Executive detention and the Australian Constitution

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This article explores the constitutionality of laws providing that a member of the Executive can order the incarceration of an individual thought to pose a risk to public society. Remarkably, this was legislated in Queensland in 2013 as a response to a Queensland court ordering the release of a repeat sex offender. The Queensland Court of Appeal invalidated the legislation on constitutional grounds in Attorney-General (Qld) v Lawrence (2013) 284 FLR 21; [2013] QCA 364, and the Queensland government abandoned thoughts of an appeal to the High Court. This article explores Ch III constitutional arguments against the validity of such a scheme.

INTRODUCTION

> History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.[1]

The use of preventive detention has been growing rapidly in Australia in recent years. There have been two particular contexts in which this has occurred: that of anti-terrorism legislation in the aftermath of "9/11",[2] and that of gaoled sex offenders, in circumstances where there is a fear that the gaoled offender will re-offend if released from prison.[3] Essentially, the Australian High Court has found such laws to be constitutionally valid, in the former context supported by, among other heads, the defence power.[4] In the latter context, the High Court has constitutionally validated State schemes on community protection grounds, provided they do not breach Ch III of the Australian *Constitution*; in other words, they must not compromise the integrity and independence of any court involved in the process.[5] To date, a feature of both of these regimes has been the involvement of a judge in the making of a final preventive detention order,[6] upon application by the Executive.

In September 2013, a Queensland court refused to make a continuing detention order in the case of notorious sex offender, Robert Fardon. The Queensland Parliament quickly responded with its *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld), passed in October 2013. This amending Act also provides for a system of preventive detention, but is unlike the schemes mentioned above in that it provides that the Attorney-General can recommend to the Governor that a "relevant person" be detained. The Governor can make the order if he/she believes it to be in the public interest. If the order is made, the person will be detained in prison. A judge plays no role in the making of such orders. On 6 December 2013, the Queensland Court of Appeal found that the legislation was constitutionally invalid.[7] Such executive powers, though not unprecedented in Australia,[8] and enjoying a notorious place in English constitutional law,[9] raise fundamental constitutional and human rights issues.

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[1] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187 (Dixon J).

[2] *Criminal Code* (Cth), Div 105, contained in *Criminal Code Act 1995* (Cth), Schedule.

[3] *Dangerous Prisoners (Sexual Offenders) Act 2004* (Qld).

[4] *Thomas v Mowbray* (2007) 233 CLR 307.

[5] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[6] *Criminal Code* (Cth), Div 105 allows a senior member of the Australian Federal Police to make an "interim" preventive detention order.

[7] *Attorney-General (Qld) v Lawrence* (2013) 284 FLR 21; [2013] QCA 364. No appeal was lodged.

[8] *Lloyd v Wallach* (1915) 20 CLR 299.

Part A of this article outlines the legislative scheme. Part B considers constitutional case law relevant to the scheme. Part C argues that the new Queensland legislation was correctly invalidated.

A. Outline of the Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013

This legislation must be understood in the context of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (Dangerous Prisoners Act), which implements a form of preventive detention. It permits the Queensland Attorney-General to apply to the Supreme Court for an order with respect to a "prisoner". This is someone currently imprisoned for committing a "serious sexual offence".[10] Upon the Attorney's application, the court must consider whether the prisoner is a "serious danger to the community". This means there is an unacceptable risk that the person will commit a serious sexual offence if released from custody, or released without monitoring. The court must take into account relevant psychiatric evidence in relation to the offender (s 13(4)), prior criminal history, and community protection. The last factor is the most important (s 13(6)). If the court is satisfied, by "acceptable, cogent evidence" that there is a high degree of probability that the person will re-offend, they can make an order that the person be further incarcerated beyond the person's original sentence (s 13(3)). The constitutional validity of this Act was confirmed in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (Kirby J dissenting).[11]

However, the annual reviews required by the Act ensured that Mr Fardon would regularly be back before the courts. Many of these previous reviews had resulted in a further detention order being made, however on 27 September 2013, a Supreme Court judge ordered Mr Fardon's release upon supervision.[12] The Queensland government then passed the *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld).[13] Its provisions applied after: (a) any appeal from an order made under the Dangerous Prisoners Act had been finally dealt with; or (b) if there was no appeal, the period during which an appeal against an order made under that Act had expired. In practice, the Amendment Act process would have been used for cases where the court had made an order, such as a supervised release order, with which the Attorney disagrees. Otherwise, there would be no need to resort to the provisions under the Amendment Act.

On recommendation by the Minister, the Governor could declare a relevant person (a person subject to a continuing detention order under the Dangerous Prisoners Act) to be detained under the Act, if the Governor was satisfied that such detention is in the public interest (s 21).[14] There were provisions regarding notice of the application to be given to the person affected (s 22(2), (3)(a)(i), (ii), (iii), and the Minister must have regard to them (s 22(3)(b)). However, these notice requirements did not apply if there were, in the Minister's opinion, "urgent circumstances" (s 22(4)). If (once?) the Governor-in-Council made the declaration, the person would then be detained in an "institution" (s 22B(2)(d))[15] and considered a prisoner under the corrective services legislation (s 22B(2)(e), except for provisions noted in s 22B(2)(e)(i), (ii)). There was provision for regular review of that decision by the Minister (s 22E). The Minister's recommendation and the Governor's decision were not subject to

[9] Exercise of these types of powers informed *Magna Carta* (1215), *Petition of Right* (1628); *Habeas Corpus Act* (1679); Farbey J, Sharpe RJ and Atrill S, *The Law of Habeas Corpus* (3rd ed, 2011); Tyler A, "The Forgotten Core Meaning of the Suspension Clause" (2012) 125 Harv L Rev 901 at 923-927; Endicott T, "Habeas Corpus and Guantanamo Bay: A View From Abroad" (2009) 1 *American Journal of Jurisprudence* 6 at 16-17.

[10] This is an offence of a sexual nature involving violence and/or against children: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), Schedule.

[11] It is beyond the scope and purposes of this article to critique that decision.

[12] *Attorney-General (Qld) v Fardon* [2013] QSC 264; an appeal against the order was dismissed: *Attorney-General (Qld) v Fardon* (2013) 306 ALR 300; [2013] QCA 365.

[13] This Act passed through Parliament in the early hours of 17 October 2013 and became law on 29 October 29 2013.

[14] Explanatory Notes to the Act state: "in considering the public interest it is anticipated that the Governor in Council will have regard to a wide range of relevant matters including the likely reaction of the community to the release of the offender" (p 3).

[15] Defined in s 19 to be either a corrective services facility, or an institution prescribed under s 18(14) of the Act.

the requirement to provide reasons that would otherwise exist.[16] Section 22K(3) of the Act provided that generally the decision (by the Minister and the Governor) was final and conclusive, and couldnot be challenged under the *Judicial Review Act 1991* (Qld) or otherwise, except for jurisdiction error.[17]

B. CONSTITUTIONAL ARGUMENTS REGARDING VALIDITY

This legislation reflects a different model from previous kinds of preventive detention legislation, at least in the sexual and/or violent offender realm. These have typically been characterised by the involvement of a court in making the detention order, upon application by the Executive, and usually some departure from traditional judicial processes. Those laws have enabled the court to develop its Ch III jurisprudence in relation to separation of powers, in particular the separation of judicial from non-judicial power. The court has been concerned that it not lose, or be perceived to have lost, its independence and/or its institutional integrity.[18]

The law being considered here does not neatly fit that pattern of case law and jurisprudence. The court has no role in the making of the preventive detention order under the Act. It does not decide whether it is in the public interest that a person be detained. Its role is confined to very limited judicial review of decisions made by members of the Executive under the Act, about which more is said below. Thus, it is more difficult to argue that the Act is invalid because it compromises the institutional integrity of the court.

While it may be true that the common law knew no power pursuant to which a person could be deprived of their freedom by mere administrative decision or action,[19] there have been times where this has occurred. The notorious case of *Lloyd v Wallach* (1915) 20 CLR 299 is one. There, war-time regulations entitled the Minister for Defence to order the military detention of a person that the Minister considered to be "disaffected or disloyal" while the war continued. Wallach had been detained under the legislation. The Victorian Supreme Court had issued a writ of habeas corpus to Lloyd requiring that Wallach be presented to the Court. This was unanimously overturned on appeal. Griffith CJ stated:

> Having regard to the nature and object of the power conferred upon the Minister and the circumstances under which it is to be exercised, I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it … having regard to the nature

[16] *Judicial Review Act 1991* (Qld), ss 4, 31, 32.

[17] This was presumably included, given the High Court decision in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at 581: "legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power" (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[18] There is a vast literature, eg, Ratnapala S and Crowe J, "Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power" (2012) 36 MULR 175; Bateman W, "Procedural Due Process Under the Australian Constitution" (2009) 31 Syd LR 411; Wheeler F, "Due Process, Judicial Power and Chapter III in the New High Court" (2004) 32 Fed L Rev 205; Lacey W, "Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution" (2003) 31 Fed L Rev 57; Hope J, "A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System" (1996) 24 Fed L Rev 173; Fairall P and Lacey W, "Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights" (2007) 31 MULR 1072; Lynch A and Reilly A, "The Constitutional Validity of Terrorism Orders of Control and Preventative Detention" (2007) 10 *Flinders Journal of Law Reform* 105; Keyzer P, "Preserving Due Process or Warehousing the Undesirables? To What End the Separation of Judicial Power of the Commonwealth?" (2008) 30 Syd LR 100; Welsh R, "A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality" (2013) 39 Mon LR 66; Gray A "Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions" (2014) 37(1) UNSWLJ 125.

[19] "The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action": *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528 (Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ).

> of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and indeed, inconsistent with the character of the power itself, to allow any judicial inquiry on the subject.[20]

This decision was confirmed in *Little v Commonwealth* (1947) 75 CLR 94.[21] It involved very similar regulations allowing the Minister for Defence to order the detention of an individual to ensure public safety or defence of the Commonwealth. The Minister made such a declaration with respect to Little. Dixon J followed *Lloyd*, validating the law. Dixon J acknowledged that there was no evidence before the Court that Little was in fact disloyal to the Commonwealth, and the evidence raised a "very strong presumption" that the orders had been mistakenly made. However, he claimed that was "beside the point". The fact that the Minister's declaration was mistaken was irrelevant (*Little* at 103).[22]

An important case here is *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1. The factual scenario in this case is in some respects closer to the current legislation than some of the other relevant High Court decisions, in that the process by which the relevant persons were detained did not involve a judicial order that they be so detained. They were, in effect, detained by the Minister for Immigration, acting pursuant to relevant powers in the *Migration Act 1958* (Cth). By a majority of 4:3 (Brennan, Deane, Dawson and Gaudron JJ; Mason CJ, Toohey and McHugh JJ dissenting), the High Court found that a provision which stated that a court "is not to order the release from custody of a designated person" (s 54R) was offensive to Ch III.[23] The joint reasons considered the power of the Executive in this case to order the detention of individuals. In so doing, it summarises succinctly the law in this area. The quote is lengthy, but is of central significance to the issues at hand, and worthy of extended consideration. Brennan, Deane and Dawson JJ stated:

> It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why this is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt … There are some qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our *Constitution*, part of the judicial power of the Commonwealth entrusted exclusively to Chapter III courts. The most important is that which Blackstone himself identified … namely the arrest and detention in custody, pursuant to executive warrant, of a person accused of a crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen … as punitive or as appertaining exclusively to judicial power. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervision of the courts (the justices referred to bail). Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, and putting to one side the traditional powers of the Parliament to punish for contempt, and of military tribunals to punish for breach of military discipline, the citizens of

[20] *Lloyd v Wallach* (1915) 20 CLR 299 at 304-305 (with whom Gavan, Duffy, Rich and Powers JJ agreed), 308-309 (Isaacs J): "[the Minister] is presumed to act not arbitrarily nor capriciously", 313 (Higgins J): "the reason may be found on a mistake, but still it may be a reason which satisfies the Minister's mind for the present".

[21] See also *Ex parte Walsh* [1942] ALR 359.

[22] Bad faith being the sole basis for review. There is debate regarding the status of these precedents: *Al-Kateb v Godwin* (2004) 219 CLR 562 at 588-589 (McHugh J), 620 (Kirby J).

[23] "It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the *Constitution*, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the *Constitution*, including Chapter III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Chapter III vests exclusively in the courts which it designates": *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ).

> this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.[24]

Gaudron J partly agreed and partly disagreed with this view. She agreed that generally individuals were detained in custody in consequence of an exercise of judicial power which determined they were in breach of a law which required or authorised their gaoling. However, exceptions to this rule existed, including detention under mental health legislation, and detention on remand pending trial. Her Honour agreed (at 55) that: "Detention in custody in circumstances not involving some breach of the criminal law and not coming within well-accepted categories of the kind to which Brennan, Deane and Dawson JJ refer is offensive to ordinary notions of what is involved in a just society."[25] The constitutional validity of preventive detention involving sexual offenders was considered by the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *Fardon*.[26] However, their relevance to the present situation is marginal, because both cases involved the court in making the preventive detention order. Thus, the issues were framed in terms of whether the making of such an order was a proper exercise of judicial power, or whether to grant a court such powers infringed the institutional integrity of the court contrary to Ch III.

Some passages in the case provide constitutional support for the scheme currently under consideration. For instance (at 98, 107, 132), some in *Kable* found that the making of the preventive detention order was a non-judicial function (which created Ch III difficulties). One interpretation of these comments might be that while it was constitutionally objectionable for a court to make such an order, it may not be constitutionally objectionable for a member of the Executive, or the legislature, to make such an order directly. McHugh J expressed this logical implication of the majority view: "The Parliament of New South Wales has the constitutional power to pass legislation providing for the imprisonment of a particular individual" (at 121). It is not entirely clear whether the other judges would accept this point. While it is a logical implication of a finding that the power to make a preventive detention order is non-judicial in nature, it is difficult to reconcile with the comments of Brennan, Deane and Dawson JJ in *Chu Kheng Lim* regarding the Executive power to detain, comments which were directly quoted by majority judges in *Kable* (at 97, 131) with apparent approval.

In *Fardon*, the Court distinguished *Kable* in validating the scheme.[27] As indicated, the case is of limited relevance to the current situation, given the different way in which the legislation operated. However, some comments of the Court are interesting for present purposes. For instance, Gleeson CJ in the majority said it might be considered "surprising that there would be an objection to having detention decided upon by a court whose proceedings are in public, and whose decisions are subject to appeal, rather than by executive decision".[28] Gummow J agreed. In discussing the exception to the general principle forbidding executive detention relating to pre-trial detention, Gummow J added: "but detention by reason of apprehended conduct, *even* [emphasis added] by judicial determination on a *quia timet* basis, is of a different character and is at odds with the central constitutional conception of

[24] *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 27-29; with whom Mason CJ agreed (at 10). Gaudron J took a view in some respects similar but in some respects different; one of the reasons Toohey J gave for validating the provisions in that case was that the object of custody was not punitive (at 50).

[25] This decision was confirmed in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 (McHugh J), 650 (Hayne J; with whom Heydon J agreed), 659 (Callinan J); although three dissenting judges were clearly troubled by the possibility of indefinite incarceration absent proof of a crime (at 577 (Gleeson CJ), 613 (Gummow J), 619 (Kirby J)).

[26] In the first case the legislation was struck out; in the second, it was validated.

[27] Others, and the present author, have queried the extent to which the legislative schemes in *Kable* and *Fardon* were relevantly different so as to justify a different outcome: see, eg Gray A "Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Laws" (2005) 10(1) *Deakin Law Review* 177 at 184-190.

[28] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 586; he expressed a similar view in *Thomas v Mowbray* (2007) 233 CLR 307 at 329: "the exercise of (control order) powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided".

detention as a consequence of judicial determination of engagement in past conduct."[29] He declined to characterise the preventive detention power as being either judicial power or non-judicial power, claiming it was "sui generis" in nature.[30] These dicta comments might suggest that these judges might find executive detention more difficult to accept constitutionally.

Obviously, if they had found such powers to be non-judicial in nature, as some of the judges did in *Kable*, the legislation in *Fardon* would have been invalid as involving a breach of Ch III requirements. However, such a finding may have opened the door to detention by the Executive directly, rather than upon application by the Executive to the court. At least Gleeson CJ and Gummow J in the majority, and Kirby J in dissent, seem to have been alive to this possibility, and wished to avoid its implications. McHugh J expressly found that in making the preventive detention order, the court was exercising judicial power.[31] Gummow J again referred to the joint judgment in *Chu Kheng Lim*. He preferred to formulate the Ch III principle thus: "the 'exceptional' cases aside, the involuntary detention of a citizen in custody by the state is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts."[32] Kirby J in dissent would agree with such a principle:

> To deprive a person of liberty, where that person is otherwise entitled to it, is a grave step. If it is to extend for more than a very short interval, such as may properly be entrusted to officials in the Executive Government, it requires the authority of a judicial order. These rules explain a fundamental principle that lies deep in our law. Ordinarily, it requires officers of the Executive Government, who deprive a person of liberty, to bring that person promptly before the judicial branch, for orders that authorise, or terminate, the continued detention. The social purpose behind these legal obligations is to divorce, as far as society can, the hand that would deprive the individual of liberty from the hand that authorises continued detention.[33]

C. Argument that Queensland law is constitutionally invalid

Reasons for suggesting that the Queensland law is constitutionally invalid are set out below. Step 1 involves an assertion that involuntary detention of the kind contemplated in the new Queensland legislation is in fact punishment. Step 2 involves an assertion that punishment is traditionally an exclusively judicial function. How does acceptance of the first two steps entail constitutional invalidity, given that we are dealing with State legislation? Here, either of three arguments can be advanced. In Step 3(a), the argument is made that the principle of separation of powers is enshrined in State Constitutions. If this step is unpalatable, Step 3(b) can be utilised. The argument here is that by placing the traditionally judicial power to punish in the Executive rather than the judiciary, the legislation so undermines the institutional integrity of the Queensland Supreme Court as to render the legislation constitutionally objectionable. Alternatively, Step 3(c) can be made, focusing on the fact that judicial decisions are typically characterised as being "final and decisive", yet the new Queensland legislation in effect permits the Governor to overrule a court decision.

Step 1: Involuntary detention is punitive

Generally, subject to exceptions acknowledged below, the involuntary detention of a citizen in custody by the state is considered penal or punitive in character.[34] Clearly deprivation of an individual's liberty is an extremely serious step. This seriousness is well-reflected in the judgment of Lord Hoffmann in *Secretary of State, for the Home Department v JJ* [2008] 1 AC 385 at [35]:

> Such is the revulsion against detention without charge or trial, such is this country's attachment to habeas corpus, that the right to liberty ordinarily trumps even the interests of national security. Only in

[29] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613.

[30] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 619. Callinan and Heydon JJ were also comforted that the legislation retained many of the safeguards of a judicial trial (at 655-658).

[31] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597.

[32] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612 (with whom Hayne J agreed).

[33] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 632-633.

[34] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; with whom Mason CJ agreed (at 10).

time of war or "public emergency threatening the life of the nation" may the government derogate from the Convention, suspend habeas corpus and imprison people without trial.[35]

This legislation contemplates detention that is involuntary. It is anticipated that the vast majority of its application will be in relation to citizens. This Act made it clear that a person about whom a declaration is made under it is to be considered a prisoner, and will be confined to an institution.[36] The Act here does the very thing that joint reasons found in *Chu Kheng Lim* was impermissible. It is true that the judges in *Chu Kheng Lim* were talking about a Commonwealth law, while the legislation here is a State law. While the High Court has stated that the *Kable* principle may differ in application according to whether the court involved is a federal or State court, that is not a relevant distinction here. Members of the Court in *Kable*, a case involving a State law, referred expressly with evident approval to these comments in *Chu Kheng Lim*.[37] No suggestion was made there that the comments were confined to a federal court, and there is no good reason to do so.

The remarks of Brennan, Deane and Dawson JJ in *Chu Kheng Lim* were expressed not to be absolute. Their Honours referred to pre-trial detention, mental illness, infectious diseases, and historical precedents involving parliament's power to punish for contempt, and military courts-martial and, perhaps, extraordinary measures during wartime. They excluded non-citizens, and/or those subject to voluntary detention, from their general principle.[38] The exceptions to the general rule may be categorised as:

(1) cases where a person is detained for non-punitive purposes (pre-trial, mental illness, infectious diseases, non-citizens and/or those subject to voluntary detention);
(2) where historically (and exceptionally) such powers have existed (contempt, military courts-martial); and
(3) (possibly) in the extraordinary circumstances of war-time.[39]

Of these categories, and accepting that they may not be closed,[40] only category (1) could possibly be relevant here. Can this legislation be categorised as being for non-punitive purposes, and thus avoid constitutional invalidity? Such an argument appealed to a majority of the High Court in *Fardon*, where a preventive detention regime (involving the court making the detention order) survived constitutional challenge, partly on the basis that the object of the detention was "community protection" rather than punitive in nature.[41] The Queensland government would claim that this Act was passed for purposes of community protection, a legitimate non-punitive objective. While some argue it is not possible to neatly divide punitive from non-punitive,[42] or that a power may have both punitive and non-punitive features,[43] Hart refers to five elements of punishment:

- it must involve pain or other consequences normally considered unpleasant

[35] See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 632 (Kirby J): "in Australia, personal liberty has always been regarded as the most fundamental of rights … to deprive a person of liberty, where that person is otherwise entitled to it, is a grave step".

[36] *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld), s 22B(2)(d), (e).

[37] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97 (Toohey J), 131 (Gummow J).

[38] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28; Mason CJ (at 10) and Gaudron J (at 53) expressed general agreement with the joint reasons.

[39] *Lloyd v Wallach* (1915) 20 CLR 299. In the US context, see Klein A and Wittes B, "Preventive Detention in American Theory and Practice" (2011) 2 *Harvard National Security Journal* 85.

[40] However, "courts must be very slow to recognise new categories of cases in which non-criminal detention is permitted": Gordon J, "Imprisonment and the Separation of Judicial Power: A Defence of Categorical Immunity from Non-Criminal Detention" (2012) 36 MULR 41 at 92.

[41] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654 (Callinan and Heydon JJ); cf Lynch and Reilly, n 18 at 115: "clearly, legislation authorising executive detention, without more, would give rise to an inference of punitive purpose"; Edgely M, "Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia" (2007) 33 UWALR 351 at 361.

[42] *Rich v Australian Securities & Investment Commission* (2004) 220 CLR 129 at 145 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ: "at best, the distinction between punitive and protective is elusive".

[43] *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 (McHugh J).

- it must be for an offence against legal rules
- it must be of an actual or supposed offender for his offence
- it must be intentionally administered by human beings other than the offender
- it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[44]

In terms of the Queensland Act, clearly involuntary detention is unpleasant. The regime is in a sense "for an offence", given that it only applies to individuals who have committed particular crimes. It is applied against an actual offender. It is administered by the State, thus fulfilling elements (d) and (e). Kirby J directly considered the issue of whether the detention in *Fardon* was punitive:

> As a safeguard against expansion of forms of administrative detention without court orders, our legal system has been at pains to insist that detention in custody must ordinarily be treated as penal or punitive, precisely because only the judiciary is authorised to adjudge and punish criminal guilt. Were it otherwise, it would be a simple matter to provide by law for various forms of administrative detention, to call such detention something other than punishment, and thereby to avoid the constitutional protection of independent judicial assessment before such deprivation could be rendered lawful.[45]

In contrast, of the majority judges, only Callinan and Heydon JJ specifically decided that the legislation in question was non-punitive in nature. They held that the Act had a community protection objective, rather than a punitive objective. This was because the legislation expressly said so, and the test to be used in assessing whether an order should be made depended on an assessment of risk to the community.[46] With respect, it is surely a question of substance, rather than form, as to whether legislation is punitive in nature or not. There is ample High Court authority to the effect that imprisonment is punishment. This has occurred in contexts where judges have acknowledged that the legislation may also have other purposes.[47] This view enjoys academic support.[48]

Equivalently, courts elsewhere have considered whether proceedings are in substance criminal or civil. They have looked past the label ascribed by the legislature to the legislation, and considered the question substantively.[49] This question might take place, for instance, in the context of determining what due process is to be accorded to the individual. This has occurred both in the US and Europe.[50] The US Supreme Court has articulated several factors in determining whether a process is criminal or civil: (a) whether the sanction involves an affirmative disability or restraint; (b) whether it has historically been regarded as punishment; (c) whether it comes into play only on a finding of scienter; (d) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (e) whether the behaviour to which it applies is already a crime; (f) whether an alternative purpose to which it may rationally be connected is assignable for it; and (g) whether it appears excessive in

[44] Hart HLA, *Punishment and Responsibility* (OUP, 1968), pp 4-5.

[45] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 633. Edgely, n 41 at 382, agrees that preventive detention in the Queensland (2003) legislation is in fact punitive.

[46] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654; of other judges in the majority, Gummow J refused to categorise the proceedings as being either criminal (punitive) or civil in nature, claiming they were "sui generis" in nature (at 619) (with whom Hayne J agreed at 647). Neither Gleeson CJ nor McHugh J determined whether the purpose of the Act was community protection, punishment, any other purpose, or had a combination of purposes.

[47] "Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines … constitute punishment": *Witham v Holloway* (1995) 183 CLR 525 at 534 (Brennan, Deane, Toohey and Gaudron JJ, of five judges deciding the case). In *Power v The Queen* (1974) 131 CLR 623 at 627, Barwick CJ, Menzies, Stephen and Mason JJ stated: "we cannot understand how … imprisonment, either with or without hard labour, can, however enlightened the prison system is, be regarded as otherwise than a severe punishment". "[I]mprisonment is always punitive in effect": Keyzer, n 18 at 108.

[48] Blackstone W, *Commentaries on the Laws of England* (Clarendon Press, 1769), Vol 1, p 132: "the confinement of the person, in any wise, is an imprisonment"; Zines L, "A Judicially Created Bill of Rights" (1994) 16 Syd LR 166 at 174.

[49] In *Engel v Netherlands* (1976) 1 EHRR 647 at [82], the Court provided three factors to be considered: (a) the domestic classification; (b) the nature of the offence; and (c) the severity of the potential penalty which the defendant risks incurring. The third factor is the most important: *Clingham v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 at [30] (Lord Steyn).

[50] It is important in Europe because *European Convention on Human Rights*, Art 6 requires that someone charged with a criminal offence be accorded certain minimum rights; in the US because of the 5th and 14th Amendments.

relation to the inquiry.[51] Applying these factors, certainly imprisonment involves a serious disability or restraint, relevant to (a). Regarding (b), historically imprisonment has been regarded as punitive. Under the Queensland regime, only a person convicted of a crime can be detained. Regarding (d) and (f), while the government claims the Act serves a community protection purpose, this need not be the only purpose. It is likely that this kind of regime will have some kind of deterrence to would-be repeat offenders. The Queensland Attorney-General himself is on record as expressing hope that the legislation "will send a message to serial sex offenders".[52] This indicated a deterrence rationale, consistent with a criminal (punitive) model.

The US Supreme Court has considered this issue in the context of preventive detention statutes. In the leading case, *Kansas v Hendricks* 521 US 346 (1997), a majority found that a preventive detention statute was not "punitive" in nature, and did, as claimed, provide for civil rather than criminal commitment. However, the legislation operated independently of any conviction of the offender. Further, the person detained was not placed in with the general prison population but with others who had been civilly committed, was receiving substantial treatment for their condition, and contemplated immediate release upon proof the person was no longer a danger to society (at 368-369).[53] There was evidence that the person detained could not control their paedophile instincts. This suggested the existence of a mental disorder (at 357-358).[54] On this basis, five members of the US Supreme Court found the commitment was civil, rather than criminal, in nature, not involving punishment. Even with these features, four members of the Court found that the preventive detention regime was punitive.[55]

In contrast to that legislation, held to be civil, stands the Queensland legislation. This Act contains no mention of any treatment a person detained under it will receive. There is no indication they will be housed separately from those in gaol for punishment;[56] rather the legislation expressly states that a person so detained is considered a "prisoner". It applies only to a person convicted of a crime. It requires no evidence that the person detained be suffering from a mental disorder. The Queensland Attorney-General has said the legislation is designed to ensure "that sex offenders never see the light of day outside of a prison cell again … these people are hardly ever rehabilitated".[57] These features make it unlike the *Hendricks* legislation found to provide for civil, non-punitive detention; they suggest that it does in substance represent criminal, punitive detention.

Further, one must question the legitimacy of the government's claimed concern for community protection. Accepting for the purposes of argument that community protection may be a legitimate non-punitive objective of a law, there is reason to doubt that this is the real objective of the law. I draw this conclusion from the Explanatory Notes accompanying the legislation. On page three, there appears the following: "In considering the public interest it is anticipated that the Governor in Council will have regard to a wide range of relevant matters including the likely reaction of the community to the release of the offender." This suggests the real purpose of this legislation was to shore up political support for the government, and prevent politically damaging media coverage of the release into the community of a convicted sex offender.[58] This conclusion becomes more attractive when timing is

[51] *Kennedy v Mendoza-Martinez* 372 US 144 (1963); "punishment serves several purposes; retributive, rehabilitative, deterrent – and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment": *United States v Brown* 381 US 437 at 458 (1965).

[52] Queensland, *Parliamentary Debates*, 17 October 2013, p 3538.

[53] Thomas J for the Court, in which Rehnquist CJ, O'Connor, Scalia and Kennedy JJ joined.

[54] A finding of dangerousness may also be necessary: *Zadvydas v Davis* 533 US 678 (2001).

[55] Breyer, Stevens, Souter and Ginsburg JJ. See also Sandberg-Zakian E, "Beyond Guantanamo: Two Constitutional Objections to Nonmilitary Preventive Detention" (2011) 2 *Harvard National Security Journal* 283 at 312: "all of the first five (*Mendoza*) factors suggest that a non-military preventive detention scheme would impose criminal punishment".

[56] This was also considered essential in order that the detention be considered non-punitive in *United States v Salerno* 481 US 739 (1987).

[57] Queensland, *Parliamentary Debates*, 17 October 2013, p 3536.

[58] In *Attorney-General (Qld) v Lawrence* (2013) 284 FLR 21 at [35]; [2013] QCA 364 the Queensland Court of Appeal noted the "political character" of the criterion for the exercise of the executive detention power in the legislation.

borne in mind, that the legislation was passed within weeks of media coverage of the public release of Robert Fardon. The other danger of accepting government arguments that detention is for non-punitive purposes and so does not require the court's involvement is that it will again open the door to large-scale executive detention of individuals without trial. This door was closed in England in the 17th century with the passage of the *Petition of Right* 1628 and *Habeas Corpus Act* 1679. It should not be re-opened in another guise. We ignore the lessons of history at our peril.

There would be at least two consequences of a finding that detention under the 2013 legislation was in fact "punitive". First, arguments would arise that in effect, the legislation was implementing double punishment since the offender had already been punished for committing the offence/s for which they were originally imprisoned, and detention under the 2013 Act does not depend on any assessment that further crimes have been committed.[59] As Brennan, Deane and Dawson JJ put it succinctly in *Chu Kheng Lim*, a citizen may "be punished for a breach of law, but he can be punished for nothing else".[60] The second consequence is that as punishment is traditionally an exclusively judicial function, it would be unacceptable for a member of the Executive to exercise this function. It is to that issue that Step 2 now turns.

Step 2: Punishment is an exclusively judicial function

"The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some court of justice, according to the law and custom of England."[61] If the argument is accepted above that detention here is at least partly punitive, there is ready authority for the fact that generally punishment is exclusively a judicial function.[62] There is in international case law repeated expression of concern with executive powers of detention. In *A v Secretary of State for the Home Department* [2005] 2 AC 68, the House of Lords considered legislation allowing a Minister to order detention of an individual based on a reasonable suspicion they were terrorists. Lord Hoffmann said that the legislation (at [86]-[88]):

> Calls into question the very existence of an ancient liberty of which this country until now has been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom … Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers.[63]

[59] Keyzer P, "The 'Preventive Detention' of Serious Sex Offenders: Further Consideration of the International Human Rights Dimensions" (2009) 16 *Psychiatry, Psychology and Law* 262 at 263-265.

[60] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28.

[61] *Prohibitions Del Roy* (1607) 12 Co Rep 63; 77 ER 1342 (Lord Coke) (cited in *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 379 (Street J)). See Holdsworth WS, *A History of English Law* (Methuen, 1903), Vol 1, pp 194, 207: "Coke merely stated the existing practice in answer to James I's claim to decide cases for himself. When Coke gave it as his opinion that James I could not give judgments in his court of King's Bench, he obviously found it difficult to cite a decision to that effect precisely in point. But there is no doubt both of the legal and political expediency of his opinion, and the statutes and other authorities which he cites show that it represented the spirit of much mediaeval authority".

[62] *Waterside Workers' Federation (Australia) v JW Alexander Ltd* (1918) 25 CLR 434 at 444 (Griffith CJ); see also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, where Brennan, Deane and Dawson JJ refers to "exclusively judicial function of adjudging and punishing criminal guilt"; with whom Mason CJ agreed (at 10); *Nicholas v The Queen* (1998) 193 CLR 173 at 186 (Brennan CJ); *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518 at 580 (Brennan J); *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 537; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 609-610 (Gummow J), 650 (Hayne J); *A v Secretary of State for the Home Department* [2003] 1 AC 837 at [39] (Lord Steyn); *Reyes v The Queen* [2002] 2 AC 235 at [47], Lord Bingham for the PC: "a non-judicial body cannot decide what is the appropriate measurement of punishment to be visited on a defendant for a crime he has committed".

[63] See also at [100], where Lord Hope spoke of the danger to democracy if the courts allowed individuals to be deprived of their liberty indefinitely and without charge on grounds of public interest by the executive.

Lord Nicholls stated that indefinite imprisonment without charge or trial was anathema to the rule of law, and would only be acceptable in exceptional circumstances (at [74]).[64] In the same case, Baroness Hale connected deprivation of liberty with an exercise of judicial power. Dismissing an argument that any of the exceptions to the right to liberty in Art 5 of the *European Convention on Human Rights* justified the kind of preventive detention regime here, Baroness Hale said (at [222]):

> [N]either the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned. It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. *Only the courts can do that* [emphasis added]; and except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.[65]

In the American jurisprudence, we find re-affirmation of the seriousness of detention and the need for due process:

> To bereave a man of life … or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation, but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.[66]

Kirby J mirrors these comments in his dissenting judgment in *Fardon*, stating that where deprivation of liberty is to extend for more than a very short interval, judicial authorisation of such deprivation is required.[67] Hayne J in that case referred to the "central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct".[68]

The High Court has validated the court's involvement in preventive detention regimes in cases like *Fardon* and *Thomas v Mowbray* (2007) 233 CLR 307. In so doing, the court was evidently satisfied that the power to make a preventive detention order was within the realm of judicial power.[69] The fact that a power to order preventive detention has been considered by the High Court to be an exercise of judicial power suggests strongly that separation of powers difficulties would arise if the power were given to an individual that was not a member of the judiciary. Surely, the State Parliaments cannot have it both ways. They cannot claim that a preventive detention order is a valid

[64] See also Fairall and Lacey, n 18 at 107: administrative detention is "anathema to liberal democracy; that an individual should be deprived of liberty by executive order in the absence of any allegation of criminal wrongdoing is to axiomatically wrongful as to require no argument".

[65] See also *South Australia v O'Shea* (1987) 163 CLR 378 at 420, 414, where Deane J referred to the "tyranny of arbitrary detention", stating that an executive power to detain a person contrary to medical opinion "lies ill with acceptable minimum safeguards of human liberty and dignity". *European Convention on Human Rights*, Art 5, in asserting the right to liberty, creates six exceptions, including most relevantly here, detention after conviction (Art 5(1)(a)), and detention reasonably considered necessary to prevent a person from committing an offence (Art 5(1)(c)). In relation to Art 5(1)(a), the European Court of Human Rights has found preventive detention regimes valid if the imprisonment is imposed at the time of the original sentence and can reasonably be said to be related to the original sentence. However, implementing a longer prevention detention period introduced after the person was convicted of the original crime is not acceptable, because the link between the sentence and the detention will have been severed: *M v Germany* (2010) EHRR 41; and re Art 5(1)(c), the Court has interpreted it narrowly; it has refused to allow it to enable general prevention directed against an individual or category of individuals who are argued to present a danger due to criminal propensity. It has been confined to allowing contracting states a means of preventing a concrete and specific offence: *M v Germany* at [89], [102]; *Haidn v Germany* [2011] ECHR 39 at [90].

[66] *Boumediene v Bush* 128 S Ct 2229 at 2247 (2008), quoting Blackstone, n 48.

[67] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 632.

[68] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 648; while he "tolerated" interference with that principle to the extent that the legislation in *Fardon* referred to the probability of future criminal behaviour as a ground of detention, rather than "engagement in past conduct", it is not clear whether he would be willing to take the further step of constitutionally permitting detention which was not a consequence of judicial determination.

[69] For example, Gleeson CJ in *Thomas v Mowbray* (2007) 233 CLR 307 at 328: "the power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively or only administratively".

exercise of judicial power (*Kable*, *Fardon*), and at the same time, a valid exercise of executive power. While the waters dividing the three arms of power are sometimes muddy, and acknowledging that sometimes powers can be classified in more than one way,[70] for purposes of separation of powers arguments, the author accepts the tenor of judgments such as *South Australia v Totani* (2010) 242 CLR 1 and *Fardon* that the serious consequences on the liberty of an individual reflected in detention suggest an exercise of judicial power.

Indeed, the legislation bears at least some of the hallmarks of a bill of pains and penalties. Mason CJ described such bills in *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 535 as "a legislative enactment which inflicts punishment without a judicial trial" (see Toohey J to like effect at 685).[71] Certainly, no trial is involved in order to incarcerate a person under this new legislation. Clearly imprisonment is punishment. Perhaps the argument is that this is not a bill of pains and penalties because it is not the legislative enactment itself which inflicts the punishment, but rather a power given by the enactment to a member of the Executive to do so. However, similar philosophical objections arise – that a body that is not judicial in nature is passing judgment on an individual with a view to their detention for criminal activity. Typically that is seen as a judicial function. The separation of powers roots of the bill of attainder principle were reflected upon by members of the High Court in *Polyukovich*.[72] These judges indicated that a law which inflicted a bill of attainder, or bill of pains and penalties, would offend the requirements of Ch III. That bills of attainder were typically aimed at determinations of past guilt,[73] rather than future guilt, is not an obstacle, because it is the separation of powers principle implicated by such laws, and that implication arises regardless of whether the law operates on past or future behaviour.

Step 3(a): The constitutional argument

It has long been accepted that the Australian *Constitution* contemplates a separation of powers between the legislature, Executive and judiciary.[74] This has come to be known as the *Boilermakers* principle, from one of the leading cases, *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1954) 94 CLR 254. Functions essentially judicial in nature cannot, consistently with the *Constitution*, be lawfully conferred on the Executive. A court cannot generally be authorised to exercise non-judicial functions. While State Constitutions do not formally embody the separation of powers principle,[75] the High Court has established that the Australian legal system features an integrated court structure, with State courts empowered to exercise federal jurisdiction. For this reason, separation of powers

[70] McDonald S, "Involuntary Detention and the Separation of Judicial Power" (2007) 35 Fed L Rev 250 at 67. There is also argument regarding whether the question of separation of powers should be answered in a formalistic way (with careful definitions of legislative, executive and judicial power that are mutually exclusive, or a functional way) acknowledging the great difficulty in neatly dividing a line between the various types of power and applying a flexible test that takes into account the reason for the divide: see, eg Merrill T, "The Constitutional Principle of Separation of Powers" (1991) *Supreme Court Review* 225; Gwyn W, "The Indeterminacy of the Separation of Powers and the Federal Courts" (1989) 57 *George Washington Law Review* 474.

[71] See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 69-70; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 621 (Gummow J); see also *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 367 (Gummow and Bell JJ; Hayne, Crennan and Kiefel JJ agreeing at 378): "[the section] is not a bill of pains and penalties; it does not operate independently of a judicial determination of liability".

[72] *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 536 (Mason CJ), 646 (Dawson J), 686 (Toohey J), 721 (McHugh J).

[73] *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 647 (Dawson J).

[74] *Commonwealth v New South Wales* (1915) 20 CLR 54 (*Wheat Case*); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1954) 94 CLR 254.

[75] *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372; *South Australia v Totani* (2010) 242 CLR 1 at 45 (French CJ), 81 (Hayne J): "there was at federation no doctrine of separation of powers entrenched in the constitutions of the states"; *Clyne v East [No 1]* (1967) 68 SR (NSW) 385; *Collingwood v Victoria [No 2]* [1994] 1 VR 652; *Gilbertson v South Australia* (1976) 15 SASR 66 at 85; Carney G, *The Constitutional Systems of the Australian States and Territories* (CUP, 2006), pp 344-349.

principles have been applied to invalidate State laws which attempt to confer powers on State courts inconsistent with separation of powers principles;[76] in other words, laws undermining a court's independence and/or institutional integrity.

The High Court has repeatedly said that the application of the separation of powers principles to the context of federal law differs from application of such principles at State level.[77] One of the ways in which the High Court has "drawn down" the principle of separation of powers to the State level is through the principle that State courts are invested with federal jurisdiction, such that arguments regarding an integrated court structure are relevant. This reasoning is not directly applicable to cases where the court is not involved in the process by which the order is made. The State might argue that there is no separation of powers in the Queensland Constitution, an argument backed by numerous precedents, and given that the court is not involved in the making of the order, the separation of powers principle cannot be "drawn down" to apply to cases involving an exercise of power by the Executive. While there is an integrated court structure, there is no integrated structure applicable to the exercise of executive power. The argument is that it is possible that limits that would apply to the exercise of executive power federally would not apply to exercise of executive power at a State level. As McHugh J said: "The Parliament of New South Wales has the constitutional power to pass legislation providing for the imprisonment of a particular individual. And that is so whether the machinery for the imprisonment be the legislation itself or the order of a Minister, public servant or tribunal."[78]

This reflects a submission made in *Totani* that, in respect of the legislation considered there, it would have been constitutionally permissible for the SA Parliament to have vested in the Executive of that State power to declare organisations and to make the control order. It was not necessary for the High Court to directly respond to this suggestion, but Gummow J did. He said that this claim contained "large propositions", and expressly refused to accept the proposition there that State law may authorise a body other than a court to punish criminal guilt by ordering that a person be detained.[79]

On the other hand, the *Constitution of Queensland 2001* (Qld), like the Australian *Constitution* and that of other States,[80] adopts a chapter system, with a different chapter dealing with each of the legislature (Ch 2), Executive (Ch 3), and judiciary (Ch 4). This structure could imply a formal separation of powers between the three arms of government.[81] It may be possible to discern the principle of separation of powers in the Constitution of at least some States,[82] both at common law[83]

[76] *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

[77] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598 (McHugh J), 614 (Gummow J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J); *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at 573 (French CJ, Gummow Hayne Crennan Kiefel and Bell JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 212 (French CJ and Kiefel J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 466 (French CJ), 488 (Hayne Crennan Kiefel and Bell JJ); [2013] HCA 7.

[78] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 121.

[79] *South Australia v Totani* (2010) 242 CLR 1 at 67; Appleby G and Williams J, "A New Coat of Paint: Law and Order and the Refurbishment of Kable" (2012) 40 Fed L Rev 1 at 30; Southwood E, "Extending the Kable Doctrine: South Australia v Totani" (2011) 22 PLR 89 at 93-95.

[80] *Constitution Act 1902* (NSW); *Constitution Act 1975* (Vic), *Constitution Act 1934* (SA).

[81] In contrast, *Constitution Act 1867* (Qld) clearly does not reflect the principle of separation of powers; the courts are not mentioned.

[82] Hope, n 18 at 184.

[83] For example, in *Broken Hill Pty Co Ltd v Dagi* [1996] 2 VR 117 at 190, Hayne JA claimed there was "a serious question whether Parliament may … so change the Constitution of this State as to remove as one element of its governance a superior court of record with the powers and adjudication inherent in such a court"; see also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 19 (Mason CJ).

and by some constitutional amendments in some jurisdictions.[84] There is precedent for implications drawn from the Australian *Constitution* to subsequently be applied to State Constitutions. For example, the implied freedom of political communication, derived from provisions such as ss 7 and 24 of the Commonwealth *Constitution*, was subsequently implied into a State Constitution with similar provisions. A majority was satisfied that the "basis" of the implication at federal level had equivalent counterpart at State level.[85]

In deciding that the Australian *Constitution* implied a formal separation of powers, the majority in *Boilermakers* considered both structural and substantive issues; structurally, the fact that judicial power was described in a chapter of the *Constitution* separate from the legislative power and the executive power; substantively, the provisions setting out the creation of a federal judicature, and the content of its jurisdiction.[86] In *Liyanage v The Queen* [1967] AC 259 the Privy Council considered, among other factors, the structure of the Ceylon Constitution, with the legislature, Executive and judiciary referred to in different parts of the document, in determining that the principle of separation of powers was implicit in the document.

There are parallels in State Constitutions. It is true that, unlike the Australian *Constitution*, no State Constitution expressly "vests" judicial power in the judiciary, executive power in the Executive etc.[87] On the other hand, consider the criteria provided in *Boilermakers* for the making of the implication there – both structure and the substantive provisions. Structurally, State Constitutions can be argued to reflect a separation, with the legislative power, executive power and judicial power in different "chapters", as with the Australian *Constitution*, and with the Ceylon Constitution, both of which have been deemed to enshrine the principle of separation of powers. Substantively, for instance, s 57 of the Queensland Constitution states that there must be a State Supreme Court and State District Court. Section 58(1) confers upon the Supreme Court all necessary jurisdiction for the administration of justice in Queensland. Section 61 limits the extent to which a judge may be removed, s 62 the extent to which a judge's salary can be altered, and s 63 protects the judge if his or her office is abolished. These clear, evident concerns for the independence of the judiciary are replicated in other State constitutional documents.[88] They find parallels in s 72 of the Australian *Constitution*.

These provisions suggest a separation of powers between the three arms of government,[89] or at the very least, and of most relevance here, a strict separation between judicial power and non-judicial power. Specifically, if it were not intended that the judiciary be independent of the other arms of government, it would not be necessary to limit the extent to which a judge could be removed, their salary reduced etc. There would be no need to guarantee that a court could not be abolished. The

[84] For example, *Constitution Act 1902* (NSW), Pt 9 and its double entrenchment by s 7B(1)(a), expressly introduced to "secure the independence of the judiciary" according to NSW Premier Fahey: *The Independence of the Judiciary: Commentary on the Proposal to Amend the New South Wales Constitution*, Briefing Paper 9/95 (NSW Parliamentary Library, 1995), p 3; *Constitution Act 1975* (Vic), ss 18(2), (2AA), 75, 85(5), (6).

[85] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J agreeing). This decision may mean that the early High Court decision to the effect that State Constitutions were generally considered to be ordinary Acts of Parliament, subject to amendment in accordance with any express requirements, may no longer be good law: *McCawley v The King* (1918) 26 CLR 9.

[86] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1954) 94 CLR 254 at 269-272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 536 (Lord Simonds for the Privy Council).

[87] *Constitution* (Cth), ss 71, 61, 1 respectively; see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 77 (Dawson J dissenting).

[88] See, equivalently, *Constitution Act 1902* (NSW), ss 53 – 56; *Constitution Act 1975* (Vic), ss 75, 82(6B), 87AAB, 87AAJ; *Constitution Act 1934* (SA), ss 74, 75; *Constitution Act 1889* (WA), ss 54, 55. *Constitution Act 1934* (Tas) does not expressly provide for the judiciary.

[89] Alvey JR, *The Separation of Powers in Australia: Issues for the States* (Masters by Research thesis, Queensland University of Technology, 2005), p 3, concludes that "there is an implied separation of powers at the State level in Australia", noting (p 215) that the doctrine substantively operates as a convention, but which has been breached by State governments in Queensland, NSW and Victoria. Alvey (p 219) concludes it would be an improvement to the law if the court recognised the principle of separation of powers existed at State level.

notion of a permanent court reflects an intention to enshrine the separation of powers principle. In so arguing, I must concede that this position is contrary to the orthodox position, reflected in various authorities to which reference was made earlier.

One leading case apparently establishing the lack of separation of powers at State level was *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 (*BLF*). This decision has never been formally overruled, but there must be serious doubt regarding its continuing correctness given the High Court decision in *Kable*, and subsequent applications of that principle.[90] Despite this, given it has technically not been overruled, and continues to be cited,[91] it is considered necessary to critique the reasoning in that decision given it reaches a different conclusion than the one advocated here. The facts were quite simple, involving an appeal by the BLF against its de-registration. Before the appeal could be heard, the NSW Parliament passed a law validating the Minister's actions, and terminating the parties' typical right to costs in relation to the appeal process. The BLF then unsuccessfully challenged the validity of this law.

The leading judgment on point was written by Kirby P. He gave several reasons why the principle of separation of powers did not apply in the case of the NSW Constitution, compared with the Australian *Constitution*, and that of former Ceylon.[92] First, he remarked that at the relevant time, there was no restriction on the ability of the NSW Parliament to amend that State's Constitution, while in the comparison Constitutions there was. Specifically, matters relating to the judicature were subject to alteration (at 400; see also 407 (Glass JA), 409 (Mahoney JA), 419 (Priestley JA)). Kirby P said that State courts could be abolished (at 401). Respectfully, this reasoning is now open to challenge for at least two reasons. The impact of *Kable* (almost a decade after *BLF*) is that State Parliaments *are* now restricted in their ability to deal with constitutional provisions, because of the place of their court in the federal judicial hierarchy, and the fact that they must remain suitable repositories of judicial power in that hierarchy. Contrary to the decision in *BLF*, French CJ and Kiefel J specifically stated in *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 that a State legislature could not now, consistent with Ch III, enact a law purporting to abolish the Supreme Court of a State. Secondly, the NSW Constitution has, subsequent to the *BLF* decision, been amended to provide for manner and form provisions designed to preserve judicial independence.

Another reason Kirby P gave was the structure of the NSW Constitution which, at the time he wrote, apparently contained no separate division dealing with the judiciary (at 400).[93] This was contrasted with the Australian and Ceylonese Constitutions. Respectfully, this reasoning is again open to challenge today. The Constitution of several States, including Victoria, NSW and Queensland does now contain a separate part dealing with the judiciary. In this respect, they have become more like the Australian and Ceylon Constitutions. As a result, the decision in *BLF* is no longer good law.

Another argument against the one I make here is that it is established precedent that State Constitutions are ordinary Acts of Parliament, amendable as would be any other piece of legislation, subject to any manner and form provisions (*McCawley v The King* (1918) 26 CLR 9). The response is that a majority of the High Court in *Stephens* would imply a freedom of political communication into

[90] Ratnapala and Crowe (n 18 at 176) also make this point: "It has been the longstanding judicial view, repeatedly affirmed by state supreme courts, the High Court and the Privy Council, that the doctrine of the separation of powers is not constitutionally entrenched at state level. This orthodox view, we argue, no longer represents the constitutional law of Australia following a series of judgments of the High Court commencing with *Kable*".

[91] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458; [2013] HCA 7.

[92] See *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 419, while Priestley JA agreed with the view of the other judges, he did suggest that a view may have been taken that the NSW constitutional provisions were equivalent to that of Ceylon, which were held to embrace separation of powers principles in *Liyanage v The Queen* [1967] 1 AC 259.

[93] See also at 411, where Mahoney JA spoke of the Ceylonese Constitution as significantly dividing its provisions dealing with the legislative, executive and judicial power.

the WA Constitution.[94] Several judges have indicated that State Constitutions contain an implication of representative democracy.[95] They clearly disagree with *McCawley* regarding whether binding implications can be drawn from the text and structure of the document.[96] Further, *Kable* requires that State courts remain suitable repositories of federal judicial power, which indirectly contradicts a notion of unbridled State parliamentary power to amend constitutional arrangements, given courts are typically specifically provided for in Constitutions.

In terms of coherence of principle, the people of Australia, the holders of the sovereign power, adopted a system of government in the Australian *Constitution* formally enshrining the principle of the separation of powers. This compact reflects an agreement as to how citizens should be governed, and the principle of separation of powers is one way the founders conceived that the liberty of citizens would be protected, given the lack of a bill of rights. Colonial constitutions were to continue to exist, subject to the federal *Constitution*. It does not seem radical to suggest that a principle so clearly enshrined by the people at one level of the federal system should be applied to the same people at a different level of the federal system.[97] Support for this position appears in comments by Gaudron J in *Muldowney v South Australia* (1996) 186 CLR 352 at 376:

> In a context where the legislative power of the Commonwealth is to be exercised by a democratically elected legislature and its executive power is, in the main, entrusted to democratically elected Ministers of State, it is obviously in the interests of the Australian people for State legislative and executive powers to be exercised, respectively, by democratically elected legislatures and democratically elected Ministers. That interest is such that it necessarily requires that the freedom implied from the text and structure of the Australian *Constitution* does not operate to strike down laws capable of being viewed as operating to further the democratic processes of the States provided, as already indicated, they do not interfere with the democratic processes of the Commonwealth.

Gaudron J suggested (at 377) that s 106 of the Australian *Constitution*, by which State Constitutions continued "subject to [the Australian] *Constitution*", meant that "in the interest of preserving the democratic nature of the federation, the States be and remain essentially democratic".[98] Gaudron J was "drawing down" principles of representative democracy from the Australian

[94] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J agreeing).

[95] *Muldowney v South Australia* (1996) 186 CLR 352 at 373 (Toohey J), 376 (Gaudron J); *McGinty v Western Australia* (1996) 186 CLR 140 at 210 (Toohey J) (with whom Gaudron J agreed at 216).

[96] In *McGinty v Western Australia* (1996) 186 CLR 140 at 211, Toohey J specifically rejected the argument that no implications could be drawn from State Constitutions because of the manner in which they could be amended; cf Twomey A, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws" (2012) 35 UNSWLJ 625 at 638: "most provisions in state constitutions are not entrenched and therefore cannot support overriding implications that limit legislative power".

[97] Members of the High Court have made this point in the context of extending the implied freedom of political communication to State laws, eg, in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 75 (Deane and Toohey JJ): "Under the Australian federal system .. it is unrealistic to see the three levels of government … as isolated from one another or as operating otherwise than in an overall national context … Clearly enough, the relationship and interaction between the different levels of government are such that an implication of freedom of communication about matters relating to the government of the Commonwealth would be unrealistically confined if it applied only to communications in relation to Commonwealth government institutions. Accordingly, there is much to be said for the view that the *Constitution*'s implication of freedom of discussion extends to all political matters, including matters relating to other levels of government within the national system which exists under the *Constitution*"; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 142 (Mason CJ), 168-169 (Deane and Toohey JJ), 217 (Gaudron J).

[98] See also *McGinty v Western Australia* (1996) 186 CLR 140 at 216 (Gaudron J); cf *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 201 (McHugh J).

Constitution to State Constitutions,[99] recognising that a lack of democracy at State level could undermine the requirements of democracy federally.[100]

States should not be permitted to undermine the clear mandates of the federal *Constitution*. We know it would be unconstitutional for a State Parliament to direct a State court to exercise powers in a particular way. Although a State court is involved, the court has accepted that to permit this would effectively undermine the separation of powers in the Commonwealth *Constitution*. However, if we were to constitutionally permit the State Parliament to circumvent this limitation by conferring the power that would otherwise be exercised by the court in the Executive, this would be an even more egregious infringement of the separation of powers principle.[101]

Step 3(b)

If the argument in Step 3(a) is not accepted, an alternative constitutional argument can be made drawing upon the High Court's recent Ch III jurisprudence. The argument is that by placing the power to punitively detain in a member of the Executive, rather than by involving the court, where such a power is traditionally one exercised by the judiciary, the transfer of that power out of the hands of the judiciary and to the Executive undermines the institutional integrity of the judiciary in a way that is offensive to Ch III.[102]

The High Court has determined that the *conferral* of particular functions on courts or members of the judiciary may, because they are non-judicial, undermine the institutional integrity of the court contrary to Ch III.[103] The fact that public confidence in the judiciary is likely to be undermined is a symptom of a law that offends such institutional integrity.[104] It has determined that a court has certain defining characteristics, and at some stage, denial (abrogation) of these becomes unconstitutional. In the words of Gummow, Hayne and Crennan JJ in *Forge v Australian Securities & Investment Commission* (2006) 228 CLR 45 at 76: "If the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."[105] For example, a law which exempted judges from a duty to give reasons compromises the institutional integrity of a court in a manner offensive to Ch III, because it disregards a fundamental characteristic of a judicial process.[106]

The ability of State Parliaments to legislate with respect to their courts is constrained by the requirement that their courts maintain these essential characteristics.[107] The Parliament of a State does not have authority to enact a law which deprives a court of the State of one of its defining characteristics as a court, or impairs one or more of those characteristics.[108] *Kable* and its subsequent amplification in case law does not represent a code of the law in this area. The High Court will

[99] Gaudron J specifically left open whether there was a separate freedom of political communication in the State Constitution (at 381), see also at 376 (Brennan CJ), 374 (Toohey J), 387-388 (Gummow J), with whom McHugh J agreed.

[100] Some claim that administrative detention, which describes the new Queensland regime, as "anathema to liberal democracy; that an individual should be deprived of liberty by executive order in the absence of any allegation of criminal wrongdoing is so axiomatically wrongful as to require no argument": Fairall and Lacey, n 18 at 1076.

[101] McLeish S, "The Nationalisation of the State Court System" (2013) 24 PLR 252.

[102] Recently in *Kuczborski v Queensland* [2014] HCA 46 at [115], Hayne J (dissenting) would have invalidated aspects of legislation which treated as equivalent actions of the judiciary, and actions of a non-judicial body.

[103] *Wainohu v New South Wales* (2010) 243 CLR 181 at 206 (French CJ and Kiefel J), 229 (Gummow, Hayne, Crennan and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1 at 43 (French CJ).

[104] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 618 (Gummow J).

[105] See also at 122 (Kirby J): "if the institutional alterations result in a court that is qualitatively changed (so that, in the case of a Supreme Court, it does not answer that constitutional description as such), the *Kable* rule is engaged". In *South Australia v Totani* (2010) 242 CLR 1 at 44, French CJ at 44 refers to the "assumption of the continuity of the defining characteristics of the courts of the states as courts of law" being supported by *Constitution* (Cth), ss 106, 108; see also at 157 (Crennan and Bell JJ).

[106] *Wainohu v New South Wales* (2011) 243 CLR 181.

[107] *South Australia v Totani* (2010) 242 CLR 1 at 45 (French CJ).

[108] *South Australia v Totani* (2010) 242 CLR 1 at 46 (French CJ).

consider on a case-by-case basis whether the legislation offends the principles of institutional integrity and independence.[109] My argument is just as the *conferral* of certain powers to a court may undermine its institutional integrity, the *removal* of certain powers from a court may undermine its institutional integrity. The High Court confirmed in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 566 that the removal of power from a court could undermine its institutional integrity in a way that was offensive to Ch III.[110]

Punishment is seen as an exercise at the heart of judicial power. The removal of this function (or, more precisely, removal of the right to make the final decision) to the Executive deprives a court of one of its defining characteristics: its ability to determine finally the punishment that an individual should receive. Gummow J said that a feature of law that undermines the institutional integrity of a court was that it would undermine public confidence in the judiciary. A law that allows a member of the Executive to overturn a considered decision of a court is apt to undermine public confidence in the judiciary in a way that compromises the requirements of Ch III. A citizen in society who observed that the court had made a decision on the matter, only for the Governor (acting on the recommendation of the Attorney-General) to reach a different decision on a matter, would be apt to conclude that the court had made an incorrect decision. This undermines the authority of judicial decisions and public confidence in those decisions.

Evidence of the effect of changes on public confidence is not hard to find. The Queensland Attorney-General claimed during the public debate that the courts had been releasing sex offenders into the community, so "something stronger" than an application to a court under the existing Dangerous Prisoners Act was needed.[111] Members of the judiciary saw it that way. Former Queensland Supreme Court judge, Richard Chesterman, called the legislation an "unjustified attack on the Supreme Court", and given the timing of its introduction, when an appeal against an order releasing a sex offender was being heard, a "threat to the court to induce it to decide the case for the Attorney-General". Mr Chesterman concluded that "by the new Act, the Attorney-General declares he will accept the decision of the court only if it is in his favour".[112] Premier Newman countered that judges were letting sex offenders out of prison, so "we had to act". He said that critics of the legislation, including judges and other members of the legal profession, were living in ivory towers. He called critics of the laws apologists for rapists and paedophiles, and claimed Queenslanders were sick of judges being appointed who were not accountable for their decisions.[113] Clearly, some members of the judiciary believe the legislation undermines public confidence in the Queensland judiciary, and Premier Newman's subsequent comments arguably serve to further undermine public confidence in the judiciary.

It is true that three members of the High Court in *Chu Kheng Lim* contrasted a law which granted or withheld jurisdiction, and one which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former would, subject to the *Constitution*, be acceptable; the latter was offensive to the requirements of Ch III.[114] It might be argued that the new Queensland law is of the former type, which withholds from the court the power to make the final decision regarding the detention order. It can make a decision, but it is liable to be overridden by the Executive. However, subsequent to *Chu Kheng Lim*, the High Court's jurisprudence on Ch III has expanded exponentially, with institutional integrity now considered the touchstone of Ch III jurisprudence. A law which denies the court the ability to finally determine whether a person should be (further) incarcerated is a law

[109] *South Australia v Totani* (2010) 242 CLR 1 at 47(French CJ).

[110] See Ratnapala and Crowe, n 18 at 189.

[111] Queensland, *Parliamentary Debates*, 17 October 2013, p 3537.

[112] Chesterman R, "Attorney-General Jarrod Bleijie's Amendment to the Dangerous Prisoners (Sexual Offenders) Act Will Breed Contempt", *Courier Mail*, 22 October 2013.

[113] "Campbell Newman Criticises Sex Offender 'Apologists'", *Brisbane Times*, 23 October 2013; "Premier Campbell Newman Sinks 'to a New Low' Over Queensland Sex Offenders Law Criticising Queenslanders", *ABC News*, 25 October 2013; McMurdo P, "Judgment Based in Legislation is Fundamental to Democracy", *The Australian*, 15 November 2013, p 12.

[114] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ).

which undermines that court's integrity, by removing from that court a power that it traditionally exercises, and placing it in the hands of the Executive.[115]

This was one of the grounds on which the Queensland Court of Appeal declared the law invalid. The Court of Appeal was satisfied that the legislation effectively rendered Supreme Court decisions under the Dangerous Prisoners Act provisional, in that the Attorney-General could override the court's decision (*Attorney-General (Qld) v Lawrence* (2013) 284 FLR 21 at [41]; [2013] QCA 364). The conferral of such a power undermined the authority of that court's orders in a way that was repugnant to its institutional integrity (at [41]). The law was offensive to the requirements of Ch III.

Step 3(c)

If arguments in Step 3(a) or (b) are not accepted, there is one further argument that can be made. This draws on the same jurisprudence as the argument in Step 3(b) to the extent that the High Court has confirmed that depriving a court of essential characteristics of a court, or essential characteristics of a judicial process, can infringe Ch III.[116] While a complete definition of judicial power may be elusive, the classic statement of Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357, refers to:

> The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power to give a *binding and authoritative decision* (whether subject to appeal or not) is called upon to take action.

The fact that judicial power is characterised by a final and conclusive decision, subject to an appeal to another court, was pivotal in the High Court decision in *British Imperial Oil Co Ltd v Commissioner of Taxation (Cth)* (1925) 35 CLR 422,[117] and the Privy Council decision in *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.[118]

The legislation which is the focus of this article expressly applies once an appeal (to a court) under the Dangerous Prisoners Act has been finally dealt with, or where the period during which an appeal could have been brought has expired.[119] As discussed, it then allows for a different decision to be made by the Governor, pursuant to a recommendation by the Attorney-General. This undermines the "final and decisive" nature of the decision rendered by the Supreme Court, or the High Court if the matter has been appealed. It is impossible to say that the court's decision to release a past sexual offender bears the quality of being "final and decisive" when it is subject to being overridden by a subsequent order by the Executive.[120] Given that "final and decisive" is an essential characteristic of a court exercising judicial power, the ability under the legislation to have that decision overturned by a member of the Executive sufficiently undermines an essential characteristic of a court that Ch III is

[115] The legislation does permit judicial review of the Governor's decision but this is on greatly restricted grounds, involving jurisdictional error only: *Criminal Law Amendment Act 1945* (Qld), s 22K(4).

[116] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

[117] Where at 432, Knox CJ at 432 refers to whether the body's decision was "final and conclusive"; finding it was, he indicated the body was exercising judicial power; see also to like effect Isaacs J at 437 and Starke J at 445.

[118] Where the Council noted that the body's decisions there were stated not to be final and conclusive, assisting to a conclusion that the body was not exercising judicial power.

[119] *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld), s 21.

[120] Chesterman, n 11: "By the new Act, the Attorney-General declares he will accept the decision of the court only if it is in his favour".

offended.[121] In invalidating the legislation, the Queensland Court of Appeal observed that the legislation had effectively rendered the Supreme Court's decision "provisional".[122]

Space does not permit a fuller amplification, but concerns also arise with respect to the rule of law here, given the lack of objective criteria to constrain the decision-maker's powers, and the fact they do not provide reasons for their decision. This has an insidious effect on the extent to which the court can, in reality, see whether a decision made under the legislation is tainted by jurisdictional error. As Bateman puts it: "A statute that confers a power which is not conditioned by sufficient jurisdictional limitations will authorise the arbitrary exercise of power and will thus undermine a primary function of the entrenched jurisdiction to review for jurisdictional error and is invalid."[123]

CONCLUSION

While the conferral of power on a member of the Executive to detain an individual is not unprecedented, it must be viewed with great caution, with strict limits on its use maintained. The *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) was not operative during a time of national emergency, as was the case with some earlier executive detention cases, and did not fit any of the exceptional categories discussed by the majority in *Chu Kheng Lim* where involuntary executive detention might be legally permitted. This legislation withdrew a power that is traditionally considered to be a judicial one, from the judiciary and to the Executive, with greatly constrained judicial review.

This article has argued the constitutional invalidity of such measures in various ways. First, it is argued that involuntary detention is in substance punitive, rather than purely based on community protection as the government might argue. Secondly, it is argued that punishment is an exclusively judicial power, to be exercised by the courts. This sets up the separation of powers "problem". The response from the Queensland government might be that there is no strict separation of powers at State level, relying on the *BLF* orthodoxy. In this article I have sought to challenge this orthodoxy. Alternatively, if this argument is not accepted, I have argued that the withdrawal of a power traditionally given to a court and its placement with the Executive offends the institutional integrity of that court contrary to Ch III requirements. I have argued the fact that the Executive can effectively overrule the court's decision offends the "final and decisive" characteristic of the exercise of judicial power, to also offend Ch III.

[121] Having said that, I do not wish this argument to be accepted, but the other parts of Step 3 not accepted. If that occurred, the Queensland Parliament might simply cut the court out of the process altogether, and provide for direct executive detention with no court involvement at all in the process. Relevantly, Gerangelos P, "Interpretation Methodology in Separation of Powers Jurisprudence" (2005) 8 *Constitutional Law and Policy Review* 1 at 11, discussing a UK statute that overruled a House of Lords decision, concluded that equivalent legislation in Australia would be struck down as an "egregious" breach of the separation of powers principle.

[122] *Attorney-General (Qld) v Lawrence* (2013) 284 FLR 21 at [41]; [2013] QCA 364.

[123] Bateman W, "The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review" (2011) 39 Fed L Rev 463 at 504. His test is whether the statute in substance (not form) makes the decision maker "unrestrained in the exercise of will" (at 503). See also Kirk J, "The Entrenched Minimum Provision of Judicial Review" (2004) 12 AJ Admin L 64; McDonald L, "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" (2010) 21 PLR 14.