IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B39 of 2013

BETWEEN:

EDWARD POLLENTINE
First Plaintiff

ERROL GEORGE RADAN
Second Plaintiff

and

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

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

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

ANNOTATED SUBMISSIONS ON BEHALF OF THE DEFENDANTS

I. CERTIFICATION

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

II. THE ISSUES

2. The First, Second and Third Defendants ('the Defendants') agree with the Plaintiff's identification of the issue.

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Filed on behalf of: Attorney-General for the State of Queensland

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III. SECTION 78B NOTICES

3. The Plaintiffs have given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).[1] The Defendants do not consider that any further notice is required.

IV. FACTS

4. The principal facts are set out at paragraphs 4 to 14 of the case stated.[2]

5. The following facts are also relevant.

6. On 4 May 1984, the Second Plaintiff's counsel submitted to Judge McLoughlin of the District Court that his client had a history of committing sexual offences against young girls dating to 1953.[3] He submitted that his Honour should direct medical practitioners to examine the Second Plaintiff's mental condition, particularly whether the Second Plaintiff was capable of exercising control over his sexual instincts. His Honour made the direction sought.[4]

7. On 31 May 1984, the Second Plaintiff's counsel further submitted that the court's discretion to make an order under s 18 of the *Criminal Law Amendment Act 1945* (Qld) ('the CLAA') arose and that the Second Plaintiff was highly likely to re-offend without treatment.[5]

V. APPLICABLE LEGISLATION

8. The applicable legislation is:

   a. The *Constitution*, Chapter III; and

   b. *Criminal Law Amendment Act 1945* (Qld) ('CLAA'), ss 2A, 17, 18.[6]

VI. ARGUMENT

(i) *Preliminary point: the context in which the statutory scheme must be considered*

9. The constitutional challenge to the statutory scheme constituted by section 18 of the CLAA needs to be considered in the context of longstanding principles about parliamentary competence to create offences, to nominate the penalties for them and to legislate for the protection of the community. When that is done, it is

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1 SCB 12-13.
2 SCB 21-22.
3 SCB 46, lines 14 to 36.
4 SCB 48, lines 7 to 20.
5 SCB 78-79.
6 9 Geo 6 No. 11, amended by *Criminal Law Amendment Act 1946* 11 Geo 6, No. 6. This was the version in force in 1984. For convenience, references in the submissions will be to this version of the legislation unless otherwise stated.

apparent that the involvement of Queensland courts in making orders under s 18 of the CLAA is consistent with the independent exercise of judicial power, just as it is consistent with the judicial imposition of other sentences in respect of criminal matters.

10. First, the separation of powers at the Commonwealth level contemplates that the Parliament will pass laws creating offences, the Executive will enforce them, and the judiciary will determine whether those laws have been breached, and if so, impose the penalty which the legislature has nominated.

11. Secondly, it is also within the competence of State Parliament—which is not bound by a separation of powers—to determine what will constitute a criminal offence, and to nominate the penalty for it. A State Parliament, like the Commonwealth Parliament, can therefore impose a penalty of capital punishment or mandatory life imprisonment for any crime.[7] As that is so, a State Parliament can legislate for some lesser sanction, such as detention at her Majesty's pleasure.[8] In that context, s 18 of the CLAA may be seen as a nomination of a sentencing alternative within the range of sentencing alternatives that the Queensland Parliament was competent to impose.

12. Thirdly, it is a ubiquitous feature of criminal laws and their penalties, and consistent with the separation of judicial power at the Commonwealth level, that once a court determines whether the criminal law has been broken, and determines the penalty that it will impose, the court's function is then over.[9] In almost all cases it will then be left to the Executive, and the application of legislation governing matters such as parole, to determine whether the full amount of the penalty imposed by the court will be served or not. The court will have no further involvement in that determination. Later involvement of a court may result from, for example, the judicial review of a refusal of parole, but that is a different matter. It is not a matter of recalling, or acting under, the original jurisdiction to sentence. Once this is recognised, s 18 of the CLAA operates in an unexceptional manner. The court imposes its sentence, in this case including detention at her Majesty's pleasure; the Executive carries out that sentence; and the Executive has a role in determining whether within limits of the sentence imposed by the court a convicted person might be released.

13. Fourthly, a State Parliament (like the Commonwealth Parliament, within its sphere of powers) has the competence to legislate in respect of mental health (or condition), both for the protection of somebody suffering an impairment to his or her mental condition who has committed an offence and for the protection of the community against a person whose mental condition is so afflicted. That being so, there can be no objection in principle to the legislature addressing the conviction of

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7 *Palling v Corfield* (1970) 123 CLR 52; *Magaming v The Queen* (2013) 87 ALJR 1060.

8 *Veen v The Queen (No.2)* (1988) 164 CLR 465 at 486 (Wilson J); *R v Moffatt* [1998] 2 VR 229 at 251 (Hayne JA, as his Honour then was) (on indeterminate sentences).

9 *Elliott v The Queen* (2007) 234 CLR 38 at [5]; *Crump v New South Wales* (2012) 247 CLR 1 at [28] (French CJ), [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

a person who may be suffering from some impairment of mental condition in respect of his or her criminal conduct and at the same time responding in the interest of the community to that impairment of mental condition. Section 18, on any view, addresses both these matters.

14. It is now necessary to consider the particular aspects of the scheme established by s 18 and the specific arguments regarding its validity.

10 (ii) ***The statutory scheme***

15. The main elements of the statutory scheme are these.[10]

16. First, under s 18(1)(a) of the CLAA, where a person has been found guilty on indictment of an offence of a sexual nature committed upon or in relation to a child under the age of 17, the judge may at his discretion direct that two or more legally qualified medical practitioners 'inquire as to the mental 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'. In context, the words 'incapable of proper control over his sexual instincts' refer to the absence of that degree of self-control that would prevent a person from committing an offence of a sexual nature.[11]

17. Secondly, under s 18(2), the medical practitioners must conduct the inquiry by personal examination and observation of the offender and by reference to the depositions and other records relating to the offender as they think necessary. They must then give their report on oath to the judge.

18. Thirdly, under s 18(3)(a), if the medical practitioners report to the judge that the offender is incapable of exercising proper control over his sexual instincts, the judge 'may, either in addition to or in lieu of imposing any other sentence where the offender was convicted on indictment...declare that the offender is so incapable and direct that he be detained in an institution during his Majesty's pleasure'. The terms of s 18(3)(a) suggest that the power only arises where the medical practitioners are unanimous about the incapacity of the offender to exercise proper control.[12]

19. The power conferred on the court by s 18(3)(a) is also discretionary.[13] The words 'may...declare...and direct' suggest this.[14] The fact that a declaration can be made

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10 An essential step in determining the validity of legislation is to construe it: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ).

11 *R v Kiltie* (1986) 41 SASR 52 at 65 (Legoe J). The concept of an 'incapacity' to exercise proper control over sexual instincts means more than an unwillingness or failure to exercise that control: *R v Kiltie* (1986) 41 SASR 52 at 62 (King CJ); *R v Waghorn* [1992] 1 Qd R 563 at 566 (McPherson JA).

12 That is how s 77a of the *Criminal Law Consolidation Act 1935* (SA), the equivalent provision in South Australia, was construed: *R v Kiltie* (1986) 41 SASR 52 at 62 (King CJ), 65 (Legoe J).

13 The Plaintiffs admit this: see Plaintiffs' submissions, footnote 50.

'in addition to or in lieu of imposing any other sentence' reinforces this construction, since a fixed term of imprisonment may preclude any prospect of an offender committing an offence of a sexual nature.[15] In addition, given the impact on a person's liberty, the principle of legality[16] favours a construction that does not oblige a court to make any order under s 18(3)(a) even if the court considers that the person is incapable of exercising proper control over his sexual instincts.

20. Fourthly, the proviso to s 18(3)(a) gives the offender certain safeguards. He or she is entitled to cross-examine the medical practitioners in relation to their reports and to call evidence in rebuttal. Furthermore, the judge cannot make an order under s 18(3)(a) unless the judge considers the matters reported by the practitioners regarding incapacity to be 'proved'.[17] However, as the incapacity of the offender to exercise proper control is not a readily observable fact and as the process of being satisfied about that incapacity is not readily amenable to proof beyond reasonable doubt, the court must be satisfied on the balance of probabilities.[18]

21. Fifthly, under s 18(5), a person in respect of whom a direction is given under s 18(3)(a) must be detained and must not be released until the Governor in Council is satisfied on the report of two medical practitioners that it is expedient to release the person. Given the presence of s 18(8), the reference to the report should be taken to be reports prepared in accordance with that provision.

22. Sixthly, under s 18(8), a person detained under s 18 must be examined at least once every three months by the Director of Mental Hygiene or by some legally qualified medical practitioner appointed by the Director.

23. Seventhly, where a judge orders detention during Her Majesty's pleasure in addition to imprisonment the detention commenced upon the expiration of the term of imprisonment. In other cases, it commences upon the making of the order.

24. Finally, under s 18(13), a person directed to be detained under s 18 is deemed to be person convicted on indictment and the direction is deemed to be a sentence of the court for the purpose of Chapter 67 of the *Criminal Code* (Qld). Consequently, the offender can appeal or seek leave to appeal just as he or she could a sentence.

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14 Elsewhere in s 18, the word 'shall' denotes an obligation, whether imposed on the court or another entity: see, for example, ss 18(2) ('the medical practitioners shall conduct the inquiry...and shall give their report on oath'); 18(3)(a) ('no such order shall be made unless the judge shall consider the matters reported to be proved'); 18(4) ('[u]pon such application the medical practitioners shall report to the judge upon oath and the prisoner shall be entitled to cross-examine').

15 *R v O'Shea* (1982) 31 SASR 129 at 140 (Wells J). See also *Buckley v The Queen* (2006) 80 ALJR 605 at [7].

16 See *Momcilovic v The Queen* (2011) 245 CLR 1 at [43] (French CJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86]-[87] (Hayne and Bell JJ), [158] (Kiefel J).

17 The 'matters' in s 18(3)(a) refer principally if not exclusively to the matter whether the offender is incapable of exercising control over his sexual instincts: *R v Waghorn* [1993] 1 Qd R 563 at 565 (McPherson JA, with whom White J agreed).

18 *R v England* (2004) 87 SASR 411 at [53]-[56] (Bleby J).

25. Furthermore, for the purpose of Chapter 67 of the *Criminal Code* (Qld), the Attorney-General can appeal a refusal to direct that a person be detained in the same way as he or she could appeal a sentence.[19]

(iii) ***Preventative detention regimes: a brief survey***

26. Legislative schemes for preventive detention of persons who are regarded as a danger to the community have a long history.[20] Many of those schemes required or authorised people to be detained indefinitely by the Executive after a judicial process.

27. An early example of such legislation concerned the defence of insanity. In May 1800, James Hadfield fired a pistol at George III as the King was entering his box at the Drury Lane Theatre. He was tried and was found by the jury on his trial to be 'not guilty, it appearing to us that he was under the influence of insanity when the act was committed'. Shortly before that verdict, however, the presiding judge, Lord Kenyon, had observed:[21]

> [T]he prisoner, for his own sake, and for the sake of society at large, must not be discharged; for this is a case which concerns every man of every station, from the king upon the throne to the beggar at the gate; people of both sexes and of all ages may, in an unfortunate frantic hour, fall a sacrifice to this man, who is not under the guidance of sound reason; and it is absolutely necessary for the safety of society that he should be properly disposed of...

28. Hadfield was detained in custody after his acquittal, although there was no clear legal authority for doing so. In July 1800, the Act, 38 & 40 Geo III, c 94 was enacted to remedy the deficiency with retrospective effect. The preamble to the Act recited that it may be dangerous to permit persons acquitted on charges of high treason, murder or felony by reason of insanity to go at large. Section 1 of the Act then provided:[22]

> That in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be

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19 Other legislation has also regulated an offender's capacity to obtain parole or to have leave of absence. An offender who was directed to be detained under s 18 in addition to serving a term of imprisonment might have been eligible for parole under s 53(1)(c) of the *Offenders' Probation and Parole Act 1980* (Qld). In addition, from 1987 until 2002, the Governor in Council could have granted leave of absence, subject to terms and conditions, to an person detained under s 18 of the CLAA: s 46A of the *Mental Health Act 1974* (Qld). Offenders detained under s 18 (and also sentenced to a fixed term) have been able to apply for parole under various versions of the *Corrective Services Act* since 1988. Those detained under s 18 of the CLAA without a fixed term have had access to parole under various versions of the *Corrective Services Act* from 2002.

20 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ('*Fardon*') at [13] (Gleeson CJ).

21 *The Trial of James Hadfield,* Howell's State Trials, Vol 27 38-40 Geo III, 1798-1800, pp 1354-1355.

22 Section 3 of the Act also provided for preventive detention of those who were 'discovered and apprehended under circumstances that denote[d] a derangement of mind, and a purpose of committing some crime, for which, if committed, such person would be liable to be indicted'.

> acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be had, shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until His Majesty's pleasure shall be known; and it shall thereupon be lawful for His Majesty to give such order for the safe custody of such person, during his pleasure, in such place and in such manner as to His Majesty shall seem fit ....

29. Later legislation authorised a sentencing court to make declarations that had the effect of ensuring that certain persons could be detained at the pleasure of the Executive. Section 3 of The *Habitual Criminals Act 1905* (NSW), for example, provided for a judge to declare that a person convicted of specified offences on two or more occasions was a habitual criminal. Section 5 then relevantly provided that every habitual criminal, at the expiration of his sentence, was to be detained during His Majesty's pleasure in some place set apart for that purpose by the Governor.

30. The Commonwealth and the States soon enacted similar provisions,[23] as did New Zealand.[24] In the case of at least three Australian jurisdictions, the provisions expressly authorised the courts to direct that the habitual offenders be detained at the pleasure of the King's representative.[25]

31. Still later State legislation provided for indefinite sentences in slightly different circumstances. In simple terms, s 7 of the *Criminal Law Amendment Act 1917* (SA) required the trial court to make a declaration against a person who had been convicted of a sexual offence and whom at least two medical practitioners (after being directed to do so by the court) had reported to be suffering from venereal disease. Upon the expiration of the person's sentence, the person subject to the declaration was to be detained during His Majesty's pleasure until the Governor was satisfied that the person was no longer suffering from venereal disease and directed the person's release.

32. Section 8 of the same Act provided for that regime to apply, *mutatis mutandis*, to a person convicted of a sexual offence where there was reason to suspect that the mental condition of the person was such that he was incapable of exercising proper control over his sexual instincts.

33. Section 662 of the *Criminal Code* (WA), which was introduced in 1918,[26] provided:

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23 *Crimes Act 1914* (Cth), s 17; *Indeterminate Sentences Act 1907* (Vic), ss 4, 5, 6; *Criminal Code* (WA), ss 661, 662, 663; *Habitual Criminals Amendment Act 1907* (SA), ss 3, 4, 5; *Habitual Criminals and Offenders Act 1907* (Tas), ss 2 to 7; Criminal Code 1899 (Qld), ss 659A to 659D.

24 *Habitual Criminals and Offenders Act 1906* (NZ).

25 *Crimes Act 1914* (Cth), s 17; *Indeterminate Sentences Act 1907* (Vic), ss 4, 5; *Criminal Code* (WA), ss 661, 662, 663.

26 *Yates v The Queen* (2013) 247 CLR 328 at [6].

> When any person is convicted of any indictable offence, (whether such person has been previously convicted of any indictable offence or not), the court before which such person is convicted 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:
>
> (a) direct that on the expiration of the term of imprisonment then imposed upon him he be detained during the Governor's pleasure; or,
>
> (b) without imposing any term of imprisonment upon him sentence him to be detained during the Governor's pleasure.

34. Section 77a of the *Criminal Law Consolidation Act 1935* (SA), which commenced in 1940, provided for detention by a sentencing court of those who had been found guilty of offences of a sexual nature. It evidently served as the model for s 18 of the CLAA. Subsection 77a(1) provided:

> (1) In any case where a person has been found guilty of an offence of a sexual nature the court or judge sitting for the trial of that offence may at its or his discretion direct that two or more legally qualified medical practitioners named by the court or judge, inquire as to the mental 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.

35. The remainder of the section provided for reports by the medical practitioners and the making of a declaration and a direction in terms like those in s 18 of the CLAA.

36. As this brief survey demonstrates, laws attaching to the sentencing process regimes for preventive detention at the pleasure of the Executive are hardly novel.[27] They have applied by the courts in Australia for many decades.

37. The significance of these matters to the Plaintiffs' arguments based on the principle established in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')[28] will become apparent shortly.

(iv) *The Kable principle*

38. The *Kable* principle invalidates State legislation that would deprive courts of their 'institutional integrity'. That term refers to those essential qualities that distinguish

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[27] In the United Kingdom and elsewhere in the Commonwealth, laws that are not concerned with preventive detention have on occasions also provided for detention at the pleasure of the Executive: see, for example, *Children Act 1908* (UK), s 103; *Children and Young Persons Act 1933* (UK), s 53; *Crimes Act 1961* (NZ), s 16. The United Kingdom legislation was considered in *R v Secretary of State for the Home Department; ex parte Venables* [1998] AC 407.

[28] (1996) 189 CLR 51.

courts from other bodies.[29] The formulation of the *Kable* principle in terms of defining characteristics does not, however, imply that the States cannot authorise or require courts to depart from the usual aspects of the judicial process or the methods and standards that have traditionally characterised judicial power. That is so for several reasons.

39. First, the *Kable* principle is concerned with ensuring that State courts remain suitable repositories for federal jurisdiction.[30] That is its rationale. Departures from the usual judicial process and the historical methods and standards of courts are only significant if they undermine the suitability of State courts to exercise federal jurisdiction. As McHugh J explained in *Fardon*:[31]

> State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid *only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law*. That conclusion is likely to be reached only when *other provisions of the legislation* or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government.

40. Secondly, the Constitution does not impose a separation of powers on the States.[32] That was a deliberate choice of the framers. To base invalidity on mere departures from the ordinary judicial process and traditional methods and standards would in practice subject State courts to the same kinds of restrictions that have been imposed on the conferral of functions on federal courts which are subject to a strict separation of judicial power. It would also inhibit the capacity of the States, as laboratories of democracy in which experiments may be conducted,[33] to experiment with their court systems. Consistent with these considerations, the Court has emphasised that the notions of repugnancy to and incompatibility with institutional integrity 'are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth'.[34]

41. Finally, the authorities accept that significant departures from ordinary judicial processes are permissible, even with regard to procedural fairness and the open court principle.[35] In *Pompano*, for example, the Court accepted that the Supreme

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29 *Forge v Australian Securities and Investments Commission*, (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ). See also *Wainohu v New South Wales* ('*Wainohu*') (2011) 243 CLR 181 at [44] (French and Kiefel JJ).

30 *Baker v The Queen* (2004) 223 CLR 513 at 534 [51] (McHugh, Gummow, Hayne and Heydon JJ).

31 (2004) 223 CLR 575 at 601 [42] (emphasis added).

32 *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*') at [66] (French CJ).

33 *New State Ice Co v Liebmann* 285 US 262 at 311 (1932) (Brandeis J). See also *Totani* (2010) 242 CLR 1 at [246] (Heydon J).

34 *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458 ('*Pompano*') at [125] (Hayne, Crennan, Kiefel and Bell JJ).

35 These have been described as defining characteristics of courts: *Wainohu* (2011) 243 CLR 181 at 208 [44] (French CJ and Kiefel J); *Pompano* (2013) 87 ALJR 458 at [67]-[68] (French CJ).

Court might have regard to 'criminal intelligence' even if one party did not have the opportunity to examine it.[36]

(v) ***The Plaintiffs' claims***

42. The Plaintiffs' claim that s 18 breaches the *Kable* principle because it differs from the legislation considered in *Fardon*.[37] In particular, they claim that s 18 substantially undermines the institutional integrity of Queensland courts because:[38]

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(a) the criterion of 'incapable of exercising proper control over his sexual instincts' is devoid of content or is not suitable for application by a court;

(b) the standard of proof for an order authorising the indefinite detention is set at an impermissibly low level;

(c) there is no provision for regular supervision by the court of the order made under s 18;

20 (d) the court is deprived of its decisional independence because it must exercise its jurisdiction in conjunction with, and not independently of, the executive government;

(e) the conferral of the power of release on the Governor in Council is practically unreviewable and so creates an 'island of power immune from supervision and restraint'; and

(f) the appearance of judicial independence is undermined because a reasonable observer is likely to conclude that the prisoner remains detained 30 as a result of an order of the court, although the court cannot supervise or revoke its order.

43. None of these submissions should be accepted.

(vi) **Fardon** ***does not lay down the minimum requirements for preventive detention laws***

44. The Plaintiff's submissions assume that the observations made by various members of the Court about the regime in *Fardon* can be applied without qualification to 40 s 18 of the CLAA. But they cannot. The regime under the DP(SO)A did not involve a judge deciding whether to impose an indeterminate sentence as part of the sentencing process. It instead involved a judge deciding whether to order the continuing detention or supervision of a person whose sentence was about to expire and who would otherwise soon be at liberty. Nothing in *Fardon* suggests that the

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36 (2013) 87 ALJR 458.

37 (2004) 223 CLR 575. This was the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('the DP(SO)A').

38 Plaintiffs' submissions, para 31.

majority intended to question the validity of general preventive detention schemes that were attached to the curial sentencing process upon conviction.[39] That was not a matter that the Court was asked to address.

45. In any event, it is mistaken to reason that because the DP(SO)A did not infringe the *Kable* principle, preventive detention regimes that depart significantly from it must be invalid. The question remains whether the State legislation would be repugnant to or incompatible with the institutional integrity of State courts. The basic features of s 18 of the CLAA suggest that the answer is 'no':

(a) s 18 is not *ad hominem* legislation like the *Community Protection Act 1994* (NSW) that was invalidated in *Kable*; it is instead a law of general application;[40]

(b) unlike the law invalidated in *International Finance Trust Co Ltd v New South Wales Crime Commission*,[41] s 18 does not require the court to make ex parte orders of any kind;

(c) s 18 does not displace the principle that the legislature takes the court as it finds it, with all its incidents.[42] It therefore leaves in place the open court principle, the principles of procedural fairness and the requirement to provide reasons for judgment;

(d) an offender can cross-examine the medical practitioners and adduce evidence in rebuttal to their report;

(e) the court has discretion whether or not to make an order under s 18(3)(a);[43] and

(f) a declaration under s 18 made may be appealed in the same way as a sentence.

These are not hallmarks of a law that substantially undermines the institutional integrity of a court.

46. It remains, however, to address the particular criticisms of the Plaintiffs.

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39 See, for example, (2004) 223 CLR 575 at [72]-[73], [83] (Gummow J) (distinguishing the DP(SO)A from preventative detention regimes attached by legislation to the sentencing process).

40 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at [62] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

41 (2009) 240 CLR 319.

42 *Electric Light and Power Supply* (1956) 94 CLR 554 at 560; *Mansfield v Department of Public Prosecutions* (WA) (2006) 226 CLR 486 at 491-492 [7]-[9]; *International Finance Trust* (2009) 240 CLR 319 at 377-378 [134] (Hayne, Crennan and Kiefel JJ).

43 Contrast the law in *Kable*: (1996) 189 CLR 51 at 106 (Gaudron J), 129-130 (Gummow J).

(vii) Criterion in s 18 is not devoid of content or unsuitable for judicial application

47. The Plaintiffs claim that the criterion of 'incapable of exercising proper control over his sexual instincts' is devoid of content or not suitable for application by a court.[44]

48. These submissions should be rejected.

49. First, the submissions ignore numerous authorities demonstrating that even highly imprecise criteria are capable of being applied in accordance with the judicial method.[45]

50. Secondly, the Plaintiffs make no attempt to construe the criterion in the context of s 18 of the CLAA. As outlined in paragraph 16 above, the words 'incapable of proper control over his sexual instincts' refer to the absence of that degree of self-control that would prevent a person from committing an offence of a sexual nature. The criterion therefore cannot be said to be devoid of content.

51. Thirdly, and in any event, there is nothing to suggest that courts of South Australia or Queensland have found the criterion to be devoid of content or incapable of application.[46]

52. Finally, it is difficult to see how the criterion is any more indeterminate or incapable of judicial application than the various criteria considered in *Thomas v Mowbray*,[47] *Fardon* or *Pompano*.[48] None was found to lead to invalidity.

53. Accordingly, this claim has no basis.

(viii) Degree of satisfaction not impermissibly low

54. The Plaintiffs claim that where a court order will result in indefinite detention it is necessary for the jurisdictional fact that enlivens the power to detain to be proved to a high degree of probability. Because the judge can make an order under s 18 if he or she considers the matters reported to be 'proved', and this involves only satisfaction on the balance of probabilities, the standard is impermissibly low.[49]

55. These submissions ignore authority on the manner in which similar tests are to be applied. In *R v England*,[50] the Supreme Court of South Australia considered the

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44 Plaintiffs' submissions, paras 35-38.

45 See *Baker v The Queen* (2004) 223 CLR 513 at [42] (McHugh, Gummow, Hayne and Heydon JJ). See also *Thomas v Mowbray* (2007) 233 CLR 307 at [72]-[79] (Gummow and Crennan JJ), [595]-[596] (Callinan JJ).

46 See, for example, *R v Kiltie* (1986) 41 SASR 52; *R v England* (2003) 86 SASR 273; *R v Waghorn* [1993] 1 Qd R 563.

47 (2007) 233 CLR 307.

48 Contrast Plaintiffs' submissions, paras 37 to 38.

49 Plaintiffs' submissions, paras 39 to 41.

50 (2004) 87 SASR 411.

standard of satisfaction required under s 23(5) of the *Criminal Law (Sentencing) Act 1988* (SA). It authorised the Supreme Court to declare that a defendant was incapable of controlling his or her sexual instincts if the Court was so satisfied after receiving reports from medical practitioners and hearing any evidence adduced by the defendant. Although Bleby J found that Court had to be satisfied on the balance of probabilities, his Honour added:[51]

> [S]atisfaction as to the inability of a person to control their sexual instincts is a matter of assessing the opinions [of the medical practitioners] to that effect, their strengths and their weaknesses, to a point where the Court can be satisfied that the incapacity is present. *In doing so, the Court will need to take account of the seriousness of the declaration it is asked to make and the gravity of the consequences of giving the direction.* To borrow the words of Dixon J in *Briginshaw v Briginshaw*...the necessary degree of satisfaction cannot be produced "by inexact proofs, indefinite testimony or indirect inferences". *It will require cogent and acceptable evidence in order to justify the making of the declaration and the giving of the direction.* But even then, there is a residual discretion conferred by the use of the word 'may' in the sub-section.

56. Similarly, a court acting under s 18 of the CLAA will not find the matters 'proved' in the absence of cogent and acceptable evidence that would justify the making of a declaration and the direction. Even if the court does find the matters proved, however, it still has discretion whether or not to make the declaration. In exercising that discretion, moreover, the court will need to bear in mind that an order under s 18 is exceptional.[52]

57. Accordingly, it is difficult to understand why the standard of satisfaction would have the effect of depriving a court of its institutional integrity.

(ix) *Lack of curial supervision of order does not deprive court of institutional integrity*

58. The Plaintiffs claim that the CLAA contains no provision allowing a court to set aside an order made pursuant to s 18 of the CLAA on the basis that further medical evidence contradicts earlier evidence on which the order was made. They claim that the CLAA, unlike the DP(SO)A, does not provide for curial supervision of the order.[53] These factors, they say, undermine the institutional integrity of Queensland courts.

59. These submissions are impossible to reconcile with the history of preventive detention regimes attached to the sentencing process. As outlined in paragraph 31 above, s 662 of the *Criminal Code* (WA) authorises making an indefinite sentence at the pleasure of the Executive. It has done so since 1918. Although a person who is detained under that provision can obtain parole, there is no scope for regular

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51 (2004) 87 SASR 411 at 423 [56] (emphasis added).

52 Compare *Buckley v The Queen* (2006) 80 ALJR 605 at [6]-[7].

53 Plaintiffs' submissions, paras 42 to 47.

curial review of the order, as there is in the case of orders under the DP(SO)A. Yet the Court has not previously suggested that s 662 deprives a State court of its institutional integrity. Indeed, in *Kable* itself, at least one member of the majority suggested the contrary.[54]

60. A similar point can be made about s 77a of the *Criminal Law Consolidation Act 1935* (SA). It left the release of a person in the hands of the Governor, who could choose to accept or reject the recommendation of the Parole Board. In *South Australia v O'Shea*, the Court considered the operation of s 77a.[55] Although some members of the Court observed that there might be greater safeguards for a person detained if there were a system of judicial review,[56] no one suggested that the absence of such a system sapped the integrity of the court that had made the order or otherwise posed a constitutional difficulty.

(x) ***No lack of effective judicial review***

61. The Plaintiffs claim that the decision of the Executive is effectively unreviewable. The absence of a requirement to provide reasons, the opaque nature of the political process and the nature of the test to be applied by the Governor in Council ('expedient') means that there is, in substance, an 'island of power'.[57]

62. In addition, the Plaintiffs claim that s 18 also distorts the operation of habeas corpus.[58]

63. These submissions are without foundation.

64. First, the reliance on the concept of 'islands of power' is misplaced. The joint judgment in *Kirk v Industrial Court (NSW)*[59] observed that to deprive a Supreme Court of its supervisory jurisdiction to enforce the limits on the exercise of State executive and judicial power by certiorari, mandamus and prohibition would be to create 'islands of power' and would deprive the Court of one of its defining characteristics. The joint judgment was not, however, speaking of practical difficulties in obtaining judicial review. Any such difficulties do not, by themselves, create 'islands of power' that result in invalidity of laws or decisions made under them.[60]

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54 (1996) 189 CLR 51 at 97 (Toohey J). See also at 121 (McHugh J) (observing that there is 'no reason to doubt the authority of the State to make general laws for preventive detention when those laws operate in accordance with ordinary judicial processes of the State courts'). These observations are consistent with those in *Veen v The Queen (No.2)* (1988) 164 CLR 465 at 486 (Wilson J).

55 (1987) 163 CLR 378.

56 (1987) 163 CLR 378 at 390 (Mason CJ), 402 (Wilson and Toohey JJ).

57 Plaintiffs' submissions, paras 48 to 51.

58 Plaintiffs' submissions, paras 52 to 53.

59 (2010) 239 CLR 531 at [98]-[99].

60 *Totani* (2010) 242 CLR 1 at [191]-[195] (Hayne J), [268]-[271] (Heydon J). The difficulties in successfully setting aside various kinds of decisions have been acknowledged in various contexts: see, for example, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-276 (Brennan CJ, Toohey, McHugh and Gummow JJ).

65. Secondly, the alleged difficulties regarding judicial review could arise in any scheme under which detention is left at the pleasure of the Executive. Yet as outlined in paragraphs 59 and 60, the Court has never suggested that such schemes are invalid on that account.[61] The history of indefinite sentencing terminable by the Executive therefore suggests that any practical difficulties with judicial review of the Executive do not lead to an infringement of the *Kable* principle.

66. Thirdly, in any event, the difficulties with judicial review here are exaggerated. The Plaintiffs acknowledge that review for procedural fairness is possible, but deny that any other basis for challenging the decision would be possible.[62] It is unclear why that is so. The Governor in Council's discretion must be exercised consistently with the scope and purpose of s 18. As Fitzgerald P pointed out in the Court of Appeal, the statutory scheme would require consideration of the offenders' claim to liberty and the factors affecting community safety and risk to potential victims.[63] An offender who was not provided with a statement of reasons upon request could seek to subpoena the quarterly medical reports provided to the Director of Hygiene and the material provided to the Governor.[64] Depending on the circumstances, such as if the medical reports gave unqualified support to the release of the offender, it might well be difficult to maintain that the Governor in Council's refusal to release was not unreasonable, or was supported by any material or had not failed to take into account a relevant consideration. The absence of an obligation to provide reasons therefore need not pose an insurmountable obstacle to judicial review.

67. Finally, the claim that s 18 distorts the operation of habeas corpus is baseless. No part of s 18 prevents the Supreme Court or any other court from issuing habeas corpus; the provision does not even refer to that writ. The fact that the order of the court and the terms of s 18 might provide an answer to any application for habeas corpus does not make s 18 unconstitutional. If it were otherwise, any State law that purported to authorise detention by the Executive would be invalid. Further, if the Plaintiffs were correct about habeas corpus, the historical examples of indefinite sentencing at the pleasure of the Executive would be inexplicable.

(xi) ***Section 18 does not affect independence of courts***

68. The Plaintiffs claim that s 18 undermines the independence of courts because judicial-decision-making is entangled with, and is not, independent of executive decision-making; the process of detention is shared by the judiciary and the executive government. They rely on the decision of the Privy Council in *Hinds v The Queen* ('*Hinds*')[65] for the proposition that to transfer from the judiciary to any executive body a discretion to determine the severity of an individual's sentence is to breach the separation of powers. Such a proposition, they say, applies equally to

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61 See *R v Moffatt* [1998] 2 VR 229 at 236 (Winneke P), 252 (Hayne JA). Furthermore, the example of the insanity defence demonstrates that leaving an offender to be detained at the pleasure of the Executive is not contrary to the institutional integrity of a court.

62 Plaintiffs' submissions, para 49.

63 *Pollentine v Attorney-General* [1998] 1 Qd R 82 at 92.

64 See *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at [94] (Heydon J).

65 [1977] AC 195 at 225-226.

the requirement of judicial independence that follows from Chapter III of the Constitution.[66]

69. These submissions should be rejected for three related reasons.

70. First, as outlined earlier, these submissions are contrary to the long history of indefinite sentencing in Australia and other common law countries. Laws providing for indefinite sentences terminable by the Executive in the case of habitual offenders and other convicted persons would, on the Plaintiffs' reasoning, have been invalid from the day they purported to commence. Such a result demonstrates that their reasoning is flawed.

71. Secondly, *Hinds* offers no assistance to the Plaintiffs. That case involved the validity of provisions in the *Jamaican Gun Court Act*. One provision imposed a mandatory term of imprisonment at hard labour during the Governor-General's pleasure for certain gun offences.[67] However, another required the Governor-General to act on behalf of and in accordance with the advice of a Review Board, the members of which were not qualified to exercise judicial powers under the Jamaican Constitution. The Privy Council held that the Parliament could not transfer to such a body the power to determine the severity of punishment upon an individual member of a class of offenders.[68] The reasoning in *Hinds* was therefore founded on a strict separation of powers. The *Kable* principle, however, does not mirror the effect of the separation of powers.[69] For that reason, *Hinds* has no obvious application to State legislation such as s 18 of the CLAA, which imposes no mandatory sentence but leaves the court free to determine whether or not to direct that an offender be detained at Her Majesty's pleasure.

72. In any event, the Privy Council in *Hinds* did not consider in any detail whether the history of indefinite sentences in common law countries might have affected its conclusions. That fact alone raises questions about whether *Hinds* was correctly decided.

73. Thirdly, *Crump v New South Wales* recognises that once a court has exercised judicial power by imposing a sentence on an offender, the responsibility for the convicted persons passes into the hands of the executive branch of government.[70] As historical provisions for parole of habitual offenders and persons detained under s 18 of the CLAA demonstrate, that proposition holds true regardless of the type of sentence imposed.[71] Once that is accepted, it becomes difficult to understand why indefinite sentences terminable by the Executive are said to undermine the independence of courts but other sentences (including life sentences) do not.

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66 Plaintiffs' submissions, paras 54 to 60.
67 [1977] AC 195 (describing the relevant provisions of the Gun Court Act 1974).
68 [1977] AC 195 at 226.
69 *Pompano* (2013) 87 ALJR 458 at [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ).
70 (2012) 247 CLR 1 at [28] (French CJ), [58] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
71 See, for example, *Offenders' Probation and Parole Act 1980* (Qld), s 53(1)(b) and (c).

(xii) *No impermissible 'cloaking'*

74. The Plaintiffs claim that s 18 of the CLAA is invalid because the reputation of the judicial branch is used to justify a continuing decision of the executive government to detain a person. They claim that a reasonable observer is likely to conclude that the prisoner remained detained solely as a result of a court order, as opposed to the decision of the executive government.[72]

10 75. These submissions should not be accepted.

76. First, for the reasons outlined above,[73] they are contrary to the history of courts making orders for indefinite sentencing terminable by the Executive.

77. Secondly, the test of what a reasonable observer would be likely to conclude about the effect of an order is not the touchstone of validity, any more than public confidence is.[74] For the reasons outlined above,[75] the Plaintiffs' claims about the features of s 18 cannot be established. For example, the criterion of 'incapable of controlling his sexual instincts' is not devoid of content or unsuitable for judicial
20 application. Nor is the standard to be applied before an order can be made under s 18(3)(a) impermissibly low. Since that is so, it is difficult to see how the perception of a reasonable observer can result in a breach of the *Kable* principle.

78. Thirdly, even if the perception of a reasonable observer were to be treated as the touchstone of validity, the Plaintiffs' claims should not be accepted. Section 18 and the terms of any order made under it would make it plain that detention is at the pleasure of the Executive. In those circumstances, there is little basis for claiming that the reasonable observer would be likely to conclude that the prisoner remains detained 'solely' as a result of the court order and the Executive is not partly
30 responsible.

79. Section 18 of the CLAA therefore does not breach Chapter III of the Constitution.

80. The first question in the special case stated[76] should be answered 'no'.

81. The second question in the special case stated[77] should be answered 'the Plaintiffs'.

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40 72 Plaintiffs' submissions, paras 61 to 64.

73 Paragraphs 29 to 49, 65 and 70.

74 As to which, see *Nicholas v The Queen* (1998) 193 CLR 173 at [37] (Brennan CJ), [242] (Hayne J); *Silbert v Director of Public Prosecutions (WA)* 217 CLR 181 at [26] (Kirby J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [23] (Gleeson CJ), [102] (Gummow J), [144] (Kirby J); *Forge* (2006) 226 CLR 45 at [274] (Heydon J); *South Australia v Totani* (2010) 242 CLR 1 at [73] (French CJ), [206] (Hayne J), [245] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181 at [174]-[177] (Heydon J).

75 Paragraphs 47 to 73.

76 SCB 22.

77 SCB 23.

ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

The Attorney-General estimates that 2 hours should be sufficient to present his oral argument.

Dated: 16 May 2014

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77 SCB 23.