IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No.B39 of 2013

BETWEEN:

Edward Pollentine
First Plaintiff

Errol George Radan
Second Plaintiff

and

The Honourable Jarrod Pieter Blejie
Attorney-General for the State of Queensland
First Defendant

and

John Francis Sosso, Director-General, The Department of Justice and Attorney-General
Second Defendant

and

The Chief Judge and Judges of the District Court of Queensland
Third Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES (INTERVENING)

Part 1: Publication of Submissions

1. These submissions are suitable for publication on the internet.

Part II: Basis of Intervention

2. The Attorney-General for New South Wales intervenes in this proceeding pursuant to s 78B of the Judiciary Act 1903 (Cth) in support of the Defendants.

Part III: Why Leave to Intervene Should be Granted

3. Not applicable.

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Part IV: Constitutional and Legislative Provisions

4. The Defendants have referred to the applicable constitutional and legislative provisions.

Part V: Argument

Summary of argument

5. The question in this case is whether s 18 of the Criminal Law Amendment Act 1945 (Qld) ("CLAA") infringes the principle in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable").

6. The Attorney General for New South Wales submits:

(a) the Kable principle applies only to legislation of an extraordinary character which substantially impairs the institutional integrity of the Court by fundamentally distorting the judicial process or substantially undermining the independence of the court;

(b) in determining the application of the Kable principle, it is necessary to consider the operation of the process mandated by the legislative scheme, and focus on the functions invested in the court;

(c) as at July 1984, the court was, pursuant to ss 18(1) and (3)(a) of the CLAA, exercising judicial power in accordance with the ordinary incidents of the judicial process in a manner that was independent (both in substance and appearance) of the Executive;

(d) accordingly, the legislative scheme as at July 1984 was valid.

The Kable principle

7. The principle which the High Court developed in Kable arises out of the integrated Australian court system established under Ch III of the Constitution, pursuant to which State courts are vested with federal jurisdiction (in particular, from ss 71, 73(ii) and 77(iii)). See Kable at 100-103 per Gaudron J, at 109-115 per McHugh J and 140-143 per Gummow J. A consequence of the integrated Australian court system is that a State or Territory body that is maintained as a court (and therefore

capable of being vested with federal jurisdiction) must be a suitable repository for the investment of federal jurisdiction. See Forge v Australian Securities and Investment Commission (2006) 228 CLR 45 ("Forge") at [40] per Gleeson CJ; Fardon v Attorney-General (Qld) (2004) 223 CLR 575 ("Fardon") at 591 [15] per Gleeson CJ, 595 [32] per McHugh J, 627 [137] per Kirby J; Baker v The Queen (2004) 223 CLR 513 ("Baker") at 519 [5] per Gleeson CJ. This requirement of suitability entails a limit on the functions with which State or Territory courts can be invested. That limit is defined by reference to the institutional integrity of a State or Territory court, which cannot be impaired to a degree that is repugnant to or incompatible with the exercise or potential exercise by that court of federal jurisdiction: see eg Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458 at 487 [123] ("Pompano"). Relevantly, "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes": Pompano at 488 [124] per Hayne, Crennan, Kiefel and Bell JJ, quoting Fardon at 618 [104] per Gummow J.

8. As both Toohey J and Gummow J separately stated in Kable, the legislation there at issue was of an "extraordinary character" (at 98 and 134 respectively; see also at 121 per McHugh J). See also Fardon at 591 [16] per Gleeson CJ, 595 [33] per McHugh J. In Fardon at 601 [43], McHugh J said that "Kable is a decision of very limited application."

9. The legislation in Kable was held to distort the judicial process to a fundamental degree. It was, in the words of Gaudron J, "the antithesis of the judicial process" (at 106). McHugh J found that the legislation "expressly removes the ordinary protections inherent in the judicial process" (at 122). See also the reasons of Toohey J at 98; Gummow J at 134.

10. The legislation also substantially undermined the institutional independence of the Supreme Court. McHugh J said that the legislation made the Supreme Court the "instrument of a legislative plan, initiated by the Executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person" (at 122). To like effect, Gummow J found that the laws sapped the appearance of "institutional

impartiality" (at 133) and that the judiciary was apt to be seen as "but an arm of the Executive which implements the will of the legislature" (at 134). See also Forge at 76 [63] per Gummow, Hayne and Crennan JJ.

11. The Kable principle was applied to invalidate the legislation at issue in International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319 ("International Financial Trust"). A majority found that the legislation involved the Supreme Court of New South Wales in an activity that was repugnant in a fundamental degree to the judicial process. As French CJ described it (at 354-355 [55]):

> To require a court, as s 10 does, not only to receive an ex parte application, but also to hear and determine it ex parte, if the Executive so desires, is to direct the court as to the manner in which it exercises jurisdiction and in so doing to deprive the court of an important characteristic of judicial power. That is the power to ensure, so far as practicable, fairness between the parties.

12. Gummow and Bell JJ concluded that the legislation "conscripted" the Court for a process "which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no curial enforcement of the duty of full disclosure on ex parte applications" (at 366 [97]).

13. The Kable principle was also engaged in South Australia v Totani (2010) 242 CLR 1 ("Totani") to invalidate s 14(1) of the Serious and Organised Crime (Control) Act 2008 (SA). As noted by the plurality in TCL Air Conditioner v Judges of the Federal Court (2013) 87 ALJR 410 at 431-432 [105], both Kable and Totani were situations where State courts were enlisted by the Executive to perform a task which did not engage the court's independent judicial power to quell controversies. In Totani, s 14(1) directed the Court to make a control order against a person if satisfied of one matter, namely whether the person was a member of a "declared organisation". It was the responsibility of the Attorney General under s 10(1) to declare the organisation. The declaration of the Attorney General rested upon findings that members of the organisation had committed

criminal offences in respect of which they may never have been charged or convicted. Where the Court made a control order, it could then make numerous orders pursuant to s 14(6) including prohibiting a "controlled" person from associating with certain people, going to certain places and engaging in certain activities. Breach of these prohibitions was a criminal offence. French CJ found that the curial process was in substance directed by the Executive such that the Court lacked "decisional independence" (at 48 [70], 50 [75], 52-53 [82]-[83]). Gummow J found that s 14(1) enlisted the court to effectively act at the behest of the Attorney General (at 67 [149], see also at 66 [142]). Hayne J also referred to the Court being "enlisted" by the Executive (at 88 [226]). Crennan and Bell JJ found that the adjudicative process under s 14(1) was so confined and so dependent upon the Executive's declaration that it was impermissible as it undermined independent curial determination (at 160 [436]). Similarly, Kiefel J found that s 14(1) "involves the enlistment of the Court to give effect to legislative and Executive policy" (at 173 [481]).

14. The Kable principle also invalidated the Crimes (Criminal Organisations Control) Act 2009 (NSW) in Wainohu v New South Wales (2011) 243 CLR 181 ("Wainohu"). However, the circumstances in Wainohu are far removed from the present case. The vice in that case was to vest powers in a judge of the Supreme Court acting in an administrative rather than a judicial capacity (called an "eligible judge") which substantially undermined the institutional integrity of the Supreme Court, chiefly because that eligible judge was under no obligation to give reasons in determining that an organisation was a "declared organisation".

15. The legislation in this case does not bear the extraordinary features of the impugned laws in Kable, International Finance Trust, Totani or Wainohu. It neither impermissibly distorts the judicial process nor makes the judiciary a mere instrument of the Executive.

The operation of the legislative scheme

16. To determine whether the Kable principle invalidates legislation that invests power in a court, it is necessary to consider the substance of the process (International Finance Trust at 366 [97] per Gummow and Bell JJ; Totani at 49 [71] per French

CJ) or the practical operation of the law (Totani at 50 [74] per French CJ and at 63 [134] and 65 [138] per Gummow J). Whether the legislative scheme is invalid depends upon the "particular combination of features" in the process: Totani at 82 [204] per Hayne J.

17. The legal operation of s 18 of the CLAA, as it stood in July 1984, needs to be properly understood. With respect, the plaintiffs have incorrectly elided the functions conferred upon the District Court by s 18 with the subsequent functions conferred upon the Governor in Council by s 18. In advancing an objection based upon Kable, a principle concerned with the functions invested in a court, the plaintiffs have failed to distinguish between the separate functions conferred upon the Court and the Executive respectively. This is clear, for example, at paragraph 53 of the plaintiffs' written submissions where it is asserted that s 18 "places the *continued* detention in the remit of the Governor-in-Council". That is not correct. The continuing authority for the offender's detention is the order of the Court. The power to relieve from continuing detention lies in the hands of the Executive. That is a time-honoured distinction, as the prerogative of mercy well illustrates. The prerogative of mercy is saved by s 18 of the Criminal Code, which is a Schedule to the Criminal Code Act 1899 (Qld). See generally Smith, "The Prerogative of Mercy, the Power of Pardon and Criminal Justice" [1983] Public Law 398.

18. While the plaintiffs seek orders invalidating s 18 as a whole, it is noted that the declarations and orders made against the plaintiffs were made under s 18(3)(a) of the CLAA, rather than s 18(4): SCB at paras 10 and 14. Section 18(4) empowered and continues to empower the Attorney General, subsequent to the conviction and sentencing of an offender, to make an application to the Court for a declaration that an offender is incapable of exercising proper control over his sexual instincts and an order that the offender be detained in an institution during His Majesty's pleasure. Accordingly, an order under s 18(4) is an order for preventive detention that forms no part of the sentencing process and is not the subject of this litigation. The regime contemplated by s 18(4) is more in line with that considered by the Court in Fardon. An order under s 18(3) operates in a different way.

19. In the present case, as at July 1984, ss 18(1)(a) and s 18(3)(a) operated as follows:

(a) in the case where an offender was convicted on indictment of an offence of a sexual nature upon or in relation to a child under the age of 17 years, the judge who had presided at trial had a discretion as to whether to direct medical practitioners to prepare a report on the offender's capacity to control his sexual instincts (in this regard, s 18(1) provides that "the judge ... may at his discretion direct ...");

(b) in the event the judge exercised that discretion, the judge was thereafter required to take into account the reports of those medical practitioners, which had to be given on oath (s 18(2));

(c) the offender was permitted to cross-examine those medical practitioners (s 18(3));

(d) the offender was also permitted to adduce evidence in rebuttal of the evidence of the medical practitioners (s 18(3));

(e) the judge was required to hear submissions of the offender on whether the declaration and direction ought be made (since the opportunity to be heard was an ordinary incident of procedural fairness that was not excluded by the Act, as to which see Kioa v West (1985) 159 CLR 550 at 584 per Mason J and Annetts v McCann (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh J);

(f) the judge was required to apply a legal standard in making a finding of fact. That legal standard was whether the offender was incapable of exercising proper control over his sexual instincts. Contrary to the submissions of the plaintiffs, that legal standard was not devoid of meaning. The same standard was ascribed substantive content in *The Queen v Kiltie* (1985) 41 SASR 52 at 62 per King CJ and 65 per Legoe J. In any case, it is the duty of the court to give the standard some meaning unless that is impossible: Baker at 523 [14] per Gleeson CJ;

(g) the judge was required to make a finding on the balance of probabilities and by application of the principles in Briginshaw v Briginshaw (1938) 60 CLR 336 regarding whether the offender was incapable of exercising proper control over his sexual instincts (this is made clear by the words in s 18(3)(a) "no such order shall be made unless the judge shall consider the matters reported to be proved" (emphasis added). The civil standard of proof applied since the legislature did not expressly nominate the criminal standard. It has been held that the Briginshaw standard applies in the context of legislation in South Australia analogous to s 18 of the CLAA: R v England (2004) 87 SASR 411 at 423 [53]. See also Chester v The Queen (1988) 165 CLR 611 at 618-619);

(h) if (and only if) the judge made the finding that the offender was incapable of exercising proper control over his sexual instincts, the judge had a discretion as to whether to make the declaration and direction for detention (that a discretion existed is indicated by the use of the word "may" in s 18(3)(a));

(i) there was nothing that exempted the judge from the obligation to give reasons; and

(j) the entire process described above would ordinarily take place in open court.

20. The exercise of the court's power in relation to that declaration and direction was then complete: cf Crump v State of New South Wales (2012) 247 at 19 [34] per French CJ. See also at 16-17 [28]. As the plurality noted in Baker at 528 [29], in the context of the old release on licence system in NSW, "[u]pon passing that sentence the judicial power was exhausted. Whether the offender served the sentence in prison or at large was a matter which then was to be decided by the Executive, not a court."

21. It is also relevant to note that there was the facility to appeal the declaration and direction of the judge: see s 18(13) of the CLAA and Chapter 67 of the Criminal Code, which is a Schedule to the Criminal Code Act 1899 (Qld).

22. Sections 18(5), (7), (8) of the CLAA were then directed to conferring functions upon the Executive:

(a) upon the making of the said declaration and direction of the judge, s 18(5)(a) conferred an authority upon the Executive to detain the offender in any prison or police gaol, and also conferred a discretion upon the Governor in Council to direct the offender to be detained in such institution as was directed;

(b) s 18(5)(b) conferred an authority upon the Governor in Council to release the offender upon being satisfied, in consideration of the reports of two legally qualified medical practitioners, that it was "expedient" to release the offender; and

(c) s 18(8) imposed a duty on the Director of Mental Hygiene or his or her appointee to conduct three monthly examinations on the offender and report on those examinations to the Director General of Health and Medical Services.

23. None of these functions conferred by ss 18(5), (7) or (8) were a function invested in a court. Nor is the exercise of any of the functions conferred by those subsections expressly excluded from the purview of review by the court. This is not a case where the legislature has sought to immunise decision-makers from judicial review by the Supreme Court of a State for jurisdictional error (Kirk v Industrial Court (NSW) (2010) 239 CLR 531 and Crump at 18 [31] per French CJ). Indeed, in Pollentine v Attorney-General [1995] 2 Qd R 412, the first plaintiff successfully sought judicial review against a decision of the Governor in Council declining to release him. The availability of judicial review in respect of such a decision was again accepted in Pollentine v Attorney-General [1998] 1 Qd R 82.

An order for preventive detention that is part of the sentence

24. There is a question as to what precisely the Court was doing when it made an order with respect to each plaintiff under s 18(3)(a) of the CLAA. In 1984, s 18(3)(a) provided that in an instance where the offender had been convicted on indictment the declaration and consequent direction to be detained in an institution at His Majesty's pleasure was "either in addition to or in lieu of imposing any other sentence" (emphasis added). Section 18(7) provided that where the order of detention was in addition to imprisonment, it was to commence after the term of imprisonment had expired. The direction under s 18(3)(a) is correctly to be characterised as an order for preventive detention: South Australia v O'Shea (1987) 163 CLR 378 at 383 per Mason CJ, in the context of a statutory analogue to s 18(3), being s 77a(3) of the Criminal Law Consolidation Act 1935 (SA).

25. The better view is that the direction under s 18(3)(a) of the CLAA constitutes part of the sentence by reason of the language of that subsection as well as the facts that the direction is consequent upon conviction, achieves one of the purposes of sentencing (being a protective purpose, as to which, see Veen v The Queen (No 2) (1988) 164 CLR 465 at 474 and Fardon at 647 [196] per Hayne J) and is, by virtue of the deeming provision in s 18(13), appealable as part of the offender's "sentence". See R v England (2004) 87 SASR 411 per Bleby J at 415 [11]-[14]; cf R v England (2003) 86 SASR 273 per Bleby J at [11]-[12]. Likewise in McGarry v The Queen (2001) 207 CLR 121 at 126 [8], the Court held that an order for indefinite detention under s 98(1) of the Sentencing Act 1995 (WA) formed "part of a single sentencing decision." Thus, in contrast to the legislative regime considered in Fardon, the order for indefinite detention draws its authority from what was done in sentencing following conviction: cf Fardon at 610 [73] per Gummow J.

No undermining of the judicial process

26. The exercise by court of the functions identified in paragraph 19 above was characterised by the ordinary incidents of the judicial process and was a process

where both in substance and appearance the judge remained independent of the Executive.

27. Gaudron J in Re Nolan; Ex parte Young (1991) 172 CLR 460 at 496 identified "general features" of the judicial process as including:

> open and public inquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.

28. Other hallmarks of the judicial process include the giving of reasons for decision (Fardon at 658 [230] per Callinan and Heydon JJ and Wainhou at 213 - 215 [54]-[58] and 219 [68] per French CJ and Kiefel J) and the entitlement to cross-examine and adduce evidence (Fardon at 656 [221] per Callinan and Heydon JJ). None of these features of the judicial process is excluded by s 18 of the CLAA.

29. In the result, there is no warrant for the plaintiffs' contention that s 18 has vested functions in the court in such as way as to substantially undermine the judicial process. In summary, the court was conferred with the judicial power of imposing a sentence following the adjudgment of criminal guilt, such sentence being of a type long-recognised as acceptable in the laws of this country (ie preventive detention or indefinite detention) and the court exercised that power in accordance with traditional judicial process.

No undermining of judicial independence

30. The contention that s 18 of the CLAA in some way enlists the Court and makes it a mere tool of an Executive scheme is equally unsustainable. It is not an officer of the Executive who lays the expert reports before the Court. Rather, whether the expert reports are obtained lies entirely within the discretion of the judge within s 18(1). As such, it cannot be said that, as was the case in Totani, that the Executive made a prior decision which effectively dictated the result for the Court. Moreover, the offender may cross-examine the experts on their reports and adduce

his own evidence to contradict the contents of those reports. As such, the scope of the evidence before the judge is not controlled in any way by the Executive. Instead, the court is required to perform a genuine adjudicative process.

Neither preventive detention nor indefinite detention are novel

31. Moreover, as noted by Gleeson CJ in Fardon at 590 [13], "[l]egislative schemes for preventive detention of offenders who are regarded as a danger to the community have a long history". See also at 613 [83] per Gummow J. For example, in NSW, an order could by made by a judge under the Habitual Criminals Act 1905 (NSW) that the offender was a "habitual criminal" and s 5 provided that at the end of the sentence the offender was to be detained at His Majesty's pleasure. At present, a convicting judge may under s 4 of Habitual Criminals Act 1957 (NSW) declare an offender to be a "habitual criminal", in which case the judge can sentence the offender for an additional term of between 5 to 14 years imprisonment pursuant to s 6. During this term, the Governor may, pursuant to s 7, grant the offender a licence to be at large. Further, a legislative scheme for court-ordered preventive detention now exists under the Crimes (High Risk Offenders) Act 2006 (NSW), which is similar in nature to the preventive detention scheme upheld by this Court in Fardon.

32. Historically, there have been legislative regimes that empower the courts to order imprisonment of indefinite duration. For example, until s 463 of the Crimes Act 1900 (NSW) was repealed on 12 January 1990 by the Prisons (Serious Offenders Review Board) Amendment Act 1989 (NSW), the only sentence a court could pass on a convicted murderer was life imprisonment and it was up to the Governor to determine whether to release that offender on licence. Further, in many jurisdictions, a court may impose a minimum sentence of imprisonment, but it falls to the Executive to determine whether the offender will be released on parole (Crump at 19-20 per French CJ at [36]-[37]). Moreover, under s 19A(1) of the Crimes Act 1900 (NSW), a person convicted of murder may be sentenced to life imprisonment, which by s 19A(2) means a term of the person's natural life. That sentence is indeterminate in the sense that it is unknown at the time of sentence how long the offender will live.

33. In view of this history, there is no constitutional requirement that a State court, in sentencing, specify a fixed period of detention.

Conclusions

34. The first question in the special case stated should be answered "No". So far as the second question is concerned, the Attorney General for the State of New South Wales should bear his own costs and not pay any of the costs of the case stated.

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Part VI: Estimate of Time for Oral Argument

35. Approximately 15 minutes will likely be required for oral argument.

Dated: 22 May 2014

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