attorney-General advanced preliminary contentions to the following effect:

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38 (1909) 8 CLR 330 at 357.

39 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ) and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

40 See *Pompano* at [125] (Hayne, Crennan, Kiefel and Bell JJ).

1. Because there is presently no public interest declaration in relation to Mr Lawrence, or because any successful invocation of the *Kable* doctrine must result in the invalidity of the amendments purportedly made to the *CLAA* by the Declarations Act, the *DPSOA* could not be invalid on the ground assigned in the first question in the stated case.

2. The Court lacks jurisdiction to consider the questions in the stated case because that involves the exercise of federal jurisdiction, which is necessarily confined to a "matter" within the meaning of the Constitution, and there is no such "matter".

3. Alternatively, the Court should exercise its discretion to refrain from deciding the validity of the Declarations Act. The institutional integrity of the Supreme Court could not be compromised because the Declarations Act is either valid (which presumes the rejection of Mr Lawrence's argument that the Act impugns the institutional integrity of the Supreme Court) or invalid (in which case the Act has no effect and for that reason could not impugn the institutional integrity of the Supreme Court).

[29] In the alternative to those preliminary contentions, the Attorney-General argued that none of the legislation in issue is invalid on the grounds assigned in the stated case. His argument may be summarised as follows. The Declarations Act left intact those processes for obtaining an order under the *DPSOA* which led to the rejection of the constitutional challenge to its validity in *Fardon*; there must be a hearing in which the Attorney-General has the onus of satisfying the court that the prisoner is a serious danger to the community, the court must be satisfied by cogent evidence establishing a high degree of probability that there is an unacceptable risk that the prisoner will commit a serious sexual offence if the prisoner is released from custody or is released from custody without a supervision order being made, the rules of evidence apply, and the court retains a discretion whether to make a continuing detention order or a supervision order. The *DPSOA* could not be viewed as part of a legislative scheme involving the Declarations Act because those Acts did not refer to each other and the Declarations Act had no effect upon the operation of the *DPSOA* in the absence of the making of a valid public interest declaration. It followed that the court could not be regarded as exercising power to detain persons indefinitely "in conjunction" with the Queensland executive. The fact that a public interest declaration could only be made in relation to a person who is subject to a continuing detention order or supervision order under the *DPSOA* did not mean that a court that had made such an order had been dragooned into an executive or legislative scheme. In general a legislature was entitled to select whatever "factum" or criterion it wished as the trigger for particular legislative consequences.[41] The High Court held in *Baker v The Queen* that the New South Wales Parliament could validly restrict the ability of courts to grant parole to prisoners who had been the subject of a non-release recommendation in earlier proceedings even though such recommendations had no legal effect when made, and in *Crump v New South Wales*[42] the High Court upheld the validity of legislation which required the New South Wales Parole Board not to grant parole, except in very limited circumstances, to a prisoner who had been subjected to a minimum term. The fact that the legislation considered in those cases operated by reference to

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41 *Baker v The Queen* (2004) 223 CLR 513 at [43] (McHugh, Gummow, Hayne and Heydon JJ).

42 (2012) 247 CLR 1.

persons who were subject to judicial orders was insufficient to create a "legislative scheme" that infringed the *Kable* doctrine.

[30] The Attorney-General objected to the Court considering the argument that the Declarations Act was contrary to s 73 of the Constitution on the ground that it was not the subject of a notice under s 78B of the *Judiciary Act* 1903 (Cth). He argued that there were five difficulties in Mr Lawrence's argument that the Declarations Act was constitutionally invalid on the ground that it undermined the power of the Supreme Court to give a binding and authoritative decision:

1. The *Kable* doctrine is framed in terms of the conferral of functions and powers on courts,[43] but the amendments made by the Declarations Act do not confer any function or power upon the court; the Governor-in-Council is empowered to make a public interest declaration only after the Court has made orders under the *DPSOA* and, in relation to supervision orders, a public interest declaration may be made only after the final disposition of any appeal or after the expiry of the appeal period. In each of the decisions in which the High Court held that State legislative provisions were repugnant to or incompatible with the institutional integrity of a State court (*Kable*, *International Finance*, *Totani* and *Wainohu*),[44] the legislation conferred functions or powers upon the State courts.

2. The authorities suggest that the *Kable* doctrine does not forbid legislation affecting the orders of Ch III courts. As support for this proposition the Attorney-General's outline of argument quoted the following passage in *Lay v Employers Mutual Ltd*:[45]

> "The limitations which a constitutional separation of the judicial power impose on legislative exercise of judicial power are not part of constitutional law of New South Wales, and in my opinion they are not part of the *Kable* doctrine, which relates to the different subject of the suitability of courts to exercise federal jurisdiction, not the unsuitability of legislatures for the exercise of the judicial power. In the law of New South Wales there is no constitutional entrenchment of the separation of judicial power, and there is no corresponding limitation on the validity of legislation by which the legislature prescribes, even in relation to particular identified proceedings, what order the Court is to make or what effect its order is to have; or substitutes a rule made by the legislature for a court order."

3. Mr Lawrence's argument overlooked the legislative power to affect the finality of Court decisions in a variety of ways without breaching Ch III of the Constitution. The Attorney-General referred to legislation conferring rights of appeal, modifying the rules against double jeopardy,[46] abolishing

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43 *Fardon* at [15] (Gleeson CJ); *Pompano* at [67] (French CJ) and at [123] (Hayne, Crennan, Kiefel and Bell JJ).

44 Those decisions are discussed in *Pompano* at [128]-[135] (Hayne, Crennan, Kiefel and Bell JJ).

45 (2005) 66 NSWLR 270 at 290 [59] (Bryson JA, Santow and McColl JJA agreeing).

46 The Attorney-General cited references to the public interest in judicial determinations being final and authoritative in *R v Carroll* (2002) 213 CLR 635 at [1]-[8], [22] and [45] (Gleeson CJ and Hayne J), [86] (Gaudron and Gummow JJ) and [128] (McHugh J) and noted the absence of any suggestion that the legislature lacked power to modify the rules against double jeopardy in relation to acquittals.

advocates' immunity against negligence,[47] and modifying or abolishing the rules relating to issue estoppel in certain tribunals.[48]

4. Mr Lawrence's argument was difficult to reconcile with the States' legislative power to amend or repeal legislation, including by altering substantive rights in issue in legal proceedings. A flaw in Mr Lawrence's argument was revealed by its consequence that State legislation which repealed the *DPSOA* could not validly provide for the unqualified release of all persons subject to orders made under the *DPSOA* but would instead have to provide that such persons remained in detention until the orders were set aside or expired.

5. Contrary to Mr Lawrence's argument, the Declarations Act did not provide for the reversal of orders of the Supreme Court. The Declarations Act merely treated the order of the Court against a "relevant person" as the factum or criterion by reference to which new rights and obligations were imposed. It was submitted that it did not materially differ from legislation selecting as a factum orders that had been made under invalid legislation (*R v Humby; Ex parte Rooney*[49] and *Haskins v The Commonwealth*[50]) and judicial comments that did not amount to orders (*Baker v The Queen*).[51]

Consideration

[31] The questions in the stated case refer to a doctrine which is ultimately sourced in part in the constitutional expression of the "Supreme Court" in s 73 of the Commonwealth Constitution as the highest court in the judicial hierarchy of the State, the orders of which are vulnerable on appeal only in an appeal to the High Court. The provision in that section for the High Court to hear and determine appeals from judgments, decrees, orders and sentences of the Supreme Court of any State informs the State courts' "constitutionally mandated position in the Australian legal system" to which Gummow J referred in *Fardon* in the passage quoted by Hayne, Crennan, Kiefel and Bell JJ in *Pompano*.[52] In *Kable*, Gummow J observed that:[53]

> "… s 73 of the Constitution places this Court in final superintendence over the whole of an integrated national court system. This ensures the unity of the common law of Australia.
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> …
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> The existence of such an integrated system of law and the terms of s 73 itself necessarily imply that there be in each State a body answering the constitutional description of the Supreme Court of that

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47 The Attorney-General referred to statements in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ) identifying the principle of finality as a justification for advocates' immunity and submitted that it had not been suggested that the abolition of the immunity was contrary to Ch III of the Constitution.

48 The Attorney-General referred to the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 126(2), the *Magistrates Court Act* 1991 (SA), s 39, and the *Magistrates Court (Civil Division) Act* 1992 (Tas), s 31AG.

49 (1973) 129 CLR 231.

50 (2011) 244 CLR 22 at [30]-[31] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

51 (2004) 223 CLR 513 at [43] (McHugh, Gummow, Hayne and Heydon JJ).

52 *Fardon* at [101] (Gummow J), referring to *Kable* at 103 (Gaudron J), quoted in *Pompano* at [123].

53 *Kable* at pp 138, 139, 141-142. See also *Wainohu* at [45]-[46] (French CJ and Kiefel J).

> State. Contrary to what appeared to be a tentative submission by the Solicitor-General for New South Wales, it would not be open to the legislature of that State to abolish the Supreme Court and to vest the judicial power of the State in bodies from which there could be no ultimate appeal to this Court.
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> …
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> The meaning of the term "Supreme Court" in s 73 is to be determined in the process of construction of the Constitution and is not to be governed merely by legislation of the relevant State. It is, in this sense, a constitutional expression. The phrase identifies the highest court for the time being in the judicial hierarchy of the State and entrenches a right of appeal from that court to this Court …".

[32] The questions in the stated case, the terms of which were replicated in the notices served upon the Attorneys-General in compliance with s 78B of the *Judiciary Act* 1903 (Cth), do not refer to any effect of the Declarations Act upon the jurisdiction or orders of the High Court. To that extent the Attorney-General's objection to Mr Lawrence's argument based on s 73 of the Constitution was well taken. However, because the *Kable* doctrine, which is plainly invoked by the stated case, is grounded in part in implications drawn from s 73, the Court is not precluded from taking into account in considering the applicability of the *Kable* doctrine any inconsistency between implications arising from s 73 and any effect upon the Supreme Court of the Declarations Act.

[33] Legislation may affect orders of the Supreme Court in various ways without being repugnant to the Court's institutional integrity. That is a consequence of the generally plenary character of State legislative power and the absence from the constitutions of the States of those provisions in the Commonwealth Constitution which entrench the separation of judicial power from executive and legislative powers. So much is consistent with the other legislation to which the Attorney-General referred in argument not being invalid under the *Kable* doctrine, but nothing is to be gained by analysing cases about that other legislation which were cited by the Attorney-General. None of that legislation produced an effect upon a court which bears any substantial similarity with the effect of the amendments made by the Declarations Act. The stated case requires consideration of the overall effect of those amendments in relation to the institutional integrity of the Supreme Court, not one or more aspects of those amendments considered in isolation from other relevant aspects.

[34] The power conferred upon the executive by those amendments to make a public interest declaration which would result in the replacement of continuing detention under an order under the *DPSOA* with detention under the *CLAA* would not immediately affect the liberty of the detained person, but that power is conferred in a way which is inseparable from the power to make a public interest declaration which would result in the replacement of supervised liberty under a supervision order under the *DPSOA*. It is therefore sufficient for present purposes to focus on the latter case. In that case the effect of a public interest declaration made by the executive would be to deprive a "relevant person" of supervised liberty granted to that person by an order of the Supreme Court which was made under and in accordance with the *DPSOA*.

[35] With that in mind, the effect of the amendments made by the Declarations Act may be summarised in the following terms. After the resolution of any appeal or the expiry of the period for any appeal against an order granting supervised liberty to a person made by the Supreme Court in accordance with the *DPSOA* on the application of the executive,[54] the executive is empowered to make decisions on the basis of its view of the public interest, the merits of which are not reviewable in any court, whether or not to nullify the Supreme Court's order[55] by imprisoning that person[56] and whether or not subsequently to give effect to the order.[57] The power to nullify orders of the Supreme Court, being exercisable upon the merits of each case on a case by case basis, is analogous with the power of an appellate court to set aside orders found to be made in error. The power is otherwise foreign to judicial power, most obviously because of the political character of the sole criterion for a decision which may result in imprisonment and the fact that the power is exercisable by a party to the proceedings in which the affected order was made.

[36] Consideration of the stated case upon the constitutional grounds stated in it is an exercise of federal jurisdiction,[58] which is confined to a "matter" within the meaning of the Constitution.[59] *In re Judiciary and Navigation Acts*[60] holds that "matter" in s 76 of the Constitution means "… the subject matter for determination in a legal proceeding", "… there can be no matter … unless there is some immediate right, duty or liability to be established by the determination of the Court", and a court exercising federal jurisdiction may not make a declaration of the law "… divorced from any attempt to administer that law".[61]

[37] In *Croome v Tasmania*,[62] in which the State of Tasmania conceded that the plaintiffs had standing to bring an action seeking declarations that provisions of the Criminal Code of Tasmania were inconsistent with the law of the Commonwealth, that State argued that there was no "matter" because no proceeding had been brought or threatened against the plaintiffs in respect of conduct alleged to contravene the State law. That argument was rejected by all members of the High Court. Gaudron, McHugh and Gummow JJ observed that:[63]

> "Their Honours in *In re Judiciary and Navigation Acts* are not to be taken as lending support to the notion that, where the law of a State imposes a duty upon the citizen attended by liability to prosecution and punishment under the criminal law, and the citizen asserts that, by operation of s 109 of the Constitution, the law of the State is invalid, there can be no immediate right, duty or liability to be established by determination of this Court, in an action for declaratory relief by the citizen against the State, unless the Executive Government of the State has, at least, invoked legal process against the particular citizen to enforce the criminal law."

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54 *DPSOA*, ss 5(1), 27.
55 *CLAA*, s 22B(2)(a)-(c).
56 *CLAA*, ss 22B(2)(d) and (e).
57 *CLAA*, s 22G.
58 *Judiciary Act* 1903 (Cth), s 39; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [180] (Heydon, Crennan and Kiefel JJ).
59 Constitution, s 77(iii), with reference to s 76(i).
60 (1921) 29 CLR 257 at 265.
61 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266.
62 (1997) 191 CLR 119.
63 (1997) 191 CLR 119 at 136.

[38] With reference to that quote, the Attorney-General argued that Mr Lawrence had no standing to challenge the Declarations Act or the *DPSOA,* and that any answer to the questions in the stated case would not quell any controversy about any immediate right, duty or liability, because the Declarations Act had no application in the absence of a public interest declaration in relation to Mr Lawrence and there was no evidence that the Attorney-General had notified an intention to recommend the making of such a declaration.

[39] That argument cannot be accepted. Applying the relevant provisions of the Declarations Act to Mr Lawrence's case, the *DPSOA* empowers the Trial Division of the Supreme Court in the proceeding commenced by the executive against Mr Lawrence to order that Mr Lawrence be detained in custody for an indefinite term for control, care or treatment or to order that he be released from custody subject to a supervision order. Before the enactment of the Declarations Act, any order of that kind, although subject to appeal within the Supreme Court from the Trial Division to the Court of Appeal and an appeal from the Supreme Court to the High Court, was final and binding until reviewed under the *DPSOA.* Since the enactment of the Declarations Act, which must be assumed to be valid unless and until it is declared to be invalid, any such order in relation to Mr Lawrence (as in relation to any person) must be regarded as provisional only, the continuing force of any such order after the disposition of any appeal or the expiry of the relevant appeal period being contingent upon the executive government refraining from making a public interest declaration. Mr Lawrence's interest in the administration of justice, particularly in an order being made which would quell the controversy between him and the State in the proceedings in the Supreme Court in which he is a party, gives him "a sufficient material interest, which would be prejudiced by the operation of the [Declarations Act]"[64] to challenge the validity of that Act on the ground that it is repugnant to the institutional integrity of the Supreme Court. There is here no attempt by Mr Lawrence to seek a declaration of the law "divorced from any attempt to administer that law".[65]

[40] The Attorney-General referred to Hayne, Kiefel and Bell JJ's statement in *ICM Agriculture Pty Ltd v Commonwealth,*[66] that the High Court "has followed the precept that constitutional questions should not be decided unless it is necessary 'to do justice in a given case and to determine the rights of the parties'". Accepting that the Court of Appeal should adopt the same approach, the conclusion that Mr Lawrence has a material interest which would be prejudiced by the operation of the Declarations Act in the way in which Mr Lawrence contends undermines the institutional integrity of the Supreme Court virtually compels the Court to exercise its jurisdiction to adjudicate upon his claim. The Attorney-General argued that the Court should not now adjudicate upon Mr Lawrence's contention that the amendments made by the Declarations Act are invalid because, if they are invalid, the integrity of the Supreme Court in the exercise of its jurisdiction in Mr Lawrence's case is in truth not affected. As is illustrated by the apprehension of bias principle, "which reveals the centrality of considerations of both the fact and the appearance of independence and impartiality in identifying whether particular

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64 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257 (Dixon J), quoted by Brennan CJ, Dawson and Toohey JJ in *Croome v Tasmania* (1977) 191 CLR 119 at 126.

65 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

66 (2009) 240 CLR 140 at [141] their Honours cited a passage in Higgins J's judgment in *Attorney-General for NSW v Brewery Employees' Union (NSW)* (1908) 6 CLR 469 at 590.

legislative steps distort the character of the court concerned",[67] a court's integrity may be undermined by appearances as much as by the reality. A consequence of the Attorney-General's argument is that the Supreme Court would exercise its jurisdiction in the context that the amendments create the appearance that any order made by the Supreme Court under the *DPSOA* may be nullified by the executive, an appearance which might be reflected in executive action.

[41] The exercise by the executive of the power described in [35] of these reasons would undermine the authority of orders of the Supreme Court, orders which are otherwise vulnerable on appeal only on an appeal within the Supreme Court (from the Trial Division to the Court of Appeal) and to the High Court. It would do so directly every time a public interest declaration was made, most obviously when it resulted in the executive's opponent in the litigation in which a supervision order was made being deprived of his or her supervised liberty by being imprisoned. The amendments do not merely treat the court order as the criterion by reference to which new rights or obligations are created by legislation; public interest declarations are to be made by the executive, they are to be made on a case by case basis on the merits as perceived by the executive, and the substantial effect of such a declaration is equivalent to a reversal of the Court's order. Even in the absence of any public interest declaration, the Declarations Act itself undermines the authority of the Supreme Court by impugning every order made by the Supreme Court under Division 3 of the *DPSOA*. All such orders now must be regarded as provisional, their effect after the expiry of the appeal period or the resolution of any appeal being contingent upon the executive subsequently deciding on a case by case basis not to exercise its power to nullify the effect of the orders. The power conferred upon the executive to make a declaration which would result in a nullified order subsequently becoming effective enlarges the executive's case by case control of the effect of orders made by the Supreme Court under the *DPSOA*.

[42] The effects of the amendments made by the Declarations Act which are described in [35] and [41] of these reasons distinguish it from legislation which merely alters rights or obligations which are in issue in litigation or which merely creates rules to be applied by the courts in a way which may affect the finality of previous court orders. These amendments are within that exceptional category of legislation which is invalid on the ground that it is repugnant to that institutional integrity of the Supreme Court which is entrenched under the Commonwealth as "the highest court for the time being in the judicial hierarchy of the State".[68]

[43] The Attorney-General's argument that the *Kable* doctrine applies only in relation to the legislative conferral of powers and functions on State courts does not deny that powers or functions conferred on a State court may only become repugnant to or incompatible with the Court's exercise of the judicial power of the Commonwealth as a result of subsequent legislation which alters the effect of the exercise of the Court's powers or functions. It is a sufficient reason for rejecting the Attorney-General's argument based upon the quoted passage in *Lay v Employers Mutual Ltd* that the quotation upon which the Attorney-General relied is incomplete. The paragraph concludes with the following sentence:[69]

> "Unless a limitation on legislative power is found to arise from Ch III of the *Commonwealth Constitution* in accordance with the *Kable* doctrine, there is no such limitation."

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67 *Forge* at [68] (Gummow, Hayne and Crennan JJ).

68 *Kable* at pp 138, 139, 141-142 (Gummow J). See also *Wainohu* at [46] (French CJ and Kiefel J).

69 (2005) 66 NSWLR 270 at [59] (Bryson JA, Santow and McColl JJA agreeing).

[44] Sections 3 and 6 of the Declarations Act, the provisions which purport to amend the *CLAA* in the relevant respects, are beyond state legislative power and invalid. The purported amendments are "no law" at all.[70] They have no effect in law upon the *DPSOA* or anything done under it. Consistently with decisions in which it has been held that constitutional restrictions on legislative power invalidate amending Acts rather than the Acts which the amending Acts purported to amend,[71] the enactment of the Declarations Act did not invalidate the *DPSOA* or any part of it.

Orders

Question (a) Is the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the *DPSOA*"), or parts thereof, invalid as a consequence of the enactment of the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 in that the *DPSOA* now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution?

Answer: No.

Question (b) Is the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 invalid in that it has the consequence that the *DPSOA* now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution?

Answer: Sections 3 and 6 of the *Criminal Law Amendment (Public Interest Declarations) Amendment Act* 2013 are invalid in that they would have the consequence that the *Dangerous Prisoners (Sexual Offenders) Act* 2003 now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a Court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution.

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70 *Kable* at 144 (Gummow J).

71 See, for example, *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 472 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) and *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 267-268 (Dixon CJ).