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 BLEIJIE, ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
First Defendant

JOHN FRANCIS SOSSO, DIRECTOR-GENERAL, THE DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
Second Defendant

THE CHIEF JUDGE AND JUDGES OF THE DISTRICT COURT OF QUEENSLAND
Third Defendant

PLAINTIFFS' ANNOTATED SUBMISSIONS IN REPLY

FILED ON BEHALF OF THE FIRST AND SECOND PLAINTIFFS
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PART I: CERTIFICATION

1. These Reply submissions are in a form suitable for publication on the internet.

PART II: REPLY TO THE ARGUMENTS OF THE DEFENDANTS

Introduction

2. It is necessary to clarify some matters relating to the nature of the Plaintiffs' case:

   (a) The Plaintiffs do not suggest that any one particular feature of s 18 results in invalidity, but rather, the Plaintiffs submit that it is the cumulative effect of the regime provided for in s 18 that results in the section being incompatible with and repugnant to the institutional integrity of the courts of Queensland and hence invalid.[1]

   (b) Second, the Plaintiffs' case is not, as the Defendants suggest, that "s 18 breaches the *Kable* principle because it differs from the legislation considered in *Fardon*".[2] It is, however, necessary to understand why *Fardon* does not govern the present case; and to obtain guidance from the judgments in *Fardon* as to the matters that are relevant to an assessment of whether legislation of this kind contravenes the *Kable* principle. It is to those ends that the Plaintiffs' submissions addressed this Court's decision in *Fardon.*

   (c) Third, it is necessary to clarify the Plaintiffs' reliance on the perspective of the "reasonable observer". Again contrary to the Defendants' characterisation of the Plaintiffs' case,[3] the case is not that what a reasonable observer might conclude about the regime is the "touchstone of validity". Rather, the case is that the potential for a regime to undermine public confidence in the courts (understood by reference to the reasonable observer) is relevant to, but not the touchstone of, whether the regime violates the *Kable* principle.[4]

   (d) Finally, it is necessary to clarify the nature of an order made under s 18 of the *Criminal Law Amendment Act 1945* (Qld) (***CLAA***). The Defendants and the Attorneys-General for New South Wales and Western Australia seek to characterize the imposition of an order under s 18 as the imposition of a sentence and one of a range of sentencing options open to the trial judge. That, however, is to mischaracterize an order under s 18. An order under s 18 is not the imposition of a sentence. Rather, it is an order for detention imposed by a court as a civil order and is not a criminal sentence. Its nature is akin to the orders made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), considered by this Court in *Fardon*. As Bleby J observed, in relation to the current South Australian analogue to s 18:[5]

> Detention under this section is essentially preventative and protective, not punitive. It is not a sentence. It is not imposed by reference to the sentencing criteria contained in s 10 of the *Criminal Law (Sentencing) Act 1988*. There is no upper limit on the period of detention under the section.

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[1] Plaintiffs' Submissions at [29].

[2] Defendants' Annotated Submissions at [42].

[3] Defendants' Annotated Submissions at [77].

[4] Plaintiffs' Submissions at [27].

[5] *R v England* (2003) 86 SASR 273 at 277, re to s 23 of the *Criminal Law (Sentencing) Act 1988* (SA).

3. There are several features of s 18 of the *CLAA* that lead to the conclusion that the nature of the order made pursuant that section is not properly regarded as a sentence for breach of the criminal law, but as a separate order for preventative detention.

(a) Section 18(3) provides that the Court may order a person to be detained "either *in addition to* or *in lieu of* imposing any other sentence where the offender was convicted on indictment, or *in addition to* the punishment (if any) imposed or to be imposed by the Magistrates Court" upon summary conviction.[6]

(b) Sections 18(4) and 18(6), although not in issue in this case, are part of the statutory context in which s 18(3) is to be interpreted. Section 18(4) permits the imposition of an order for detention where a person is already serving "a sentence of imprisonment"; again, the order is not the imposition of a sentence, but an order for detention in addition to sentence. Similarly s 18(6)(b), which applies to persons whose "mental condition is subnormal", provides for detention at Her Majesty's pleasure "in addition to" the sentence imposed.

(c) Section 18 uses the word "detained" as the effect of the order; and uses the word "imprisonment" for the effect of the primary sentence. The difference in language is significant[7] and reflects the difference in the nature of an order under s 18 and an order imposing a sentence of imprisonment.

(d) The standard of proof required to make an order under s 18 is set at the civil standard, as the Defendants and the Attorney-General for NSW appear to accept[8] — whereas the standard of proof of the facts adverse to the offender relevant to a criminal sentence is usually to the standard of "beyond reasonable doubt".[9]

(e) The purposes and objectives of s 18, gleaned from the section as a whole, are not punishment of the offender but the protection of the community and the welfare of the offender.

4. That an order under s 18 is not a sentence is also apparent from the form of the orders in fact made in relation to the Second Plaintiff, namely that "upon the expiration of your sentence of imprisonment, you be detained in an institution during Her Majesty's pleasure".[10]

5. This characterisation of an order under s 18 then affects the way in which the Defendants' and the interveners' arguments as to validity are to be assessed.

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[6] And see *R v England* (2003) 86 SASR 273 at 277-8 (Bleby J). Cf *McGarry v R* (2001) 207 CLR 121 at [7] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ). However, that decision concerned a different statutory regime and thus may be distinguished.

[7] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [60] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

[8] Defendants' Submissions at [54]-[56]; NSW Submissions at [19(g)]. The position of the Attorneys-General for South Australia and Western Australia on the standard of proof is unclear.

[9] *The Queen v Olbrich* (1999) 199 CLR 270 at [24]-[28] (Gleeson CJ, Gaudron, Hayne & Callinan JJ).

[10] Exhibit 4 at p 2 [**SCB 86**]. The Court of Appeal also appeared to regard the declaration under s 18 as separate from the sentences imposed: *R v Radan* [1984] 2 Qd R 554 at 557 [**SCB 93**].

Relevance and nature of "indeterminate sentencing" and "preventative detention"

6. The Defendants and interveners seek to rely on the "long history" of regimes for "preventative detention".[11] It may be accepted that historically, various regimes for preventative detention (and indefinite or indeterminate sentences) existed from time to time. The Plaintiffs do not contend that preventative detention is, in and of itself, constitutionally impermissible. Rather, the Plaintiffs contend that the particular scheme for preventative detention in s 18 of the *CLAA* undermines the integrity of the courts of Queensland so as to violate Ch III of the Constitution. Section 18 is, the Plaintiffs contend, unlike most other historical (or current) regimes for preventative detention (including the regime upheld in *Fardon*). Furthermore, it ought not be assumed that all the historical practices identified by the Defendants and interveners, some from as early as the 1800s, would necessarily survive constitutional challenge.

7. The first example proffered by the Defendants is that of persons who were acquitted on the ground of insanity and then detained at the Crown's pleasure. However, that example does not provide an answer to the question of the validity of s 18 of the *CLAA* under the Commonwealth Constitution. In particular, s 18:

   (a) is not directed at persons who are acquitted on the ground of insanity, but at persons who are convicted (and hence of sound mind for the purposes of the criminal law); and

   (b) is not simply detention "at Her Majesty's pleasure", because release is conditioned on what is "expedient" as well as on the offender's mental state.

8. Habitual criminal legislation, such as the *Habitual Criminals Act 1905* (NSW) may also be distinguished. Section 3 of that Act provided that, following conviction of a third offence of the same class, the judge may declare "*as part of the sentence*" that the person is an habitual criminal.[12] Section 5 then provided for the detention of the person "during His Majesty's pleasure" upon expiration of his sentence. That detention is properly regarded as being part of the sentence imposed on the person by reason of their commission of a third offence, and not as detention in addition to or in lieu of sentence.[13] And, again, release of the person is not governed by what is regarded as the Executive of the day as "expedient".

9. It may also be accepted that South Australia and Western Australia had provisions similar to s 18 of the *CLAA* that have not been declared invalid.[14] Nor have they been upheld by this Court in the face of constitutional challenge. The fact that no

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[11] Defendants' Submissions at [26]-[37]. And see NSW Submissions at [31]-[33]; SA Submissions at 25]-[31]; WA Submissions at [7]-[14].

[12] See (2003) 86 SASR 273 at 278 (Bleby J).

[13] Section 17 of the *Crimes Act 1914* (Cth), and s 7 of the *Indeterminate Sentences Act 1907* (Vic) were in similar terms. Sections 661-663 of the *Criminal Code* (WA) were somewhat different, but again referred to preventative detention as part of the sentence to be imposed.

[14] Respondents' Submissions at [59]-[60]; SA Submissions at [30]; WA Submissions at [14]. In South Australia s 77a of the *Criminal Law Consolidation Act Amendment Act 1940* (SA) was replaced by s 23 of the *Criminal Law (Sentencing) Act 1988* (SA), which provides for judicial supervision of an order under that section. In Western Australia s 662 of the *Criminal Code* was repealed in 1995 by s 26 of the *Sentencing (Consequential Provisions) Act 1995*, and replaced by a general power to impose an indefinite sentence under s 98 of the *Sentencing Act 1995* (WA), with release determined through the parole system.

constitutional challenge to those laws has been brought in this Court provides no answer to the question of validity.

10. Further, many of the cases in State courts dealing with s 18 or equivalent provisions[15] were decided prior to the articulation and development of the *Kable* principle by this Court. The validity of those provisions in light of more recent constitutional developments may be doubted. Those cases are thus of limited assistance.

11. Preventative detention is distinct from the imposition of an indefinite sentence. Preventative detention is permissible, both historically and today, in various contexts, but that bare statement does not mean that parliament is unfettered in its ability to devise a preventative detention regime. Rather, each regime must be considered according to its terms and subject to the constitutional requirement that conferral of jurisdiction on State courts must not undermine the institutional integrity of those courts. The question, then, is whether s 18 does so — not whether other, different regimes might or might not be, or have been, constitutionally valid. The authorities relied upon the interveners are either not directed to the question of validity or are directed to validity, but in respect of a different regime, which is assessed in detail (as occurred in *Fardon*). None are thus determinative of the question presently before this Court.

The proposition that the function of the courts is complete upon sentencing

12. It may be generally accepted that the function of the courts *in quelling the controversy represented by a criminal charge* is complete upon the imposition of a sentence on the convicted person.[16] However, an order under s 18 is not the resolution of the controversy represented by the criminal charge; it is the resolution of a separate controversy about whether the offender is a person to whom s 18 applies and, if so, whether a declaration and order under that section ought to be made.[17] It is the resolution of that separate controversy that occurs through an order under s 18 and it is that order that the Plaintiffs contend requires effective judicial supervision. It is inconsistent with Chapter III of the Constitution, understood by reference to the *Kable* principle, to confer on the executive branch alone the power to terminate an order of this kind when the executive considers it expedient to do so.

13. Further, because an order under s 18 is not the imposition of a sentence, the fact that the court's role is spent upon pronouncement of the sentence is no answer to the Plaintiffs' case concerning the validity of s 18 and the need for orders for detention imposed in addition to or in lieu of a sentence to be subject to effective judicial supervision.

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[15] See, eg, *The Queen v Kiltie* (1985) 41 SASR 52; *R v England* (2004) 89 SASR 316; *R v England* (2004) 87 SASR 411; *R v O'Shea* (1982) 31 SASR 129; *R v Wichen* (2005) 92 SASR 528; *R v Warsap* [2011] SASC 73. SA 17, 31; WA 32.

[16] *Elliott v The Queen* (2007) 234 CLR 38, 41-42 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Crump v New South Wales* (2012) 247 CLR 1 at [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). But cf the regimes considered in *Buckley v The Queen* (2006) 80 ALJR 605 and *R v Moffatt* [1998] 2 VR 229, each of which provided for ongoing judicial supervision of an indefinite sentence.

[17] And see SA Submissions at [13].

The nature of the test to be applied by the Court in imposing detention under s 18

14. The Defendants contend that the test to be applied by the Court — that is, to assess whether the offender is "incapable of properly controlling his or her sexual instincts" — is sufficiently certain and capable of application because they can re-state it in somewhat different terms. That does not mean that the test is one that is either capable of judicial application in a given case or that it is appropriately a matter for the courts. In terms s 18 is not directed to an assessment of whether an order is required to protect of the community from the commission of further sexual offences. Further, the test as re-stated does not identify what degree of control would prevent a person from committing an offence of a sexual nature or how a court is to determine that degree of "proper control".

15. Nor does the fact that there are cases in which judges have purported to apply the test and make orders under s 18[18] demonstrate its certainty or its validity. Indeed, in his sentencing remarks in relation to the Second Plaintiff the trial judge stated that "had you chose[n] at any time you need not have yielded to your temptation", yet also held that the Plaintiff lacked the necessary self-control under s 18.[19] These two inconsistent conclusions about the second Plaintiff demonstrate the uncertainty of the test and the problems with its application.

Parole for prisoners detained under s 18

16. The Defendants and the Attorney-General for South Australia each refer to the possibility of parole that now exists for prisoners detained pursuant to s 18.[20] At the time that s 18 was enacted there was no provision for parole for persons detained pursuant to an order made that section. The super-imposition of a parole regime after the enactment of the *CLAA* is irrelevant to the validity of s 18 (and cannot save the section if it is otherwise invalid).

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[18] Defendants' Submissions at [51]; NSW Submissions at [19(f)]; *Sentencing Act* Submission at [37]; WA Submissions at [31]-[32].

[19] Exhibit 4, **SCB 85**.

[20] Defendants' Submissions at [73], fn 71; SA Submissions at [20]-[21].