IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B39 of 2013**

B E T W E E N

EDWARD POLLENTINE
First Plaintiff

ERROL GEORGE RADAN
Second Plaintiff

10

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

20

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

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

30 1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

Date of Document: 22 May 2014

Filed on behalf of the Attorney General for Western Australia by:

STATE SOLICITOR FOR WESTERN AUSTRALIA
LEVEL 16, WESTRALIA SQUARE
141 ST GEORGES TERRACE
PERTH WA 6000
SOLICITOR FOR THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA

Tel: (08) 9264 9642
Fax: (08) 9264 1111
Ref: 1397-14
Email: j.berson@sso.wa.gov.au

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part V of the Defendants' Submissions.

PART V: SUBMISSIONS

5. The Attorney General for Western Australia intervenes to submit that all of the bases upon which the plaintiffs contend that the impugned orders of the District Court of Queensland involved an exercise of power incompatible with the Court's role as a repository of federal jurisdiction[1], should be rejected. Section 18 of the *Criminal Law Amendment Act 1945* ('*CLAA*') was, as at the date of the orders made in respect of each plaintiff, and is, valid, and each order was and remains effectual.

Preventive detention

6. Section 18 of the *CLAA* is within a genus of legislation – providing for preventive detention – the validity of which is unquestioned[2].

7. Deane J in *Veen (No.2)*[3] observed that protection of the community "obviously warrants" preventive detention of those who "might represent a grave threat to the safety" of others if released after serving a "proper punitive sentence". There is a long history of legislation conferring on Courts power to order protective detention of those suffering from mental illness and carrying infectious diseases[4], and, as noted by Gleeson CJ in *Fardon*, this history extends to legislative empowering of Courts to order post sentence preventive detention of offenders regarded as a danger to the community[5]. Typically, such legislative schemes have involved

---

[1] *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[2] See *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 233 CLR 575 at 592 [20] (Gleeson CJ) ('*Fardon*').

[3] *Veen v The Queen (No 2)* [1988] HCA 14; (1988) 164 CLR 465 at 495 (Deane J) ('*Veen (No.2)*'). See also Wilson J at 486: "Of course, it is always open to a legislature to provide for preventive detention. The criminal laws of the States authorize such a sentence in the case of habitual criminals... There are other examples"; Gaudron J at 496: "I am fundamentally opposed to the idea that a sentence of preventive detention may be imposed in the absence of express statutory authority." Deane J's statement in *Veen (No.2)* has been referred to approvingly in: *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 88 (Dawson J) ('*Kable*'); *Fardon* [2004] HCA 46; (2004) 233 CLR 575 at 588–589 [9] (Gleeson CJ).

[4] See *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 327–328 [42] (Doyle CJ, Perry J and White J agreeing); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ), 55 (Gaudron J), referred to in *Fardon* [2004] HCA 46; (2004) 233 CLR 575 at 586 [2] (Gleeson CJ).

[5] *Fardon* [2004] HCA 46; (2004) 223 CLR 575 at 590 [13]. See also *Kable* [1996] HCA 24; (1996) 189 CLR 51 at 88 (Dawson J), 97 (Toohey J), 121 (McHugh J); *Lowndes v The Queen* [1999] HCA 29; (1999) 195 CLR 665 at 670 [11] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Fardon* [2004] HCA 46; (2004) 223 CLR 575 at 613 [83] (McHugh J); 654 [217] (Callinan and Heydon JJ); 634 [154] (Kirby J); *Buckley v The Queen* [2006] HCA 7; (2006) 80 ALJR 605 at 606 [2] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *R v Moffatt* [1998] 2 VR 229 at 234–236 (Winneke P), 251–252 (Hayne JA); *Attorney-General (Qld) v Fardon* [2003] QCA 416 at [78] (McMurdo P); *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 328 [42] (Doyle CJ, Perry J and White J agreeing), 335 [85] (Perry J). See, further, Alan Dershowitz, 'The Origins of Preventive Confinement in Anglo-American Law' (1974) 43 *University of Cincinnati Law Review* 1, 781.

orders for detention at Her Majesty's pleasure. Naturally enough, the terminology of detention at Her Majesty's pleasure connotes that the duration of detention, and release, is determined by the Executive.

8. Legislative schemes for preventive detention at His Majesty's pleasure originated with the *Criminal Lunatics Act 1800* (UK)[6]; for those found not guilty by reason of insanity of treason, murder or felony. The *Trial of Lunatics Act 1883* (UK) extended this form of detention to all indictable offences[7]. Similar legislation was enacted in Australian colonies prior to, and shortly after, federation[8].

9. In 1905 New South Wales enacted the *Habitual Criminals Act 1905* (NSW). It empowered a judge, in prescribed circumstances, to declare an offender an "habitual criminal"[9], the effect of which was that, at the expiration of sentence, the offender was detained at His Majesty's pleasure. The Act provided for release by the Executive if certain prescribed matters were established[10]. Similar legislation was subsequently enacted by other States. Such legislation in South Australia and Queensland was near identical to New South Wales, and in each, the power to release an habitual criminal was vested in the Executive[11].

10. The *Habitual Criminals and Offenders Act 1907* (Tas) provided that a person declared an habitual criminal could apply to the Supreme Court seeking a recommendation that the person be discharged, if sufficiently reformed, or for other good and sufficient reason[12]. The Court inquired and made a recommendation to the Governor[13], who had power to discharge the declared person.

11. The *Indeterminate Sentences Act 1907* (Vic) empowered a judge of the Supreme Court (or the Chairman of the Court of General Sessions of the Peace) to declare an offender an habitual criminal. So declared, the Court could order that on the expiration of sentence (or without imposing a term of imprisonment) the prisoner be detained during the Governor's pleasure in a reformatory prison[14]. The Indeterminate Sentences Board[15] had power to inquire into and recommend release to the Governor in Council.

---

[6] *Criminal Lunatics Act 1800* (39 & 40 Geo 3 c 94). The Act followed the assassination attempt on King George III by James Hadfield in 1800. For a brief history of the *Criminal Lunatics Act 1800* (UK) see Sir Owen Dixon, 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *Australian Law Journal* 255. The *Criminal Lunatics Act 1800* (UK) also included a formal procedure for confining defendants who were found to be incompetent to stand trial, and for confining insane defendants when charges against them were dropped for want of prosecution.

[7] *Trial of Lunatics Act 1883* (UK) s.2.

[8] See, eg, the following legislation as enacted: *Lunacy Act 1871* (WA) s.46; *Criminal Code Act Compilation Act 1913* (WA) s.653; *Lunacy Act 1898* (NSW) s.65 read with *Crimes Act 1900* (NSW) s.439; *Criminal Code Act 1899* (Qld) s.647; *Criminal Law Procedure Act 1859* (SA) ss.49–50; *Criminal Law Consolidation Act 1935* (SA) s.292; *Criminal Law Procedure Act 1873* (Tas) ss.44–45; *Criminal Code Act 1924* (Tas) ss.381–382; *Crimes Act 1890* (Vic) ss.458; *Crimes Act 1928* (Vic) ss.426, 451.

[9] *Habitual Criminals Act 1905* (NSW) s.7. See *Strong v The Queen* [2005] HCA 30; (2005) 224 CLR 1 at 23–25 [57]–[62] (Kirby J) considering the history of habitual criminal legislation in New South Wales.

[10] *Habitual Criminals Act 1905* (NSW) s.7.

[11] See *Habitual Criminals Amendment Act 1907* (SA); *Criminal Code Amendment Act 1914* (Qld).

[12] *Habitual Criminals and Offenders Act 1907* (Tas) s.6(2).

[13] *Habitual Criminals and Offenders Act 1907* (Tas) s.6(3).

[14] *Indeterminate Sentences Act 1907* (Vic) s.4(1).

[15] Established by the *Indeterminate Sentences Act 1907* (Vic) s.22.

12. The *Criminal Code Amendment Act 1911* (WA) inserted a regime into the *Criminal Code* (WA) by which a person, charged with a crime on indictment, could also be charged with being an habitual criminal[16]. If convicted, the Court, in addition to any punishment provided by law for the charged offence, could order "preventive detention during the Governor's pleasure or for such period as to the Court may seem advisable"[17]. The Comptroller General of Prisons was required to report annually to the Governor on the conduct and industry of persons undergoing preventive detention and their prospects and probable behaviour on release[18].

13. Although there were changes to these various schemes, all States retained indefinite preventive detention of habitual criminals in substantially similar forms until the late 1950s[19]. In 1957 New South Wales, and in 1958 Victoria, enacted legislation providing for post-sentence detention of habitual criminals up to a prescribed maximum[20]. This legislation was based on the *Criminal Justice Act 1948* (UK)[21]. Between 1957 and 1995, all States repealed legislation providing for the indefinite detention, at the Executive's pleasure, of habitual criminals[22]. Prior to repeal, legislative regimes of indefinite detention of habitual criminals were applied by State Supreme Courts, and considered by this Court, without doubts as to validity[23].

---

[16] *Criminal Code Amendment Act 1911* (WA) s.8 (inserting s.627a).
[17] *Criminal Code Amendment Act 1911* (WA) s.9 (inserting s.653b).
[18] *Criminal Code Amendment Act 1911* (WA) s.9 (inserting s.653d).
[19] See Mary Daunton-Fear, 'Habitual Criminals and the Indefinite Sentence' (1969) 3 *Adelaide Law Review* 335 at 342–352. For example, immediately prior to repeal, the relevant legislative schemes were found in the following Acts: *Crimes Act 1928* (Vic) ss.514–515; *Criminal Code Act 1924* (Tas) s.392; *Criminal Code Act 1899* (Qld) ch.64A; *Criminal Code Act Compilation Act 1913* (WA) s.661; *Criminal Law Consolidation Act 1935* (SA) ss.319–321. To the extent any changes to the schemes were substantive, they were likely to simply reflect changing community attitudes and social values, not issues of constitutional validity: *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 328 [43] (Doyle CJ, Perry J and White J agreeing).
[20] See *Habitual Criminals Act 1957* (NSW); *Crimes Act 1958* (Vic) s.537.
[21] Mary Daunton-Fear, 'Habitual Criminals and the Indefinite Sentence' (1969) 3 *Adelaide Law Review* 335 at 342, 344.
[22] See *Habitual Criminals Act 1957* (NSW) s.2(1) repealing the *Habitual Criminals Act 1905* (NSW); *Crimes Act 1957* (Vic) s.2(1) repealing the *Crimes Act 1928* (Vic) (in particular, ss.514–515); *Criminal Law Amendment Act 1990* (Tas) s.4 amending s.392 of the *Criminal Code Act 1924* (Tas) so that it provided for declarations of "dangerous persons"; *Penalties and Sentences Act 1992* (Qld) s.197(1) repealing Chapter 64A of the *Criminal Code Act 1899* (Qld); *Sentencing (Consequential Provisions) Act 1995* (WA) s.26 repealing s.661 of the *Criminal Code Compilation Act 1913* (WA); *Statutes Amendment and Repeal (Sentencing) Act 1988* (SA) s.40 repealing ss.319-328 of the *Criminal Law Consolidation Act 1935* (SA). Although this Act repealed indefinite detention at the pleasure of the Executive, the *Criminal Law (Sentencing) Act 1988* (SA) s.22 provided for the indefinite detention of habitual criminals until discharged by the Supreme Court upon application by the Crown. This form of indefinite detention was subsequently repealed by the *Criminal Law (Sentencing) (Serious Repeat Offenders) Amendment Act 2003* (SA) s.5.
[23] See *The Queen v Fahey* [1954] VLR 460 and *Jones v Vince* [1954] VLR 88 considering ss.514–515 of the *Crimes Act 1928* (Vic); *The King v Johnston* (1945) 70 CLR 561 considering the *Habitual Criminal Act 1905* (NSW); *Clinch v The Queen* (1994) 72 A Crim R 301 considering the *Criminal Code* (WA) s.661; *R v White* (1968) 122 CLR 467 considering the *Criminal Law Consolidation Act 1935-1937* (SA) s.319; *Baldry v The Queen* (Unreported, High Court of Australia, Gibbs CJ and Murphy, Wilson, Brennan JJ, 24 June 1982) considering *Criminal Code Act 1899* (Qld) s.659A; *Singh v R* (1983) 74 FLR 407 considering the *Criminal Law and Procedure Act 1978* (NT) s.24.

14. In addition to indefinite preventive detention of habitual criminals, the States have legislated to extend indefinite preventive detention to offenders convicted of serious, generally violent, crimes[24].

Serious sexual offenders

15. Section 18 of the *CLAA* is an early example of legislation dealing with the "almost intractable problem"[25] of ameliorating the risk posed by the release, after imprisonment, of serious sexual offenders. It is based on s.77a(3) of the *Criminal Law Consolidation Act 1935* (SA)[26], which finds its current form in s.23 of the *Criminal Law (Sentencing) Act 1988* (SA).

16. More recent legislation, such as the *Dangerous Sexual Offenders Act 2006* (WA), the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), the *Crimes (High Risk Offenders) Act 2006* (NSW)[27] and the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), deal differently with the same problem of preventive detention of serious and dangerous sexual offenders. The focus of s.18 of the *CLAA* is upon a characteristic of the offender – incapacity of exercising proper control over their sexual instincts. More recent schemes focus more on the risk that the release of the person poses to the community. This difference ought not to obscure that the purpose of all such legislation is the same. A person incapable of exercising proper control over their sexual instincts, who has been convicted of sexual offences, is considered by the legislature to pose an unacceptable risk of re-offending, and committing serious sexual offences, if released.

Section 18 of the *Criminal Law Amendment Act 1945*

17. The purpose of provisions such as s.18 of the *CLAA* is evident enough. Wilson and Toohey JJ in *South Australia v O'Shea*[28], in considering the relevantly identical South Australian provisions, noted that such legislation "reflect[s] a strong concern to protect the community" from those incapable of exercising proper control over their sexual instincts by preventive detention, where the possibility of injustice is excluded by periodic medical examination[29].

18. The scheme, of which s.18 of the *CLAA* is part, has changed over time. In particular, the introduction of Part 3A of the *CLAA* incorporates provisions of the

---

[24] See, eg, *Indeterminate Sentences Act 1907* (Vic) s.5(1); *Criminal Code Act 1924* (Tas) s.393; *Criminal Code Compilation Act 1913* (WA) s.662, as inserted by *Criminal Code Amendment Act 1918* (WA) s.27. As noted at fn.3, Deane J's observation in *Veen v The Queen (No 2)* [1988] HCA 14; (1988) 164 CLR 465 at 495 was in the context of indefinite detention of violent offenders. For modern equivalents of such legislation, see *Sentencing Act 1995* (WA) s.98; *Sentencing Act 1997* (Tas) pt.3 div.3; *Penalties and Sentences Act 1992* (Qld) pt.10; *Sentencing Act 1991* (Vic) pt.3 div.2 sub-div.1A; *Criminal Law (Sentencing) Act 1988* (SA) pt.2 div.3.

[25] *Fardon* [2004] HCA 46; (2004) 233 CLR 575 at 589 [12] (Gleeson CJ). See also *Veen (No.2)* [1988] HCA 14; (1988) 164 CLR 465 at 495 (Deane J).

[26] *R v Yeoman* [1946] St R Qd 165 at 168 (Douglas J).

[27] Previously called the *Crimes (Serious Sex Offenders) Act 2006* (NSW). Its present title is the result of amendment by the *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW).

[28] *South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 396 ('*O'Shea*').

[29] As will be discussed, *O'Shea* [1987] HCA 39; (1987) 163 CLR 378 did not involve a challenge to the validity of the equivalent of s.18 of the *Criminal Law Amendment Act 1945* (Qld), but its validity was assumed, seemingly without controversy.

Corrective Services Act 2006 (Qld)[30] providing for parole. The significance of this is discussed below.

19. The operation of s.18 of the *CLAA,* as it existed at the time of the orders in these matters, is to be understood having regard to the manner in which review of the plaintiff Pollentine's detention has been considered over time. This emerges from consideration of the judgments of Thomas J in *Pollentine (No.1)*[31], Moynihan J in *Pollentine (No.2)*[32] and judgments of the Court of Appeal in *Pollentine (No.3)*[33]. In short, the common law requirements of procedural fairness compel the Executive to consider release. It was considered in 1995 and not ordered. The relevance of this regime of review is discussed further below, in response to one of the plaintiffs' contentions.

The anomaly of time – and Part 3A of the *Criminal Law Amendment Act 1945*

20. Legislation providing for lengthy imprisonment and detention can change over time and, at times, time throws up oddities. *Yates*[34] is a recent example, where the setting aside of the indefinite detention order was said (by the Crown) to give rise to an anomaly of Mr Yates being released without parole supervision. In *Yates,* the statutory requirements for an indefinite detention order were not, and never had been, met[35], and so release of Mr Yates did not give rise to any such anomaly.

21. The plaintiffs contend that s.18 of the *CLAA* was invalid as at the date of the orders made, 24 July 1984 and 31 May 1984 respectively. Accordingly, the plaintiffs contend that the orders made are void and were void and ineffectual when made. It is patent that at the time of the making of the respective orders, both plaintiffs were extremely dangerous sexual predators. The offending of both was extremely serious and at the very highest end of offending[36]. That their circumstances of offending satisfied the statutory requirement of being "incapable of exercising proper control over his sexual instincts" cannot be doubted.

22. Since the plaintiffs have been detained, Part 3A of the *CLAA* has been introduced. It was inserted in 2002[37]. Part 3A applies to those detained during Her Majesty's

---

[30] Part 3A of the *Criminal Law Amendment Act 1945* (Qld) was introduced in 2002 by the *Criminal Law Amendment Act 2002* (Qld). Amendments in 2006 by the *Corrective Services Act 2006* (Qld) primarily updated references to the old *Corrective Services Act 2000* (Qld) to the 2006 Act. The only substantive amendment to the scheme since its introduction in 2002 is the substitution of a new s.18H by the *Criminal Code and Other Acts Amendment Act 2008* (Qld).

[31] *Pollentine v Attorney-General (Qld)* [1995] 2 Qd R 411 ('*Pollentine (No.1)*').

[32] *Pollentine v Attorney-General (Qld)* (1996) 88 A Crim R 146 ('*Pollentine (No.2)*').

[33] *Pollentine v Attorney-General (Qld)* [1998] 2 Qd R 82 ('*Pollentine (No.3)*'). This was an appeal from *Pollentine (No.2).*

[34] *Yates v The Queen* [2013] HCA 8; (2013) 247 CLR 328.

[35] *Yates v The Queen* [2013] HCA 8; (2013) 247 CLR 328 at 341 [35] (French CJ, Hayne, Crennan and Bell JJ): "The respondent correctly acknowledged that the nature of the offences in this case could not alone support a conclusion of the necessity for the order. The evidence respecting the applicant's antecedents, character, age, health and mental condition did not support a conclusion that he posed a constant danger of physical harm to the community."

[36] In respect of the plaintiff Radan, his sentence of 3 and not 12 years is explained solely on the basis of the reasoning of Campbell CJ and McPherson J in the appeal against sentence – *R v Radan* [1984] 2 Qd R 554 at 556–558 (SCB: 92–94).

[37] *Criminal Law Amendment Act 2002* (Qld).

pleasure under a direction under s.18(3), (4) or (6) of the *CLAA* and includes those detained prior to the introduction of Part 3A[38]. Therefore, Part 3A applies to these plaintiffs. Section 18B of the *CLAA* provides that a detainee becomes eligible for parole after 15 years detention, or 13 years if the relevant offence occurred before 1 July 1997[39]. Consequently, the plaintiffs have been eligible to apply for parole at least since Part 3A came into operation on 19 July 2002[40]. The parole board must decide any application[41] and an applicant may be given leave to appear and to make submissions[42]. Where parole is refused, written reasons must be given[43]. Decisions refusing parole or conditions of parole can be reviewed by the Supreme Court pursuant to the *Judicial Review Act 1991* (Qld)[44].

23. No doubt many would consider it anomalous that, if the plaintiffs' claims here succeed, they will both be released from detention without condition, when they have been eligible for parole since at least 19 July 2002. Furthermore, those same many might also consider it anomalous that, if released as a result of these actions, neither plaintiff will have conditions imposed upon them that could be imposed as part of release on parole. Further, to the extent that such anomalies arise, they will also arise in respect of all who have been detained in Queensland pursuant to s.18 of the *CLAA* and in South Australia pursuant to the equivalent legislation.

24. Further, since the plaintiffs have been detained Queensland has introduced the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). It was introduced in large part because the process under s.18 of the *CLAA* did not operate adequately. Section 18 of the *CLAA* did not and does not apply to those who are capable of controlling their instincts, but choose not to[45]. The same shortcoming resulted in amendment to the equivalent South Australian legislation to include not only those incapable of controlling their sexual instincts, but those unwilling to control such instincts[46].

---

[38] See *CLAA* s.18A. This is confirmed by the Explanatory Note to the *Criminal Law Amendment Bill 2002* (Qld) at 3, and by the then-Attorney-General Rod Welford when introducing Part 3A – Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2002, 376 at 378: "Amendments have been made to ensure persons detained under the *Criminal Law Amendment Act 1945* are integrated into the same processes for conditional release as those persons serving life imprisonment. These detainees can currently only be released by the Governor in Council when it is expedient to do so. This is an anomaly not applied to any other prisoners".

[39] *CLAA* ss.18B(1)(a), 18B(2), referring to the *Corrective Services Act 2006* (Qld) s.181(2)(d).

[40] Queensland, *Queensland Government Gazette*, No.52, 28 June 2002, 876; *Proclamation commencing remaining provisions 2002* (Qld) SL No.157.

[41] *Corrective Services Act 2006* (Qld) s.193.

[42] *Corrective Services Act 2006* (Qld) s.189.

[43] *Corrective Services Act 2006* (Qld) s.193(5)(a). An applicant may also request a written statement of reasons from the parole board under the *Judicial Review Act 1991* (Qld) Pt.4: *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 at 10 [13] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[44] *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 at 10 [13] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Kruck v Queensland Regional Parole Board* [2008] QCA 399; [2009] 1 Qd R 463 at 471–472 [17]–[18] (Keane JA, Holmes and Fraser JJA agreeing).

[45] Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General and Minister for Justice).

[46] *Statutes Amendment (Sentencing of Sex Offenders Act) 2005* (SA).

The plaintiffs' contentions as to invalidity

25. The plaintiffs contend that a number of features of the scheme of s.18 of the *CLAA*, at the relevant time, required an exercise of power by, or reposed a function on, the District Court of Queensland that substantially impaired its institutional integrity, such that it was incompatible with the Court's role as a repository of federal jurisdiction[47].

26. The *first* of these contentions is that the criterion of application of the s.18 process – that the offender is "incapable of exercising proper control over his sexual instincts" – is "devoid of a legal standard capable of judicial application"[48]. The *second* contention is that the standard of proof required by s.18(3)(a) is at an "insufficiently low standard"[49]. The *third* is that the scheme of the legislation does not provide for "regular supervision of the order" or setting aside of the order if the offender ceases to be incapable of exercising proper control over his sexual instincts[50]. *Fourth*, "revocation" of any order is practically a matter for the Executive and the different roles of the Courts and Executive in the overall process are entangled to a degree that what is, in substance, an exercise of executive power is cloaked by judicial involvement[51]. As the plaintiffs' submissions reveal, there is a degree of overlap between the third and fourth contentions.

27. All of these contentions should be rejected.

***First ground* – the criterion of application – incapable of exercising proper control over his sexual instincts**

28. To understand this contention requires further understanding of the process provided for, at the relevant time, by s.18 of the *CLAA*. Section 18(1)(a) provided to a judge a power to order that two medical practitioners "inquire as to the medical condition of the offender and in particular whether his mental condition is such that he is incapable of exercising proper control over his sexual instincts". Section 18(2) prescribes mandatory conditions of this inquiry by the medical practitioners. Section 18(3)(a) requires that the medical practitioners report to the judge after inquiring, and by s.18(2) this report is to be given and tested on oath. Section 18(3)(a) requires the medical practitioners to express an opinion, based on their assessment of the person's mental condition, whether, by reason of it, he is incapable of exercising proper control over his sexual instincts. It cannot be doubted that s.18(3)(a) reposes a discretion on the judge to make or refuse an order for detention if the medical practitioners report incapability[52].

---

[47] *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[48] Plaintiffs' Submission at [31(a)], [36].
[49] Plaintiffs' Submission at [31(b)], [39]–[41].
[50] Plaintiffs' Submission at [31(c)], [42]–[47].
[51] Plaintiffs' Submission at [31(d)], [31(e)].
[52] See, by way of analogy, *McGarry v The Queen* [2001] HCA 62; (2001) 207 CLR 121 at 126 [7] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), in considering s.98 of the *Sentencing Act 1995* (WA): "Further, and no less importantly, s 98(1) does not oblige a sentencing judge to make an order for indefinite imprisonment in every case in which the conditions specified in that sub-section are met. Nor does s 98(1) oblige a sentencing judge to make such an order if satisfied of the matter specified in

29. The plaintiffs do not appear to contend[53] that medical practitioners who are directed to inquire in terms of s.18(1)(a) could not form an expert opinion, having regard to the mental condition of the offender, as to whether he is incapable of exercising proper control over his sexual instincts. The contention is not that medical practitioners would not be capable of forming an opinion. Rather, the contention is, to the effect, that the concepts of "proper control" and "sexual instincts" are seemingly so imprecise and vague as to be meaningless and incapable of application by a Court.

30. This contention should be rejected for the following reasons.

31. *First*, the contention is inconsistent with the reasoning of Wilson, Toohey and Deane JJ in *South Australia v O'Shea*[54], in considering the South Australian legislation equivalent to s.18 of the *CLAA*. Wilson and Toohey JJ, in the course of noting difficulties with understanding the legislative scheme of which the formulation – of being "incapable of exercising proper control over his sexual instincts" – was part, referred to the formulation without comment about its uncertainty or difficulty[55]. Deane J is to be understood likewise[56].

32. *Second*, the meaning of the words in the formulation have been considered by Courts, and given clear legal meaning. In particular, regard should be had to the judgments of King CJ, Legoe and Johnston JJ in *The Queen v Kiltie*[57] in respect of the words "mental condition" and "proper control over sexual instincts". It can be expected that any Court would approach the task in the manner explained by Doyle CJ in *R v England*[58], by Bleby J in *R v England*[59], by Wells J in *R v O'Shea*[60] and by Gray J in *R v Wichen*[61]. In substance:

> By reason of his mental condition the offender is incapable of not engaging in unlawful sexual activity (or incapable of not committing sexual crimes).

33. This meaning is plainly "capable of judicial application"[62] and has been applied in Queensland and South Australia for decades.

34. *Third*, the formulation is no less precise than others commonly the subject of judicial decision. In the similar process of making orders under the *Dangerous Sexual Offenders Act 2006* (WA), the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and the *Crimes (High Risk Offenders) Act 2006* (NSW) and the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), the Court is required to determine whether there is an "unacceptable risk that the prisoner will commit a

---

sub-s (2)... Even if satisfied of that fact, a sentencing judge has a discretion in deciding whether or not to make an order for indefinite imprisonment."

[53] See Plaintiffs' Submission at [36].

[54] *O'Shea* [1987] HCA 39; (1987) 163 CLR 378.

[55] *O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 396.

[56] *O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 413.

[57] *The Queen v Kiltie* (1986) 41 SASR 52 at 62 (King CJ), 63–64 (Legoe J), 70 (Johnston J).

[58] *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 330 [55] (Perry J and White J agreeing).

[59] *R v England* [2004] SASC 20; (2004) 87 SASR 411 at 423–424 [56]–[60].

[60] *R v O'Shea* (1982) 31 SASR 129 at 140 (Walters J and Matheson J agreeing).

[61] *R v Wichen* [2005] SASC 323; (2005) 92 SASR 528 at 535–540 [34]–[51].

[62] Contra Plaintiffs' Submission at [31(a)], [36].

serious sexual offence" if released from custody. Although s.13(4) of the Queensland Act (considered in *Fardon*) contains mandatory matters to which the Court must have regard in determining whether there is an "unacceptable risk that the prisoner will commit a serious sexual offence" if released, these mandatory requirements include; whether or not there is any pattern of offending behaviour on the part of the prisoner[63]; the risk that the prisoner will commit another serious sexual offence if released into the community[64]; the need to protect members of the community from that risk[65], any other relevant matter[66]. None of these are less imprecise than the impugned words in s.18. It is difficult to contend that s.18 of the *CLAA* is more difficult to construe and apply than these matters and (say) the notion of "determination of native title" in the *Native Title Act 1993* (Cth).

Second ground **– standard of proof**

35. The reasoning in *Chester v The Queen*[67] in respect of (the similar) s.662 of the *Criminal Code* (WA)[68] would apply to s.18 of the *CLAA* and, accordingly, there is no substance to this ground.

Third ground **– absence of judicial supervision or subsequent review**

36. This contention again requires an understanding of the process prescribed by s.18 of the *CLAA*.

37. The first matter is that an order for indefinite detention under s.18 of the *CLAA* is, and has always been, a sentence for the purpose of s.668 of the *Criminal Code* (Qld)[69]. It could be appealed[70], and the plaintiff Radan did appeal it[71].

38. The second matter is that the s.18 regime, as it existed at the time of the orders, provided for quarterly examinations by a medical practitioner of the mental condition of a detainee, and a power of the Governor in Council to release a detainee if expedient to do so, upon receipt of reports from two medical practitioners (ss.18(5)(b) and 18(8)).

---

[63] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s.13(4)(d).
[64] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s.13(4)(h).
[65] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s.13(4)(i).
[66] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s.13(4)(j).
[67] [1988] HCA 62; (1988) 165 CLR 611 at 619 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ). See also *Buckley v The Queen* [2006] HCA 7; (2006) 80 ALJR 605 at 607 [6]–[7]; *Yates v The Queen* [2013] HCA 8; (2013) 247 CLR 328 at 333 [7] (French CJ, Hayne, Crennan and Bell JJ); *R v England* [2004] SASC 20; (2004) 87 SASR 411 at 423–424 [56] (Bleby J); *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 326 [30] (Doyle CJ, Perry J and White J agreeing).
[68] In effect that the Court "may, if it thinks fit, having regard to the antecedents, character, age, health or mental condition of the person convicted, the nature of the offence or any special circumstances of the case" direct the person's detention at the Governor's pleasure. Section 662 of the *Criminal Code* (WA) was repealed and its equivalent can now be found in s.98 of the *Sentencing Act 1995* (WA), considered in *McGarry v The Queen* [2001] HCA 62; (2001) 207 CLR 121.
[69] *CLAA* s.18(13). See also *R v Waghorn* [1993] 1 Qd R 563 at 566–567 (Pincus JA, McPherson JA agreeing). In relation to the equivalent South Australian legislation, see *R v England* [2004] SASC 20; (2004) 87 SASR 411 at 415 [13]–[15] (Bleby J); *R v Ainsworth* [2008] SASC 67; (2008) 100 SASR 238 at 249 [32]–[33] (White J, Doyle CJ agreeing).
[70] *R v Waghorn* [1993] 1 Qd R 563. See also *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 327 [40] (Doyle CJ, Perry J and White J agreeing).
[71] *R v Radan* [1984] 2 Qd R 554 (SCB: 88).

39. As alluded to above, these processes are best understood having regard to the manner in which review of the plaintiff Pollentine's detention was considered by the Supreme Court of Queensland in *Pollentine (No.1)*[72], *Pollentine (No.2)*[73] and the Queensland Court of Appeal in *Pollentine (No.3)*[74].

40. As observed in various of the judgments in this trilogy[75], a shortcoming in the process for considering release might be thought to be the absence of a clear means of initiating the process by which the Governor considers release of a detainee. This statutory lacunae was filled by the common law requirements of procedural fairness, as applied by Thomas J in *Pollentine (No.1)*[76]. A request for release by a detainee, with material that would justify consideration of release, requires the Attorney-General to bring the request to the Governor in Council. Any jurisdictional error by the Governor in Council in considering release can be reviewed by the Supreme Court. It cannot be doubted that a failure by the Attorney-General to act in accord with the decision of Thomas J in *Pollentine (No.1)* would give rise to a right of a detainee to seek *mandamus* to compel consideration of his or her release, though Moynihan J in *Pollentine (No.2)* got to the same result by the more direct means of simply directing the Attorney-General[77].

41. As these events in respect of the plaintiff Pollentine's detention show, a process of review of indefinite detention, by the Executive, has always existed, and it is subject to judicial review powers of the Supreme Court of Queensland[78]. In this respect, the process of s.18 of the *CLAA* is unremarkable and brings to mind the observation of Wheeler JA in *McGarry*[79], in relation to s.98 of the *Sentencing Act 1995* (WA). Under s.98, a Court could impose a sentence of indefinite imprisonment and release (or not) was for the Executive[80]. In respect of this regime, her Honour observed that; "it has long been accepted in Australian

---

[72] [1995] 2 Qd R 411.
[73] (1996) 88 A Crim R 146.
[74] [1998] 2 Qd R 82.
[75] See in particular Thomas J in *Pollentine (No.1)* [1995] 2 Qd R 411 at 415 and Moynihan J in *Pollentine (No.2)* (1996) 88 A Crim R 146 at 146.
[76] See *Pollentine (No.1)* [1995] 2 Qd R 511 at 417:

> What is the content of the procedural fairness that must be implied in this particular process? This of course depends upon the particular statutory framework (*Kioa* at 601, 612–614 and 633). Having regard to the public nature of the duty entrusted to the Executive Council and the extreme breadth of the ultimate question (expediency of release) it can be seen as a process far removed from conventional adversarial notions. It seems to me that nothing more than the fundamental requirements of procedural fairness ought to be implied in relation to procedure which precedes the determination.
>
> On this basis I would consider that a request from a prisoner, particularly when evidence exists to justify consideration of the question of release, places the Attorney-General and Minister for Justice under the duty of bringing it to the Governor in Council. In such an event, procedural fairness would demand that the prisoner be made privy to the material which was intended to be placed before the decision-making body, and that he be afforded the opportunity of presenting material of his own prior to the making of the decision. This does not mean that he should be permitted to attend for the purposes of arguing a case, but rather that he be given the opportunity to present material such as evidence and submissions in writing.

[77] *Pollentine (No.2)* (1996) 88 A Crim R 146 at 147.
[78] The plaintiff Radan has never sought to invoke the release process; see Plaintiffs' Submissions at [17].
[79] *McGarry v Western Australia* [2005] WASCA 252; (2005) 31 WAR 69.
[80] *McGarry v Western Australia* [2005] WASCA 252; (2005) 31 WAR 69 at 78 [33].

jurisdictions that the function of determining whether an offender has reached a point at which it is appropriate to release him or her into the community, is one which is properly exercisable by the Executive"[81].

42. If it is the plaintiffs' contention that that s.18 of the *CLAA* is invalid because it does not provide for a power in the Court to set aside an order if the circumstances of the offender change, such a contention should be rejected. The process under s.18 is similar to that of the conviction, imprisonment and parole of any offender. The respective roles of the Court and Executive in s.18 are clear and identical to those of Courts and the Executive in statutory preventive detention regimes that have operated in Australian States since before federation. In all, the power to release a detainee was reposed in the Executive[82].

Fourth ground **– entanglement**

43. The roles of the Courts and Executive under s.18 of the *CLAA* are separate and distinct and clearly so.

44. The procedure leading to a declaration and direction by the Court under s.18(3) of the *CLAA* is consistent with the normal procedures associated with the sentencing of offenders. There is no reason to think that any of the customary rights of the offender in the sentencing process, such as the right to participate in the hearing, the right to cross-examine, and the right to challenge the State's case are excluded[83]. Indeed, s.18(3)(a) expressly provides a right of cross examination of the medical practitioners. Patently, the Court's decision-making process is not controlled or influenced by the Executive government or by legislative instruction[84].

45. The role of the Executive, prior to the insertion of Part 3A, and since, is clear and was and is a power customarily and uncontroversially exercised by the Executive. Prior to the insertion of Part 3A, any decision to release was vested in the Governor in Council by s.18(5)(b). The vesting of such power in the Executive is unremarkable, and has existed in similar legislation, and subject to judicial review[85].

46. A similar (*Kable* type) argument about conflation, or entanglement or confusion was considered in *McGarry*[86], where, as noted above, s.98 of the *Sentencing Act 1995* (WA) provided that a Court could impose a sentence of indefinite imprisonment and release (or not) was for the Executive. As Wheeler JA (with whom Roberts-Smith and McLure JJA agreed) observed; on the face of the legislation, sentencing to indefinite imprisonment was clearly reposed in the Court and release or not release in the Executive and such transparency and clarity

---

[81] *McGarry v Western Australia* [2005] WASCA 252; (2005) 31 WAR 69 at 79 [36]. See also *R v Moffatt* [1998] 2 VR 229 at 252 (Hayne JA).
[82] See [7]–[12] above.
[83] *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 327 [37] (Doyle CJ, Perry J and White J agreeing).
[84] *R v England* [2004] SASC 254; (2004) 89 SASR 316 at 327 [38], 330 [55] (Doyle CJ, Perry J and White J agreeing).
[85] See [7]–[12], [19], [40]–[41] above.
[86] *McGarry v Western Australia* [2005] WASC 252; (2005) 31 WAR 69.

rendered it difficult to comprehend how a reasonably well informed member of the public could confuse or conflate the separate roles of the Court and Executive[87].

47. The separate roles of the Court and the Executive under s.18 of the *CLAA* are clear. A more untangled process is hard to imagine.

PART VI: LENGTH OF ORAL ARGUMENT

48. It is estimated that the oral argument for the Attorney General for Western Australia will take 20 minutes.

10

Dated: 22 May 2014

G R Donaldson SC
Solicitor General for Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385
Email: grant.donaldson@sg.wa.gov.au

J D Berson
State Solicitor's Office
Telephone: (08) 9264 9642
Facsimile: (08) 9264 1111
Email: j.berson@sso.wa.gov.au

[87] *McGarry v Western Australia* [2005] WASCA 252; (2005) 31 WAR 69 at 78 [33].