

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN

No: B39 of 2013

EDWARD POLLENTINE  
First Plaintiff

ERROL GEORGE RADAN  
Second Plaintiff

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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

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

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WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF  
SOUTH AUSTRALIA (INTERVENING)

**Part I: Certification**

1. This submission is in a form suitable for publication on the internet.

**Part II: Basis of Intervention**

2. The Attorney-General for South Australia (**South Australia**) intervenes as of right under s78A 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. South Australia adopts the Defendants' statement of the applicable constitutional and legislative provisions.

#### Part V: Argument

##### *Issue and Summary of Submissions*

5. The Plaintiffs are indefinitely detained pursuant to orders of the District Court of Queensland made under s18(3)(a) of the *Criminal Law Amendment Act 1945* (Qld) (the CLA Act) following determinations by that Court that the Plaintiffs are persons incapable of exercising proper control over their sexual instincts. Pursuant to those orders, the Plaintiffs are to be detained in an institution until such time as they are released by executive decision whether conditionally, pursuant to the *Corrective Services Act 2006* (Qld), or unconditionally, pursuant to s18(5)(b) CLA Act. The Plaintiffs contend that s18 CLA Act is invalid as offending the principle recognised in *Kable v Director of Public Prosecutions (NSW)*<sup>1</sup> because:

- a. the function conferred on the court under s18 of the CLA Act requires the court to apply a criterion that is devoid of content and inappropriate for judicial application, and to find the relevant matters proved to an insufficiently low standard, such that the function conferred upon the court by s18 is substantially incompatible with the court's institutional integrity; and
- b. in allowing for executive, rather than curial review of whether an offender should subsequently be released from detention, s18 CLA Act substantially impairs the decisional independence of the court by permitting the executive to, in effect, review the court's order, and, by cloaking the executive's decisions about release with the "neutral colours of judicial action".

6. In summary, South Australia submits that:
- a. there is nothing remarkable about either the preventative detention function conferred upon the court by s18 CLA Act or the legal criterion and standard of proof which it is to apply in discharging that function;
  - b. in discharging the function under s18 CLA Act, the court undertakes an orthodox adjudicative function, determining facts, applying a legal criterion, and exercising discretion, and in doing so acts in accordance with the ordinary incidents of judicial process;

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<sup>1</sup> (1996) 189 CLR 51.

- c. nor is there anything remarkable about the question of release of a detained offender being subject to executive decision from time to time. Executive review of court-ordered punitive and preventative detention has been a long-established feature of the Australian legal landscape, in particular in relation to parole, detention of persons acquitted on grounds of insanity, and detention of habitual criminals;
- d. in determining the question of release of an offender subject to an order under s18 CLA Act, the executive, constituted by the Parole Board in the case of conditional release, and by the Governor in Council in the case of unconditional release, does not purport to sit in review of the appropriateness of the court order as if it were an appellate body. Rather, it makes an assessment as to whether an offender should subsequently be released from detention, in light of circumstances that may have changed since the initial decision was made. In so doing, it undertakes a function that operates in acknowledgement of, and does not interfere with, the court's prior decision. The executive function stands apart from and does not infect the court's function. The court's decisional independence is unimpaired.

### *The Legislative Scheme*

7. Section 18 of the CLA Act establishes a scheme of preventative detention for persons who have committed offences of a sexual nature.<sup>2</sup> That scheme, which operates concurrently with the scheme considered by this Court in *Fardon v Attorney-General (Qld)*,<sup>3</sup> has two aspects: first, an initial determination by the Supreme or District Court as to whether the offender ought be subject to an order for indefinite detention, and, second, where the offender is detained, executive review as to whether the offender ought subsequently be released, whether conditionally or unconditionally. Those two aspects of the scheme are considered below in turn.
8. Under s18 CLA Act, the Supreme and District Courts of Queensland are tasked with determining whether to declare that an offender is incapable of exercising proper control of his sexual instincts and ought be made subject to a direction that he be detained "during Her Majesty's pleasure". Section 18 CLA Act does not specify in detail the manner in which the court undertakes its function or the factors affecting its decision. However, the function conferred upon the court under s18 CLA Act is informed by three important principles, which have implications for the court's *process* and *decision* under s18 CLA Act:

<sup>2</sup> Although the legislative scheme has been subject to amendment since the Plaintiffs were ordered to be indefinitely detained in 1984, none of those amendments affect the Plaintiffs' constitutional argument. References in these submissions to the CLA Act are to the version as in force in 1984.

<sup>3</sup> (2004) 223 CLR 574.

- a. first, in conferring a function upon an existing court, Parliament may be taken to have intended that the ordinary incidents of the judicial process would apply.<sup>4</sup> This includes an open and transparent process, the giving of reasons, and the adversarial nature of the court's process undertaken *inter partes* in the usual case;
- b. second, broad discretionary powers are limited having regard to matters of statutory scope, purpose and subject-matter;<sup>5</sup>
- c. third, indefinite preventative detention is extraordinary. The circumstances in which restraints on liberty are imposed by prospective judicial order are carefully confined.<sup>6</sup> As such, an order for preventative detention is to be exercised only in exceptional circumstances, recognising that such orders vest an "extraordinary power".<sup>7</sup> As Kirby J said in *McGarry v The Queen*:<sup>8</sup>

In part, the reason why the system of criminal justice treats an order of indefinite imprisonment as a serious and extraordinary step, derives from the respect which the law accords to individual liberty and the need for very clear public authority, both of law and of fact, to deprive a person of liberty, particularly indefinitely.

Thus, the nature of an order under s18(3)(a) has a bearing upon the required degree of satisfaction of the offender's incapacity to control his sexual instincts,<sup>9</sup> as well as upon the exercise of judicial discretion whether or not to make an order for detention in a particular case.

9. The curial process under s18 CLA Act concerning persons convicted on indictment has a number of steps.
10. First, under s18(1)(a), upon a person being found guilty on indictment of an offence of a sexual nature upon or in relation to a child under 17 years,<sup>10</sup> the court *may at the judge's discretion* direct that two or more medical practitioners inquire into the mental condition of the offender, and,

<sup>4</sup> *Electric Light and Power Supply Corporation Ltd v Electricity Commission* (1956) 94 CLR 554 at 560 (The Court); *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [7] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [30] (Gleeson CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [77] (Gummow and Bell JJ); *Attorney-General (Northern Territory) & Anor v Emmerson* (2014) 88 ALJR 522 at [58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>5</sup> *Samad v District Court (NSW)* (2002) 209 CLR 140 at [32] (Gleeson CJ and McHugh J); *Wotton v Queensland* (2012) 246 CLR 1 at [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>6</sup> *Thomas v Mowbray* (2007) 233 CLR 307 at [18] (Gleeson CJ).

<sup>7</sup> *Cbeater v The Queen* (1988) 165 CLR 611 at 617-618 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ); *Thompson v The Queen* (1999) 73 ALJR 665 at [5]-[7] (Kirby J); *Lowndes v The Queen* (1999) 195 CLR 665 at [11], [24] (The Court); *Buckley v The Queen* (2006) 80 ALJR 605 at [6]-[7], [40], [44] (The Court); *McGarry v The Queen* (2001) 207 CLR 121 at [29]-[31] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [60]-[65] (Kirby J); *Yates v The Queen* (2013) 247 CLR 328 at [7] (French CJ, Hayne, Crennan and Bell JJ).

<sup>8</sup> *McGarry v The Queen* (2001) 207 CLR 121 at [60]-[61] (Kirby J).

<sup>9</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 (Dixon J); *Buckley v The Queen* (2006) 80 ALJR 605 at [5] (The Court).

<sup>10</sup> Following the enactment of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld), the relevant age became 16 years.

in particular, whether the offender's mental condition is such that the offender is incapable of exercising proper control over his sexual instincts. It is plain from the terms of the subsection that the court has a discretion whether or not to order the reports. Thus, for example, the court might consider that the circumstances of the offender or offence as known are such that the offender is unlikely to reoffend, and, accordingly, that it is inappropriate to take the step of subjecting the offender to examination by medical practitioners.

11. To the extent that the court may act on its own motion in ordering reports, it does so against the background of having conducted a trial in relation to, or having accepted a plea of guilty to, a particular charge, such that the court will have relevant material before it. In the event the court determines to refuse an order for medical examination, the further consideration of any order under s18(3)(a) will be foreclosed by reason of the need in s18(3)(a) that the practitioners make a report expressing a particular view before the court's power to detain is enlivened.
12. If the judge determines it appropriate to order medical examination, the second step of the process is the receipt *on oath* of the medical practitioners' reports as to the outcome of such examinations. If both medical practitioners report to the judge that the offender is incapable of exercising proper control of his sexual instincts, the judge's power under s18(3)(a) will be enlivened. That is, the opinions of the medical practitioners are necessary to enliven the court's power to proceed to make an order for indefinite detention.<sup>11</sup> Conversely, it follows from s18(3)(a) that if the medical practitioners report that the offender *is* capable of exercising proper control over his sexual instincts, the matter will be at an end.<sup>12</sup>
13. However, the medical practitioners' opinions in the affirmative will not be determinative of the court's factual findings, or an order for indefinite detention. As is apparent from the proviso to s18(3)(a), the court is independently required to make a factual assessment of the available evidence to determine whether it finds the offender's incapacity "proved". It is clear from the proviso to s18(3)(a) CLA Act that unlike the process for determining the appropriate penalty for an offence, the parties are joined in an issue under s18(3)(a) as to the offender's incapacity. By implication, the onus of proof rests with the prosecutor to establish the issue adverse to the offender. An offender is entitled to cross-examine the medical practitioners, and call evidence in rebuttal of their reports. The offender may call his or her own expert. However, the proceeding will not necessarily be confined to a consideration of medical evidence. An offender may, for example, wish to challenge the veracity of any depositions or other records

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<sup>11</sup> If, however, the medical practitioners report that the offender is incapable of exercising proper control but his mental condition is subnormal to such a degree that he requires care, supervision and control and the judge, upon hearing that evidence and any evidence in rebuttal is likewise of that opinion, the court may exercise an alternative power under s18(6) CLA Act, of ordering detention for a fixed period.

<sup>12</sup> See eg *R v Johnson* [1962] QWN 37.

relied upon by the medical practitioners under s18(2) CLA Act in forming their opinions. No reason arises from the silence of s18 to conclude that either party is limited in the evidence that may be led on the hearing. Any relevant evidence led by the parties, and tested in the usual way, will be considered by the court in determining whether the offender is incapable of exercising proper control over his sexual instincts.

14. Upon considering the entirety of the evidence, the court will determine if it is satisfied the offender is so incapable. While s18(3)(a) requires only that the offender's incapacity be *proved*, the degree of satisfaction necessary will be informed by the extraordinary nature of the order and the significant consequences for the offender.<sup>13</sup>

10 15. Finally, even if satisfied that the offender is so incapable, an order for indefinite detention will not necessarily follow. The power in s18(3)(a) is couched in terms that the judge *may* make the order, and may do so in addition to or in lieu of a sentence for the subject offence. No reason arises to interpret that word as conferring anything other than a discretion.<sup>14</sup> The finding of incapacity to control sexual instincts is not of a character that would inevitably require the order for indefinite detention to follow.<sup>15</sup> While the CLA Act is silent as to the factors that the court is to consider, the court's discretion is informed by the subject matter, scope, purpose and subject-matter of the statute.<sup>16</sup> It is informed also by the context in which the matter arises, namely during the determination of an appropriate sentence, following a finding or plea of guilty. In exercising the discretion, the court will have regard to the evident purpose of the Act in protecting the community from a risk of sexual reoffending, as well as the extraordinary nature of the order and the serious impact of an order on an offender's liberty. There may be a range of reasons why the court may consider such an order inappropriate. For example, the court might consider that although the offender is incapable of exercising proper control of his sexual instincts, his age and or physical capacity is such that he in fact poses little risk of reoffending. Alternatively, the court might consider that the sentence to be imposed will be of such length that an order for further detention is unnecessary, or that rehabilitation programs available to the offender while serving the sentence for the offence are likely to mitigate the

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<sup>13</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 (Dixon J); *Buckley v The Queen* (2006) 80 ALJR 605 at [5] (The Court).

<sup>14</sup> *Acts Interpretation Act 1954* (Qld), s32CA(1).

<sup>15</sup> Compare, for example the criterion considered in *Leach v The Queen* (2007) 230 CLR 1. There, if the Court was satisfied that "the level of culpability in the commission of the offence [was] so extreme the community interest in retribution, punishment, protection and deterrence [could] only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole" then no question could genuinely arise as to whether a non-parole period ought be fixed: *Leach v The Queen* (2007) 230 CLR 1 at [19] (Gleeson CJ), [37]-[38] (Gummow, Hayne, Heydon and Crennan JJ). See also the discussion in *Samad v District Court (NSW)* (2002) 209 CLR 140 at [31]-[36] (Gleeson CJ and McHugh J), [66]-[68] (Gaudron, Gummow and Callinan JJ).

<sup>16</sup> *Samad v District Court (NSW)* (2002) 209 CLR 140 at [32] (Gleeson CJ and McHugh J); *Wotton v Queensland* (2012) 246 CLR 1 at [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

offender's risk of reoffending once released.<sup>17</sup> Indeed, in light of the possibility catered for in s18(4) CLA Act for an application for indefinite detention in relation to a person serving a term of imprisonment, the court may be inclined to decline to make the order leaving open the possibility for the matter to be revisited at a later stage when the offender has had an opportunity for rehabilitation, and his level of risk can be better predicted.

16. As is apparent from the above discussion, the court is engaged in two separate inquiries under s18(3)(a): first, a factual inquiry about the offender's incapacity, and second, a judgment as to the appropriateness of the order in light of the offender's incapacity and any other relevant facts found. That said, the court's consideration of the first inquiry will inform the second. That is, because incapacity necessarily involves an assessment about levels of risk and probabilities, the court's assessment of the offender's incapacity will inform the balancing exercise between community safety and the offender's liberty necessarily entailed in the second inquiry.
17. If, upon being satisfied that the offender is incapable of exercising proper control of his sexual instincts, and determining that it is appropriate to make the order, the court will so declare and direct that the offender *be detained in an institution* (as defined in s18(14) CLA Act) *during Her Majesty's pleasure*. Once subject to an order for detention during Her Majesty's pleasure, a detainee may seek release, either conditionally or unconditionally.
18. Section 18(5)(b) CLA Act provides the means for unconditional release, where the Governor in Council<sup>18</sup> (the Governor) is satisfied, on the report of two medical practitioners, that it is expedient to release the offender. While s18 is silent as to the administrative process by which the Governor will come to consider the exercise of this power, s18(8) CLA Act provides a mechanism by which the executive is informed of the progress of an offender in custody. It may be expected that a favourable medical report would trigger further inquiry and potentially other medical practitioners to examine the offender in order to obtain reports for the purposes of s18(5)(b). Ultimately, receipt of two favourable reports could be expected to lead to the Minister to whom the CLA Act is committed, bringing that information before the Governor for consideration. In addition, an offender has, by implication, a right to obtain his own reports and, those reports being favourable, to apply to the Governor for consideration of his release. A duty to afford procedural fairness applies,<sup>19</sup> at least in relation to the aspects of the

<sup>17</sup> See for example *R v Warsap* [2011] SASC 73 where in applying s23 of the *Criminal Law (Sentencing) Act 1988* (SA) Vanstone J, while accepting the offender was unwilling to control his sexual instincts, declined to make an order for indefinite detention, bearing in mind the offender's prospects of rehabilitation and the availability of intervention programs.

<sup>18</sup> That is, the Governor acting with the advice of Executive Council: s27 of the *Constitution of Queensland 2001*.

<sup>19</sup> *Kioa v West* (1985) 159 CLR 550; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 349 (Gibbs CJ), 355 (Stephen J), 364-366 (Mason J), 383 (Aickin J).

decision personal to the applicant.<sup>20</sup> In furtherance of an application, the offender may put material before the Governor, including any relevant medical reports which support his release. No reason arises to construe the medical practitioners' reports referred to in s18(5)(b) as limited to those produced under s18(8) CLA Act.

19. As noted, the Governor will order release if satisfied that it is expedient to do so. The meaning of "expedient" is informed by the scope and purpose of the CLA Act. It includes consideration of the nature of the initial offending, the impact of detention upon the offender, and the risk the offender poses to the community. In addition, it includes consideration of matters that are broadly political and involves an assessment of the wider public interest.<sup>21</sup> The word "expedient" conveys that the Governor cannot make predictions about the offender's future conduct with any claim to complete accuracy. A practical assessment about risk is required. Bearing in mind that the release under s18(5)(b) is unconditional, release will be expedient where the risk posed by the offender is minimal such that it is deemed unnecessary that the offender be made subject to any restraints on his liberty. Inevitably it will be necessary that some change in the circumstances of the offender has occurred since the court made its initial order.
20. In addition to the provision for unconditional release, since 19 July 2002 an offender subject to an order for indefinite detention has had the alternative option of applying for conditional release pursuant to part 3A of the CLA Act.<sup>22</sup> Pursuant to that part, chapter 5 of the *Corrective Services Act 2006*, which deals with release on parole is, subject to some modification, applied as if the offender were a prisoner serving a term of life imprisonment. Pursuant to s181 of the *Corrective Services Act 2006* (Qld) and s18B(2) of the CLA Act, upon the commencement of part 3A, both Plaintiffs became eligible to apply for parole under s180 of the *Corrective Services Act 2006* (Qld).
21. Subject to certain modifications, the ordinary processes of the Parole Board under the *Corrective Services Act 2006* (Qld) apply to such applications. This includes a requirement to provide reasons for an adverse decision.<sup>23</sup> In addition to the ordinary matters of which the Parole Board must be satisfied on an application for parole, s18E CLA Act provides that the Board must not make a parole order unless it is satisfied the offender does not represent an

<sup>20</sup> *South Australia v O'Shea* (1987) 163 CLR 378 at 388-389 (Mason CJ), 405 (Wilson and Toohey JJ), 411 (Brennan J).

<sup>21</sup> *South Australia v O'Shea* (1987) 163 CLR 678 at 388 (Mason CJ), 401-402 (Wilson and Toohey JJ).

<sup>22</sup> The history of the legislative arrangements for conditional release of s18 detainees is set out in *Pollentine v Attorney-General (Qld)* [1995] 2 Qd R 412 at 419 (Thomas J). Between 1987 and February 2007, s46A of the *Mental Health Act 1974* (Qld) provided that the Governor may "on the recommendation of 2 psychiatrists nominated...release the person on leave of absence subject to such terms and conditions as may be prescribed or as may be fixed by the Governor in Council."

<sup>23</sup> *Corrective Services Act 2006* (Qld), s193(5).

“unacceptable risk to the safety of others”. Further, in addition to the conditions that may be imposed by the Parole Board under s200 of the *Corrective Services Act 2006* (Qld), additional conditions may be imposed requiring submission to medical, psychiatric or psychological treatment or reporting to a corrective services officer for drug testing.<sup>24</sup> The Attorney-General may make submissions on any such application for parole.<sup>25</sup> If an offender subject to an order under s18 CLA Act is successful in receiving release on a parole order, that order will preclude unconditional release by the Governor pursuant to s18(5)(b).

### *The Kable doctrine*

22. The constitutional objection to s18 CLA Act raised by the Plaintiffs is based on the limitation on State legislative power which was first recognised by this Court in *Kable v Director of Public Prosecutions (NSW)*.<sup>26</sup> The principle for which *Kable* stands is that the constitutional structure under which federal jurisdiction may be vested in State courts imposes an implied limitation on the legislative powers of the States.<sup>27</sup> That limitation prevents State Parliaments from interfering with the institutional integrity, or defining characteristics of, State courts. As Gageler J explained in *Assistant Commissioner Condon v Pompano*:<sup>28</sup>

To render State and Territory courts able to be vested with the separated judicial power of the Commonwealth, Ch III of the *Constitution* preserves the institutional integrity of State and Territory courts. A State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth.

23. Relevant to the present case, the *Kable* doctrine prevents:
- a. legislation requiring a State court to depart to a significant degree from ordinary methods and standards of judicial process;<sup>29</sup>

<sup>24</sup> *Criminal Law Amendment Act 1945* (Qld), s18F.

<sup>25</sup> *Criminal Law Amendment Act 1945* (Qld), s18D.

<sup>26</sup> (1996) 189 CLR 51.

<sup>27</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 (Toohey J), 106 (Gaudron J), 116-119 (McHugh J), 127-128 (Gummow J); *Baker v The Queen* (2004) 223 CLR 513 at [6] (Gleeson CJ), [51] (McHugh, Gummow, Hayne and Heydon JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [15] (Gleeson CJ), *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [41] (Gleeson CJ), [57] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at [72] (French CJ); *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 at [67] (French CJ), [123] (Hayne, Crennan, Kiefel and Bell JJ); *Attorney-General (Northern Territory) & Anor v Emmerson* (2014) 88 ALJR 522 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

(2013) 87 ALJR 458 at [183] (Gageler J).

<sup>29</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 (Toohey J), 122 (McHugh J); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54]-[56] (French CJ), [94]-[98] (Gummow and Bell JJ), [159] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181 at [68] (French CJ and Kiefel J), [104], (Gummow, Hayne, Crennan and Bell JJ). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [100] (Gummow J), [141] (Kirby J).

- b. the direct enlistment of a State court in the implementation of legislative or executive policies<sup>30</sup> so as to cloak executive action with the neutral colours of judicial action;<sup>31</sup>
  - c. otherwise interfering with the decisional independence of a State court.<sup>32</sup>
24. In addition, the Plaintiffs rely upon the related principle established in *Kirk v Industrial Court (NSW)* that a State Parliament cannot remove from a State Supreme Court its jurisdiction to grant relief for jurisdictional error by the State executive or inferior State courts, including by writ of habeas corpus.<sup>33</sup>

### *History of schemes for preventative detention*

- 10 25. In determining whether s18 CLA Act is incompatible with the institutional integrity of Queensland courts, it is relevant to note that s18 CLA Act takes its place in a long history of legislative schemes for preventative detention which existed prior to and after federation.<sup>34</sup>
26. As Gleeson CJ noted in *Fardon v Attorney-General (Qld)*, schemes for preventative detention have a long history.<sup>35</sup> Whilst guardianship arrangements date as far back as Plato,<sup>36</sup> the first legislative steps towards the detention of the mentally ill were taken in the 14th century, under which the King was empowered to seize custody and act as guardian of “natural fools” and “lunatics”.<sup>37</sup>
27. Detention of the mentally ill in Australia dates back to the lunacy acts of the 19th century. Under those Acts, detention by an order of a court was subject to discharge by mental health authorities,<sup>38</sup> by subsequent court order<sup>39</sup> or both.<sup>40</sup> Later mental health legislation likewise disclosed legislative choice regarding detention by an order of a court being subject to release
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<sup>30</sup> *South Australia v Totani* (2010) 242 CLR 1 at [4], [41], [80]-[82] (French CJ), [100], [139], [149] (Gummow J), [226] (Hayne J), [428], [436] (Crennan and Bell JJ), [445], [469] (Kiefel J).

<sup>31</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133 (Gummow J); *South Australia v Totani* (2010) 242 CLR 1 at [479] (Kiefel J).

<sup>32</sup> *South Australia v Totani* (2010) 242 CLR 1 at [62] (French CJ).

<sup>33</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 86 ALJR 862.

<sup>34</sup> *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 at [68] (French CJ).

<sup>35</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [13] (Gleeson CJ), [62]-[63] (Gummow J), [217] (Callinan and Heydon JJ); *Lowndes v The Queen* (1999) 195 CLR 665 at [11] (The Court); *R v Moffatt* [1998] 2 VR 229 at 235-6 (Winneke P), 251 (Hayne JA), 258 (Charles JA). See also generally A Dershowitz, *The Origins of Preventative Confinement in Anglo-American Law - Part 1: The English Experience* (1974) 43 University of Cincinnati Law Review 1.

<sup>36</sup> A Dershowitz, *The Origins of Preventative Confinement in Anglo-American Law - Part 1: The English Experience* (1974) 43 University of Cincinnati Law Review 1 at 28.

<sup>37</sup> 17 Edward II c. 9, c. 10 (1324).

<sup>38</sup> *Lunatics Act 1864* (SA) ss 12, 31-32.

<sup>39</sup> *Lunacy Act 1890* (Vic) ss4, 104-105; *Insane Persons Hospitals Act 1858* (Tas): ss13, 27.

<sup>40</sup> *Lunacy Act 1898* (NSW) ss6, 93-94, 99; *Insanity Act 1884* (Qld) ss24, 69-71, 74; *Lunacy Act 1871* (WA) ss11, 30-31, 37.

by mental health authorities,<sup>41</sup> subsequent court order<sup>42</sup> or both.<sup>43</sup> Contemporary mental health legislation now generally provides for detention by executive bodies, subject to executive review and appeal.<sup>44</sup>

28. As noted by the Defendants,<sup>45</sup> schemes for detention of persons acquitted on the grounds of insanity have also existed. The foundation of these laws arises from *The Trial of James Hadfield*<sup>46</sup> which gave rise to legislation first passed in 1800,<sup>47</sup> which, along with its successors,<sup>48</sup> enabled the court to order a person be detained in custody at his (and later her) Majesty's pleasure.<sup>49</sup> Similar legislation, providing for detention at her Majesty's pleasure of persons acquitted on grounds of insanity, was passed in South Australia,<sup>50</sup> New South Wales,<sup>51</sup> Queensland,<sup>52</sup> Tasmania,<sup>53</sup> Victoria<sup>54</sup> and Western Australia<sup>55</sup> in the late 19th and early 20th centuries. Contemporary legislation in the United Kingdom<sup>56</sup> and in Australian<sup>57</sup> jurisdictions continues to enable courts to order that a person be detained in a mental health institution on the ground that the person has been found mentally unfit to stand trial.
29. In addition, legislative regimes have existed to detain criminals for preventative purposes, in particular habitual criminals. As early as the 14th century, Justices of the Peace were empowered to arrest and detain persons "not of good fame", on the grounds that they had been thieves and robbers in the past and were not presently employed.<sup>58</sup> The first modern formulations for the detention of habitual criminals were introduced in the early 20th century in the United Kingdom,<sup>59</sup> the Commonwealth,<sup>60</sup> South Australia,<sup>61</sup> New South Wales,<sup>62</sup>

<sup>41</sup> *Mental Deficiency Act 1939* (Vic) ss15, 34-35; *Mental Hygiene Act 1938* (Qld): ss36, 46-47; *Mental Health Act 1962* (WA) ss29, 43.

<sup>42</sup> *Mental Defectives Act 1920* (Tas): ss24, 30.

<sup>43</sup> *Mental Defectives Act 1935* (SA) ss 25, 91-92, 95; *Mental Health Act 1958* (NSW) ss12, 16-18

<sup>44</sup> *Mental Health Act 2009* (SA) Part 5; *Mental Health Act 2007* (NSW) Part 2; *Mental Health Act 1986* (Vic) Part 3; *Mental Health Act 2013* (Tas); *Mental Health Act 2000* (Qld) Chapter 2; *Mental Health Act 1996* (WA) Part 3.

<sup>45</sup> Defendants submissions [25]-[29].

<sup>46</sup> (1800) 27 St Tr 1282.

<sup>47</sup> *An Act for the safe custody of insane persons charged with offences* 39 & 40 George III c. 94 (1800) s2.

<sup>48</sup> *An Act for making further Provision for the Confinement and Maintenance of Insane Prisoners* 3 & 4 Victoria c. 54 (1840) s3; *Trial of Lunatics Act 1883* 46 & 47 Vict c. 38 s2(2).

<sup>49</sup> See further Williams "Development and Change in Insanity and Related Defences" (2000) 24 *Melbourne University Law Review* 711.

<sup>50</sup> *Criminal Law Act 1876* (SA) s381, see later *Criminal Law Consolidation Act 1935* (SA) s292.

<sup>51</sup> *Criminal Law Amendment Act 1883* (NSW) s415, see later *Crimes Act 1900* (NSW) s439.

<sup>52</sup> *Criminal Code Act 1899* (Qld) s645; *Insanity Act 1884* (Qld) s48.

<sup>53</sup> *Criminal Code Act 1924* (Tas) s381

<sup>54</sup> *Crimes Act 1890* (Vic) s449.

<sup>55</sup> *Criminal Code Act 1902* (WA) s643; *Lunacy Act 1871* (WA) s46.

<sup>56</sup> *Criminal Procedure (Insanity) Act 1964* (UK) s5.

<sup>57</sup> *Criminal Law Consolidation Act 1935* (SA) Part 8A; *Mental Health (Forensic Provisions) Act 1990* (NSW) ss38-9; *Criminal Code Act 1899* s647; *Criminal Justice (Mental Impairment) Act 1999* (Tas) Part 4; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) Part 5; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) Parts 4, 5.

<sup>58</sup> 34 Edward III c 1 (1360).

<sup>59</sup> *An Act to make better provision for the prevention of crime* 8 Edward VII c. 59 (1908), ss10-16.

<sup>60</sup> *Crimes Act 1914* (Cth) s17.

<sup>61</sup> *Habitual Criminals Amendment Act 1907* (SA).

Western Australia,<sup>63</sup> Victoria,<sup>64</sup> Queensland<sup>65</sup> and Tasmania.<sup>66</sup> Legislation in the United Kingdom was the genesis for similar laws passed in Canada in 1947.<sup>67</sup>

30. Such preventative detention regimes have frequently been the subject of judicial analysis. This Court has considered provisions relating to indefinite detention of habitual criminals and sexual offenders in South Australia,<sup>68</sup> New South Wales,<sup>69</sup> Queensland<sup>70</sup> and Western Australia,<sup>71</sup> including schemes whereby following a court order for detention, release of an offender is determined by the judiciary<sup>72</sup> or by the executive.<sup>73</sup> Criticisms have been made with respect to both models.<sup>74</sup> However, as several members of the Court noted in *South Australia v O'Shea*, the form of review that is provided for is a matter of legislative choice.<sup>75</sup>

10 31. For present purposes it is relevant to note that it was a common feature of preventative detention regimes before and after federation to provide for an initial court determination as to detention, followed by subsequent executive decisions as to release. That history is strongly indicative of there being nothing inimical to the constitutional conception of a “court of a State” in s77(iii) of the *Constitution* in involving Queensland State courts in the process under s18 CLA Act with regard to either the function it confers upon the court or the provision for subsequent executive review of an offender’s detention.

#### *Criterion for judicial determination and degree of satisfaction*

20 32. The first limb of the Plaintiffs’ challenge to the legislative scheme is to the conferral upon the Supreme and District Courts of the function of ordering indefinite detention. The Plaintiffs do not assert that Ch III precludes a State court from making orders for preventative detention *per*

<sup>62</sup> *Habitual Criminals Act 1905* (NSW).

<sup>63</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 661-669.

<sup>64</sup> *Indeterminate Sentences Act 1907* (Vic).

<sup>65</sup> *Criminal Code Amendment Act 1914* (Qld).

<sup>66</sup> *Indeterminate Sentences Act 1921* (Tas).

<sup>67</sup> *R v Lyons* [1987] 2 SCR 309 at 321 (La Forest J).

<sup>68</sup> *South Australia v O'Shea* (1987) 163 CLR 378.

<sup>69</sup> *Strong v The Queen* (2005) 224 CLR 1.

<sup>70</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Buckley v The Queen* (2006) 80 ALJR 605.

<sup>71</sup> *Chester v The Queen* (1988) 165 CLR 611; *Lowndes v The Queen* (1999) 195 CLR 665; *Thompson v The Queen* (1999) 73 ALJR 1319; *McGarry v The Queen* (2001) 207 CLR 121; *Yates v The Queen* (2013) 247 CLR 328.

<sup>72</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Buckley v The Queen* (2005) 80 ALJR 605; *Thomas v Mowbray* (2007) 233 CLR 307.

<sup>73</sup> *South Australia v O'Shea* (1987) 163 CLR 378; *Strong v The Queen* (2005) 224 CLR 1; *Lowndes v The Queen* (1999) 195 CLR 665; *Thompson v The Queen* (1999) 73 ALJR 1319; *Chester v The Queen* (1988) 165 CLR 611; *Yates v The Queen* (2013) 247 CLR 328; *McGarry v The Queen* (2001) 207 CLR 121.

<sup>74</sup> In *South Australia v O'Shea* (1987) 163 CLR 378, Mason CJ at 390, commented on the “obvious difficulties” in a procedure where the court makes an order for indefinite detention, which is then subject to subsequent administrative reviews by the executive. See also at 402 (Wilson and Toohey JJ), 410 (Brennan J). On the other hand, the appellant in *R v Moffatt* [1998] 2 VR 229 argued that a scheme requiring a review of an indefinite sentence by a judge was impermissible, on the apparent premise that the judicial function could be exercised in the criminal law only through passing of a sentence that is subject to no further judicial reconsideration other than by way of appeal; see at 253 (Hayne JA).

<sup>75</sup> *South Australia v O'Shea* (1988) 163 CLR 378 at 390 (Mason CJ), 402 (Wilson and Toohey JJ), 410 (Brennan J).

*se.* However, the Plaintiffs submit that the legal criterion which the court is to apply in making an order under the section, and the degree of satisfaction required, render the discharge of the s18 function substantially incompatible with the courts' institutional integrity.

33. In support of their argument, the Plaintiffs point to the absence of a detailed scheme under s18. However, far from being indicative of invalidity, that factor supports the validity of the scheme. By conferring the power on the Supreme and District Courts, Parliament may be taken to have intended that it be exercised independently, impartially and judicially.<sup>76</sup> Further, since the conferral of the function upon existing courts indicates an intention that the ordinary incidents of judicial process apply, s18 requires a court to apply its usual processes, while leaving to the court a wide degree of flexibility as to its procedures in determining an application under s18 CLA Act. As such, it ensures the court is able to afford procedural fairness to the parties. Moreover, it would permit the court to stay an application under s18 if it constituted an abuse of the court's processes. For the reasons set out above, whether or not the rules of evidence apply to such a proceeding, s18 permits an offender to call any relevant evidence whether to rebut the medical opinion of the practitioners, to dispute the factual basis of their reports, or otherwise to raise matters relevant to the court's discretion under s18(3)(a) CLA Act. Nothing in s18 CLA Act interferes with the offender's capacity to have the merits of their proposed indefinite detention properly considered. Questions of relevance and weight of evidence will remain for the court to determine.

20 The legal criterion in s18(3)(a) CLA Act

34. As to the test to be applied under s18(3)(a) CLA Act, the contention that it is so broad as to be devoid of content or otherwise inappropriate for judicial application cannot be sustained. As Gummow and Crennan JJ noted in *Thomas v Mowbray*:<sup>77</sup>

Statutory criteria for curial decision may be expressed in broad terms but still be susceptible of application in the exercise of judicial power...

35. Further, in *Baker v The Queen*, in rejecting an argument that the criterion of "special reasons" was devoid of meaning, McHugh, Gummow, Hayne and Heydon JJ said:<sup>78</sup>

The qualification to [the relevant section] may be attended by difficult questions of construction. Whether or not that is so, it is a qualification to which meaning not only can, but must, be given in the context of the facts advanced in any particular case as warranting the description "special reasons". ...

It is important, as Gaudron J stressed in *Sue v Hill*, in construing such a broadly expressed conferral of authority that it is to be exercised by a court, not by an administrator. There are numerous authorities rejecting submissions that the conferral of powers and discretions for

<sup>76</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [20] (Gleeson CJ).

<sup>77</sup> *Thomas v Mowbray* (2009) 233 CLR 307 at [58] (Gummow and Crennan JJ).

<sup>78</sup> *Baker v The Queen* (2004) 223 CLR 513 at [41]-[42] (McHugh, Gummow, Hayne and Heydon JJ).

exercise by imprecisely expressed criteria do deny the character of judicial power and involve the exercise of authority by recourse to non-legal norms. A well-known example is the upholding in *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* of the conferral upon a federal court of a power of disallowance of rules of industrial organisations for imposing upon members conditions that were “oppressive, unreasonable or unjust”. Subsequently, in *R v Joske; Ex parte Shop Distributive and Allied Employees’ Association*, Mason and Murphy JJ observed:

“[T]here are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised - nevertheless they have been accepted as involving the exercise of judicial power.”

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36. As the Plaintiffs’ note, neither “proper control” nor “sexual instincts” are terms that are explicitly defined. However, that does not render those concepts devoid of meaning. Nor do difficult questions of construction impugn validity.<sup>79</sup> In any event, both phrases convey readily understandable concepts, the interpretation of which is assisted by the evident purpose of the CLA Act being to prevent sexual reoffending. “Sexual instincts” may be considered to be an innate impulse to engage in sexual behaviours. “Proper control” may be considered to be the capacity to exercise control over one’s sexual impulses where acting on those impulses would result in conduct that is illegal. Proper control would include the resistance of an innate impulse to engage in sexual conduct with a minor, or with an individual without that individual’s consent. In applying the criterion under s18 CLA Act a judge will assess evidence relating to the nature of an offender’s innate sexual impulses (for example, any paedophilic tendency), as well as the offender’s capacity to exercise control over those impulses (which might be influenced by such matters as the offender’s insight into the propriety of that behaviour, and mechanisms for resisting the impulse to engage in it).
37. The predictive task required is undoubtedly a difficult one.<sup>80</sup> However, it is not an unusual or novel type of inquiry, rather it is one that courts routinely conduct, for example in predicting prospects of rehabilitation in imposing sentence.<sup>81</sup> As a number of decisions show, courts have readily applied broad criteria with respect to preventative detention regimes.<sup>82</sup>
38. No distinction can be drawn between the nature of the inquiry under s18 CLA Act and that required by the legislation considered by this Court in *Fardon v Attorney-General (Qld)*,<sup>83</sup> *Thomas v Mowbray*<sup>84</sup> and *Assistant Commissioner Condon v Pompano*.<sup>85</sup> The legislative provision considered by

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<sup>79</sup> *R v Moffatt* [1998] 2 VR 229 at 253 (Hayne JA).

<sup>80</sup> *South Australia v O’Shea* (1987) 163 CLR 378 at 390 (Mason CJ); *R v Moffatt* [1998] 2 VR 229 at 253-254 (Hayne JA).

<sup>81</sup> See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [225]-[226] (Callinan and Heydon JJ).

<sup>82</sup> *South Australia v O’Shea* (1987) 163 CLR 378; *Chester v The Queen* (1988) 165 CLR 611; *R v Moffatt* [1998] 2 VR 229; *Lowndes v The Queen* (1999) 195 CLR 665; *Thompson v The Queen* (1999) 73 ALJR 1319; *McGarry v The Queen* (2001) 207 CLR 121; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Strong v The Queen* (2005) 224 CLR 1; *Buckley v The Queen* (2006) 80 ALJR 605; *Yates v The Queen* (2013) 247 CLR 328.

<sup>83</sup> (2004) 223 CLR 575.

<sup>84</sup> (2009) 233 CLR 307.

<sup>85</sup> (2013) 87 ALJR 458.

this Court in each case required the relevant court to make an assessment of risk based on a prediction about potential future conduct.

39. Finally, the absence of specification of criteria for the court to consider in deciding whether to make an order under s18(3)(a) does not render the decision-making function incompatible with the court's institutional integrity. The relevant criteria will be supplied as a matter of statutory construction through the identification of scope, purpose and subject matter. As explained above, relevant criteria will include such matters as the degree of risk posed by the offender and the impact upon the offender's liberty of an order for indefinite detention.

#### Degree of satisfaction

- 10 40. Section 18 CLA Act is silent as to the standard of proof to be applied under the section. In the absence of specific legislative prescription, the civil standard of proof, that is, proof on the balance of probabilities applies to a s18 application, it not being a criminal prosecution. However, that does not adequately describe the degree of satisfaction that will be necessary before a court will find the matter proved. The seriousness of the allegation and the gravity of the consequences flowing from it affect the necessary degree of satisfaction. As Dixon J said in *Briginshaw v Briginshaw*:<sup>86</sup>

20 Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequence flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences.

41. Likewise, as was noted in this Court in *Chester v The Queen* in relation to s662 of the *Criminal Code* (WA):<sup>87</sup>

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

42. Accordingly, the Plaintiffs' complaint, even if it were relevant to validity, is not made out. Section 18 CLA Act does not modify the need for a high degree of satisfaction as to the

<sup>85</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 (Dixon J).

<sup>87</sup> *Chester v The Queen* (1988) 165 CLR 611 at 618-619 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ). See also: *Yates v The Queen* (2013) 247 CLR 328 at [7] (French CJ, Hayne, Crennan and Bell JJ); *McGarry v The Queen* (2001) 207 CLR 121 at [31] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [60]-[65] (Kirby J); *Buckley v The Queen* (2006) 80 ALJR 605 at [6]-[7], [40], [44] (The Court); *Lowndes v The Queen* (1999) 195 CLR 665 at [11], [24] (The Court).

offender's incapacity, nor the need for serious consideration, upon relevant, albeit unspecified, criteria as to the appropriateness of an offender's detention.<sup>88</sup>

43. Ultimately under s18 CLA Act the court undertakes an orthodox adjudicative function, assessing questions of fact and making a judgment, in accordance with the ordinary incidents of judicial process. It does so independently of any instruction, advice or wish of the legislative or executive branches of government.<sup>89</sup> Neither the legislature or executive directs or requires the court to "implement a political decision or a government policy without following ordinary judicial processes".<sup>90</sup> The judicial function is a reality. Each application is considered on the merits. An offender may seek leave to appeal.<sup>91</sup> It cannot be concluded that s18 confers a function upon the court that is incompatible with, or repugnant to its institutional integrity.

*Executive rather than curial supervision, decisional independence and a lack of effective judicial review*

Executive, rather than curial supervision of ongoing detention

44. The inability of the court to monitor the appropriateness of the offender's continuing detention is not a constitutionally objectionable feature of the scheme. It is common for court orders to operate finally and without scope for review, other than within a court's appellate structure. The finality of judicial decisions is a central tenet of the judicial system.<sup>92</sup> Just as the exercise of judicial power is spent upon the imposition of sentence upon an offender,<sup>93</sup> the exercise of the court's power under s18 CLA Act is spent upon the court disposing of the matter by the making of final orders. Thereafter, the court becomes *functus officio*. It is an inevitable feature of the ordinary judicial process that facts may change, or new facts may be discovered following the making of final orders that would have, if known, had a bearing upon the court's decision. Such changes do not call into question the validity of the court's order, based on the facts as known at that time.
45. Nor does the executive review of an offender's ongoing detention create any impermissible interaction with, or infection of, the judicial order. The scheme for executive consideration of release is closely analogous to the role of parole authorities in determining release upon the expiration of a non-parole period. In the context of parole, it has been observed in this Court

<sup>88</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [113] (Gummow J).

<sup>89</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [19]-[20] (Gleeson CJ), [34] (McHugh J), [114]-[115] (Gummow J), [198] (Hayne J), [234] (Callinan and Heydon JJ).

<sup>90</sup> *Attorney-General for the Northern Territory & Anor v Emmerson & Anor* [2014] HCA 13 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>91</sup> Subsection 668D(1)(c) of the *Criminal Code (Qld)*, s18(13)(a) CLA Act. Such appeal right has been provided since the *Criminal Amendment Act 1946* (11 George VI No 6) (Qld).

<sup>92</sup> *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Burrell v The Queen* (2008) 238 CLR 218 at [15] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).

<sup>93</sup> *Elliott v The Queen* (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

that there is a clear distinction between the judicial function in sentencing and the administrative function exercised by the parole authority.<sup>94</sup> Upon imposition of a sentence of imprisonment, responsibility for the offender passes to the executive branch.<sup>95</sup> The same may be said in relation to s18 CLA Act.

46. In undertaking its function, the Governor does not purport to act as an appellate body reassessing the merits of the court's initial determination. Rather, the Governor is required to determine whether, accepting the judicial order for detention, it is now expedient to release the offender. The Governor's decision as to whether the offender's release is expedient does not entail any assessment of the correctness or otherwise of the court's order but rather involves an enquiry whether, having regard to the circumstances at the time of consideration, the risk posed by an offender is such that it is expedient that he be released. That determination will inevitably be affected by changes in the offender's circumstances since the initial determination.<sup>96</sup>

47. In exercising its function the Governor does not in any way alter, in form or in substance, the order for detention. Indeed, the judicial order itself entails a recognition that detention will occur *during her Majesty's pleasure*. Just as an ordinary sentence is unaffected by subsequent changes in a parole regime,<sup>97</sup> the judicial order under s18 remains unaltered by executive decisions as to release. Whether or not the court in making an order under s18 CLA Act is entitled to base its decision upon an assumption about the continuity of the prospect of release under s18(5)(b) CLA Act,<sup>98</sup> no assumption or expectation of the District Court has been frustrated in this case. Consistent with the position at the time the District Court made its orders, the Plaintiffs continue to be eligible for release if the Governor considers it expedient. In addition, the Plaintiffs have the ability to apply for release on parole.

48. Accordingly, it may be seen that the Plaintiffs' reliance upon *South Australia v Totani*<sup>99</sup> is misplaced. There, it was the anterior executive determination as to the character of the organisation which infected the judicial function in making a control order and thereby interfered with the court's decisional independence.<sup>100</sup> Here, there is no blurring of the court's function in determining whether to detain an offender with the function of the executive in

<sup>94</sup> *Crumph v New South Wales* (2012) 247 CLR 1 at [28] (French CJ).

<sup>95</sup> *Elliott v The Queen* (2007) 234 CLR 38 at [5] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See also *R v O'Shea* (1982) 31 SASR 129 at 145 (Wells J).

<sup>96</sup> Just as the factors relevant to sentence may have varied at the time of consideration of release on parole: *R v Shrestha* (1991) 173 CLR 48 at 73 (Deane, Dawson and Toohey JJ).

<sup>97</sup> *Crumph v New South Wales* (2012) 247 CLR 1 at [34] (French CJ).

<sup>98</sup> See by comparison, *Crumph v New South Wales* (2012) 247 CLR 1 at [38] (French CJ), [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [70]-[71] (Heydon J).

<sup>99</sup> (2010) 242 CLR 1.

<sup>100</sup> *South Australia v Totani* (2010) 242 CLR 1 at [4], [41], [80]-[82] (French CJ), [100], [139], [149] (Gummow J), [226] (Hayne J), [428], [436] (Crennan and Bell JJ), [445], [469] (Kiefel J).

determining whether an offender ought subsequently be released from detention.<sup>101</sup> The executive function operates in acknowledgement of, and acceptance of the judicial order. As noted, the exercise of the court's power is complete upon the making of a s18 order. Accordingly, any subsequent executive action can have no impact upon the court's decisional independence.

49. To the extent that it is relevant to validity to consider what a reasonable observer would conclude as the cause of an offender's detention under the scheme,<sup>102</sup> such a reasonable observer should be imputed with a reasonable degree of knowledge of that scheme. Such a reasonable observer will be under no misconceptions as to the reason for the offender's detention. Accordingly, no impermissible "cloaking" of the executive's decision occurs.

#### Effective judicial review

50. It is clear that the decision of the Governor under s18 CLA Act is subject to judicial review by the Supreme Court of Queensland to enforce the legal limits upon the power conferred by s18(5)(b) CLA Act.<sup>103</sup> While accepting the formal reviewability of the Governor's decision, the Plaintiffs submit that the decision of the Governor under s18 CLA Act is *effectively* unexaminable by the Supreme Court because of:

- a. the absence of a requirement to give reasons and the opaque nature of the process in which Ministers decide what advice to give the Governor; and
- b. the nature of the test to be applied (namely whether release is "expedient"),

such that there is an "island of power" in the executive government's decision-making beyond the reach of the Queensland Supreme Court. There is then, so it is contended, an impermissible removal from Queensland Supreme Court of one of its defining characteristics.

51. As to the absence of a requirement to give reasons, and the opaque nature of the process giving rise to difficulties in identifying error, those factors do not affect the practical availability of judicial review. The courts have repeatedly stated that a failure on the part of an administrative decision maker to provide reasons will not immunise that decision from review.<sup>104</sup> Indeed, the absence of reasons may pique the attention of the reviewing court.<sup>105</sup>

<sup>101</sup> *Crump v New South Wales* (2012) 247 CLR 1 at [28]-[29] (French CJ).

<sup>102</sup> As to which, South Australia adopts the Defendants' submissions at [94].

<sup>103</sup> *R v Toobey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342.

<sup>104</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 663-664 (Gibbs CJ), referring to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. This passage from *Osmond* was referred to, with apparent approval, in *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Pabne* (2003) 216 CLR 212 at 224-6 (Gleeson CJ, Gummow & Heydon JJ). See also, *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J); *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at [34] (Gummow ACJ and Kiefel J); *R v Secretary for Trade and Industry ex parte Lowrho plc* [1989] 1 WLR 525 at 540 (Lord Keith);

Absent reasons and absent evidence as to the process that led to a decision, a court conducting an independent review of the material before the Governor may more easily conclude that the decision was irrational, illogical and not based on findings or inferences of fact supported by logical grounds,<sup>106</sup> that the exercise of a discretion was so unreasonable that no reasonable decision-maker could have made it,<sup>107</sup> or that the decision-maker did not give the matter proper, genuine and realistic consideration.<sup>108</sup> This is because such decisions may, on the consideration of the supporting material, display defects the existence of which a court cannot be disabused without the benefit of the decision-maker's reasons. It is a question of inference.<sup>109</sup> The capacity for the Supreme Court to review the Governor's decision in this way ensures that the limits of the Governor's powers are enforced, and consequently that there is no island of power immune from supervision and restraint.

52. As to the nature of the test to be applied, there is no doubt that the test of "expedient" is broad, in particular having regard to the vesting of the power in the Governor, which is an indicator that the Governor may have regard to considerations that are broadly political or involve assessments of the wider public interest.<sup>110</sup> However, it is not an unbridled discretion, but one that remains subject to the scope and purpose of the Act.<sup>111</sup> When those limits are breached, the Supreme Court has power to enforce them. It is an error to conflate the question of the ability to enforce the limits of power with the question of the breadth of the power. As Deane and Gaudron JJ said in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* in relation to the High Court's jurisdiction in s75(v) of the *Constitution*:<sup>112</sup>

... the right to invoke the jurisdiction [conferred by s 75(v)] is essentially an auxiliary or facultative one in the sense that the jurisdiction which the sub-section confers upon the Court is to hear and determine the designated matters in accordance with the independently existing substantive law. In other words, the right to invoke the jurisdiction will be unavailing unless the decision or conduct of the officer of the Commonwealth in respect of which the designated relief is sought is invalid or unlawful under that substantive law. The result of that is that, while the Parliament cannot withdraw or diminish the jurisdiction of the Court to hear and determine the matters which the sub-section designates including the jurisdiction to determine the critical issue

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*Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 446 (Brennan J); *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at [94] (Heydon J).

<sup>105</sup> *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [149] (Heydon J).

<sup>106</sup> *Minister for Immigration v SZMDS* (2010) 240 CLR 611.

<sup>107</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233; *R v Connell*; *Ex Parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

<sup>108</sup> *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164.

<sup>109</sup> *R v Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119-120 (Dixon CJ, Williams, Webb and Fullagar JJ).

<sup>110</sup> *South Australia v O'Shea* (1987) 163 CLR 678 at 388 (Mason CJ), 401-402 (Wilson and Toohey JJ).

<sup>111</sup> *Wilton v Queensland* (2012) 246 CLR 1 at [9]-[10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>112</sup> *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205 (Deane and Gaudron JJ); see also 178-179 (Mason CJ), 207 (Deane & Gaudron JJ), 221 (Dawson J); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [5] (Gleeson CJ); *Re Refugee Review Tribunal*; *Ex parte Aala* (2000) 204 CLR 82 at [166] (Hayne J).

of the validity or lawfulness of an impugned decision or conduct, it can, consistently with the sub-section and within the limits of the legislative powers conferred upon it by the Constitution, alter the substantive law to ensure that the impugned decision or conduct is in fact valid or lawful.

53. Here, the fact that Parliament has conferred upon the Governor a broad power to grant release where it is “expedient” does not affect the capacity of the Supreme Court to enforce the limits of that power.

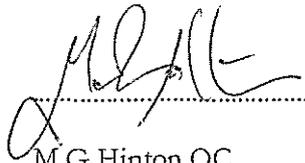
Habeas corpus

- 10 54. Finally, s18 CLA Act does not affect in any way the Supreme Court’s jurisdiction with respect to habeas corpus. The writ of habeas corpus lies to remove the body of a person detained to allow the court to examine the legality of that detention.<sup>113</sup> It would, however, be a sufficient answer to a writ of habeas corpus that the orders of the court under s18(3)(a) CLA Act established the legality of the offender’s detention.<sup>114</sup> The fact that the Governor has the power to release an offender from detention does not affect the proper characterisation of the reason for the offender’s continued detention being the court order.

**Part VI: Estimate of time for oral argument**

55. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

20 Dated 23 May 2014



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<sup>113</sup> Grady and Scotland, *The Law and Practice in Proceedings on the Crown Side of the Queen’s Bench* (1844), pp 202-203, 208.

<sup>114</sup> *Young v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262 at 285 (Kirby P), 287 (Handley JA), 291 (Powell JA).