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DETAINING FUTURE DANGEROUS OFFENDERS: DANGEROUS LAW

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I. INTRODUCTION

The [*Dangerous Prisoners \(Sexual Offenders\) Act 2003*](#) (Qld) is not the first,^[1] and is unlikely to be the last, example of 'preventive detention' legislation in Australia. Preventive detention legislation is considered to be legislation that at its base allows a court to order that a person be detained either for a further defined or indefinite period, based on an assessment that the person is likely to re-offend upon release from prison.^[2] It is certainly not free from controversy, with many believing it to be a fundamental premise of criminal law that a person can only be dealt with as a criminal because of past behaviour.^[3]

There are many further issues discussed in different models of preventive detention legislation which will be noted during this article in passing. However, the above definition captures the common element of this kind of regulation, passed by parliaments seeking to protect the community from individuals thought to pose a danger to society.^[4]

II. OUTLINE OF THE 2003 DANGEROUS PRISONERS (SEXUAL OFFENDERS) ACT

It is necessary to point out the basic features of the latest example of preventive detention legislation. It has been found to be constitutionally valid by the Queensland Court of Appeal, however an appeal to the High Court against that decision has been heard but not decided at the time of writing. It will be submitted with respect that the High Court should find the legislation to be invalid as a breach of the principle of separation of powers, and set aside the Queensland Court of Appeal decision.^[5]

The Act's objectives are stated in s 3 to be twofold:

- (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
- (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

The legislation allows the Queensland Attorney-General to apply to the Supreme Court for an order in respect of a 'prisoner' as defined by the Act. A prisoner for these purposes is a prisoner detained in custody who is serving a period of imprisonment for a 'serious sexual offence',^[6] whether the person was sentenced to the term of period of imprisonment before or after the section commences. In other words, the legislation can have retrospective effect. A serious sexual offence is an offence of a sexual nature involving violence or against children.^[7]

The most important provision is s 13, which applies where, upon application by the Attorney-General, the court is satisfied the prison is a 'serious danger to the community'. This is defined in s 13(2), to mean where there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody, or released without supervision. The court must be satisfied of this risk 'by acceptable, cogent evidence and to a high degree of probability'. The court is to have regard to many factors in making this assessment, including psychiatrists' reports and other expert opinion in relation to the offender.^[8] The court can consider the prisoner's criminal history, including any pattern of criminal behaviour, participation in rehabilitation programs, the need to protect the community from the risk of re-offending, and 'any other relevant matter'.

The court can order that the person be detained for an indefinite period, or that the prisoner be released, whether upon terms of supervision or not. The court is reminded that in deciding whether or not to make an order in relation to the prisoner, the paramount consideration is the protection of the community.^[9] A continuing detention order must be reviewed at least annually. At the review, the court must again be satisfied by 'acceptable, cogent evidence and to a high degree of probability' that the evidence is sufficient to justify the prisoner's continued detention. Again, the paramount consideration is the protection of the community. The Act allows the prisoner to be heard at the original hearing and any review. Either the prisoner or Attorney can appeal any decision made under the Act.^[10]

There are clear similarities, and some differences, between this 2003 Queensland legislation, and legislation passed by the New South Wales and Victorian Parliaments in the early 1990s.^[11] The New South Wales legislation will be mentioned here, because it was found to be unconstitutional by the High Court in the *Kable* decision, in a judgment with clear implications for the *Dangerous Prisoners (Sexual Offenders) Act 2003*. The Queensland Court of Appeal considered the *Kable* decision in some detail in assessing the constitutionality of the Queensland equivalent legislation.

III. DETAIL AND CONSTITUTIONALITY OF NEW SOUTH WALES PREVENTIVE DETENTION LEGISLATION

The New South Wales *Community Protection Act 1994* allowed that State's Attorney-General to apply to the Supreme Court for an order that a *specified person* be detained in prison for a specified period if it is satisfied, on reasonable grounds, that the person is 'more likely than not to commit a serious act of violence, and that it is appropriate, for the protection of a particular person or persons generally, that the person be held in custody'. The maximum period of detention was stated as six months, with more

than one application possible in relation to a particular person. [Section 5\(1\)\(a\)](#) of the Act defined a serious act of violence as an act of violence that has a ‘real likelihood of causing death or serious injury to the other person or that involves sexual assault’. The court could order that the person be detained upon such conditions as it saw fit. The proceedings were described as civil in nature, with the Court determining matters according to the civil standard of the balance of probabilities.[\[12\]](#)

While the Act stated that the ordinary rules of evidence would apply, the Act allowed the Court, in assessing the application, to consider a broad range of evidence, including ordering the production of medical or psychiatric records, police records, and the court could order a medical examination of the person. It went on to specifically allow hearsay evidence to be admitted to the Court in this kind of proceeding [\(s 17\)](#).

Upon its passage through the New South Wales Parliament, the legislation was amended so that the only person against whom an order could be made was Gregory Kable. [Section 3](#) of the Act stated that the object of the Act was to protect the community by providing for the preventive detention of that offender. It was specified that in interpreting the Act, the need to protect the community was paramount. Kable had been jailed for the unlawful killing of his wife, pleading guilty to manslaughter on the ground of diminished responsibility. He was sentenced to a minimum term of four years and an additional term of one year and four months. While in prison, Kable had made written threats to the family members of his dead wife that upon his release from prison, he would commit serious offences against them.

Kable challenged the legislation on constitutional grounds, arguing that the Act breached the principle of separation of powers by requiring a judicial body to perform a non-judicial function. His argument was successful 4-2 in the High Court.

All judges agreed with the findings of previous courts[\[13\]](#) that no formal separation of powers existed in State Constitutions in Australia. Thus, prima facie there would be no difficulty in asking a State court to carry out non-judicial functions. However, the majority found that since the New South Wales Supreme Court had been vested with federal jurisdiction, and was exercising federal jurisdiction when hearing this matter,[\[14\]](#) it became subject to rules about federal jurisdiction contained in the *Australian Constitution*, including those which did embody a formal separation of powers between the legislative, executive and judicial functions.[\[15\]](#)

Most importantly for present purposes, all members of the majority expressed grave concerns as to the nature of these proceedings. As Toohey J noted, the Act required the Supreme Court to participate in the making of a detention order where no breach of the criminal law was alleged and there had been no determination of guilt.[\[16\]](#) Gaudron J found that asking a court to form an opinion as to whether an offender was more likely than not to re-offend was

the antithesis of the judicial process, one of the central purposes of which (was) to protect the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts that have been properly ascertained.[\[17\]](#)

Gummow J stated that the kind of power given to the Supreme Court in this instance, not consequent on any finding of guilt, was ‘repugnant to the judicial process in a fundamental degree’.^[18] The court also concluded that the legislation undermined confidence in the judiciary,^[19] and undermined the notion that courts in Australia were an integrated system, requiring consistent application of principles,^[20] including the principle of separation of powers.

IV. QUEENSLAND COURT OF APPEAL DECISION ON QUEENSLAND’S PREVENTIVE DETENTION LAW

Queensland’s preventive detention legislation, the *Dangerous Prisoners (Sexual Offenders) Act*, was applied in respect of Robert Fardon in 2003. Fardon had been convicted in 1989 of rape, sodomy and assault occasioning bodily harm, and sentenced to 14 years’ imprisonment. His term expired on 29 June 2003. Responding to concerns that Fardon may re-offend upon release, the Queensland Attorney-General applied under the newly passed *Dangerous Offenders Act* for a Supreme Court order that Fardon be detained indefinitely under the legislation. A preliminary order for Fardon’s detention was made pursuant to the Act on 27 June 2003. Fardon appealed the decision, arguing the legislation was unconstitutional. His legal representatives relied heavily on the High Court’s decision in *Kable*. By a majority of 2-1, the Queensland Court of Appeal rejected Fardon’s arguments. The judgment and reasoning will now be considered.

A. Reasoning of Majority Justices (de Jersey CJ and Williams JA)

The majority contended that there were fundamental differences between the legislation impugned in *Kable* and the Queensland legislation before the Court. De Jersey CJ pointed out these differences.^[21] While the legislation in *Kable* (and indeed in the matter of *David*) was confined to one prisoner only, the Queensland legislation applied more generally to any prisoner convicted of a ‘serious sexual offence’. The rules of evidence applied, at least to some degree.^[22] Rather than the ‘balance of probabilities’ standard of proof required in the New South Wales law, the Queensland law required proof of the person likely re-offending ‘by acceptable, cogent evidence and to a high degree of probability.’^[23] As (arguably) another point of distinction between *Kable* and the current case, de Jersey CJ noted that ‘the criterion informing the exercise of the discretion is community protection rather than punishment’.^[24] His Honour also pointed out that the Act conferred genuine discretionary power on the Court to decide upon the appropriate course of action, once an application had been made. The Queensland law provided for the possibility of supervised release, or release upon condition. The New South Wales legislation permitted only a choice between detention or release.

From these differences proceeded a discussion of the purpose of incarceration under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Queensland). De Jersey CJ noted that the Act provided that the paramount consideration affecting the exercise of discretion under the Act was the need to ensure community protection. Why, he asked, could the community not be lawfully protected from dangerous, violent

criminals who were nonetheless sane.^[25] He viewed this kind of legislation as non-punitive in nature, with the object of protecting the community rather than punishing the offender.^[26] His Honour referred to the High Court's recognition in *Lim*^[27] that in some exceptional cases, a person may be detained in custody for reasons that are not punitive. Examples include the arrest and detention of a person accused of, but not convicted of, a crime. Involuntary detention in cases of infectious disease or mental illness was also seen as non-punitive detention.^[28] De Jersey CJ noted the comment of McHugh J in *Lim* that 'although detention under a law of the Parliament is ordinary characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object'.^[29] Further, Gummow J in *Kruger*^[30] commented that

the question whether a power to detain persons or to take them into custody is to be characterized as punitive in nature, so as to attract the operation of Ch III (containing the separation of powers) depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed.^[31]

De Jersey CJ (with Williams JA concurring)^[32] found that the Queensland legislation challenged in this case should similarly be seen as non-punitive in nature. The exceptional categories mentioned in *Lim* and *Kruger* were not closed, and

just as it extends to the protection of the community from the mentally ill, there is no reason why, by analogy, it should not also be seen to include community protection against violent criminals who, although sane, would, if at liberty, constitute a serious danger to the community. The process established by the Act sufficiently conforms to **normal judicial processes** (emphasis added).^[33]

Williams JA claimed further that there was a link between the prisoner's conviction for the serious sexual offence, and the making of an order pursuant to the Act. As His Honour said: '... there is a clear link between adjudgement of criminal guilt and the making of an order under the Act. That reasoning, to my mind, reinforces the conclusion that the legislation is not caught by the principles derived from *Kable*'.^[34]

B. Reasoning of Minority Justice (McMurdo P)

McMurdo P noted that Queensland courts had power to order the indefinite detention of an offender, at the time of sentencing them for the original offence.^[35] However, the legislation challenged in this case was different. It allowed a judge to order that a person who has satisfied the penalty imposed at sentence be detained for a further time without any further determination of criminal guilt. She specifically rejected the suggestion of Williams JA that the order under the *Sexual Prisoners* legislation was part of the sentencing process for the original offence.^[36]

McMurdo P conceded there were many differences between the legislation impugned in *Kable*, and the Queensland legislation, as the majority had noted. However, the legislation was based on a prediction about future conduct, something that was 'notoriously unreliable', and included only those serving a period of imprisonment for a serious sexual offence, not all members of the community who may also be a serious danger in the absence of detention or supervision.^[37]

Although the standard of proof in the Queensland legislation was higher than that in the impugned New South Wales law in *Kable*, it still was not at the criminal standard of beyond reasonable doubt. She dismissed the majority's claim that this legislation provided the court with more discretion than the legislation considered in *Kable*. McMurdo P concluded it was difficult to envisage a situation where if reports supported the conclusion that the prisoner was a serious danger to society if not detained, a judge would refuse to make an order. She found that despite the use of permissive words such as 'may', the legislation did significantly curtail true judicial discretion. The scheme undermined the ordinary safeguards of the judicial process.^[38] Her Honour dismissed the majority's view that the legislation was non-punitive in nature and justified on community protection grounds. Such a view had not commended itself to the High Court in *Kable*. The exceptional cases where involuntary detention had been permitted for non-punitive reasons were not the same as this kind of law, and could not be used to support it.^[39]

McMurdo P conclusion was clear:

The Act empowers judges to deprive these prisoners of their liberty, not because they have committed an offence or breached the civil law, but because opinions have been formed, probably on material which would not be admissible in a legal proceeding and on a standard other than beyond reasonable doubt, that they will commit a serious sexual offence as defined if released from custody, or at least unsupervised custody, after completing their sentenced terms of imprisonment. The Act requires the Supreme Court of Queensland to predict dangerousness by way of, at best, an informed guess, something which is notoriously unreliable and which must be based largely on opinions of psychiatrists. Despite the efforts of the Queensland Parliament to distinguish the scheme under the Act from the invalid New South Wales Act in *Kable* by numerous cosmetic changes, it remains the "antithesis of the judicial process" which is to protect the individual from the arbitrary interference of rights other than in consequence of the fair and impartial application of the law to properly ascertained facts ... Ordinary reasonable members of the public could well reasonably see the Act as making the Supreme Court of Queensland a party to, and responsible for, implementing the political decisions of the executive government that unpopular prisoners should be imprisoned beyond the expiry of their sentenced terms of imprisonment without the benefit of the ordinary processes of law. The powers conferred ... compromise the integrity of this Court and of the judicial system.^[40]

It is submitted with respect that the dissenting judgment of McMurdo P is correct and should be adopted.

C. Critique of Majority Opinion

It is submitted with respect that several points made by the majority in the Queensland Court of Appeal's judgment in *Fardon* are open to strong challenge.

1. The Act applies to a particular group of offenders rather than an individual

It is certainly true that a difference between, on the one hand, the New South Wales and the Victorian preventive detention legislation, and on the other, the Queensland legislation, that the former applied only to one named individual, while the latter

applies more generally to offenders convicted previously of a serious sexual offence. However, the issue surely is the relevance of this distinction to the issues at hand.

Legislation that applies only to a particular named individual, reminiscent of the historical Bills of Attainder, may be seen as an even more objectionable law, highly offensive to the rule of law. Legislation that applies to a category of offender is less offensive in this way. However, these points did not form part of the reasoning in *Kable* and their relevance is questionable when seeking to *relevantly* distinguish the Queensland from the New South Wales legislation. Specifically, the objection in *Kable* was to legislation which asked a judicial body to perform a non-judicial power, namely to determine whether an individual was more likely than not to commit a further offence. The legislation offended against the principle of separation of powers.^[41] This mixture of judicial and non-judicial functions was unacceptable, tending to undermine public confidence in the judiciary. Surely, it is the mixture of judicial and non-judicial functions that is unacceptable, and that objection applies regardless of whether the legislation applies to one individual or a class of individuals. It is submitted that while this is a difference between the New South Wales law and the Queensland law, it is not a material difference in relation to the ratio decidendi of the *Kable* case.

2. The court must be satisfied ‘to a high degree of probability’ that the offender will re-offend, relying on ‘cogent and acceptable evidence’. The Kable legislation did not include these safeguards, requiring only that the court be satisfied that the offender was more likely than not to re-offend.

It is true that the standard of proof in the Queensland law is higher than that contained in the impugned New South Wales law. However, the required standard of proof remains below the level of reasonable doubt, the level preferred by McHugh J in *Kable*.^[42] The evidentiary requirements of the Queensland Act do not reflect ordinary rules of evidence, allowing any ‘acceptable’ evidence to be heard. It is not clear what is meant by acceptable in this context, as it is not defined, but there is no reason to suppose that traditional rules regarding the use of hearsay evidence, as one example, will apply. If that is what was intended, it would have been easy to state so.

The applicable rules of evidence to these proceedings are relevant because they assist in characterizing the kind of power being exercised. The departure from the ordinary rules of evidence in judicial proceedings under this legislation reinforces the conclusion that the proceedings are not at all judicial in nature, and that the court is being asked to exercise a power that is clearly non-judicial in nature, in a way that is offensive to Chapter III of the *Australian Constitution*.

3. The Unpredictability of Future Behaviour

A fundamental difficulty with this legislation is its implication that it is possible to predict with a (legally) satisfactory degree of accuracy whether or not a person may re-offend. However, some judges have expressed strong reservations about such an ability:

No doubt the whole question of prediction of behaviour in the future is a most difficult one. Its very difficulty is in itself a potent reason against undue weight in

sentencing being given to the protection of the community from what is predicted as the likely future violence of the convicted person. Predictions as to future violence, even when based upon extensive clinical investigation by teams of experienced psychiatrists, have recently been condemned as prone to very significant degrees of error when matched against actuality.[\[43\]](#)

Interestingly, historically Justices of the Peace in England were also given power to prevent crime they considered was likely to occur in their areas of jurisdiction. These justices had power to act against persons who had not yet committed any criminal act (at least none which had been detected), but were nevertheless regarded as dangerous. Many circumstances were to be considered by these justices in making their determination of likely future dangerousness. These included:

- (a) his parents, if they were wicked, and given to the same kind of fault;
- (b) his ability of body, if strong and swift, or weak and sickly, not likely to do the act;
- (c) his nature ... a quarreler, pilferer or bloody-minded;
- (d) his trade, for if a man liveth idely (sic) or vagrant ... it is a good cause to arrest him upon suspicion, if there has been any felony committed;
- (e) his company;
- (f) his course of life;
- (g) whether he be of evil fame or report;
- (h) whether he hath committed the like offense (sic) before or if he hath a pardon, or been acquitted of felony before ... or beene (sic) outlawed for felony.[\[44\]](#)

Respected academics in the field have reached similar conclusions. Dershowitz conducted a study on all the published literature on predictions of anti-social behaviour. He concluded that:

psychiatrists are rather inaccurate predictors, inaccurate in an absolute sense, and even less accurate when compared with other professionals ... Even more significant for legal purposes: it seems psychiatrists are particularly prone to one type of error – over-prediction.[\[45\]](#)

The point is that a psychiatrist asked to write a report predicting future behaviour, on the basis of which a court will decide whether or not to release a past sexual offender, is likely to be conservative. No psychiatrist would wish to be known as the one who recommended that a prisoner be released, only for that prisoner to later re-offend. As a result, they are likely to take the safer option, and order that the person be kept in custody.[\[46\]](#) This is, it is submitted, particularly so when the relevant Queensland legislation directs the court that the protection of the community is the paramount consideration in assessing the applications.

Some psychiatrists use lists of factors to help determine whether or not an offender may be dangerous in future. Some authors of a study on dangerous sexual offenders suggest the following factors:

- (a) brutality sustained in childhood;

- (b) bedwetting, firesetting, and cruelty to animals;
- (c) assorted delinquent acts during puberty;
- (d) escalation of the sexual offences;
- (e) inter-related criminality with sexual offences;
- (f) sustained excitement prior to the act and at the time of the offence;
- (g) lack of concern for the victim;
- (h) bizarre fantasies with minor offences;
- (i) explosive outbursts;
- (j) absence of psychosis;
- (k) absence of alcohol consumption;
- (l) high IQ.

Each factor is graded on a 10 point scale, and a score of over 90 is 'indicative of a very high degree of dangerousness'.[\[47\]](#) One could also point to the consequences of the United States Supreme Court decision in *Baxstrom v Herold*, which found it was unconstitutional to retain indefinitely prisoners who had completed their sentence but not released because they were deemed to be dangerous.[\[48\]](#) As a result, many prisoners who had been detained indefinitely on the basis they were considered dangerous were released. Of those released, less than 5% committed further crimes upon release.[\[49\]](#)

It is also suggested that in assessing dangerousness, psychiatrists are likely to be affected by various factors which are not themselves actually indicators of dangerousness. Klein, a sociologist, in his study found that psychiatric labeling was largely an outcome of the setting in which the patient is seen, the social class of the patient determined, and the biasing effect of other clinicians' diagnoses. He found that if other psychiatrists saw a renowned psychiatrist state that a patient was psychotic, they were likely to diagnose the patient as mentally ill, even though his behaviour was not consistent with the diagnosis.[\[50\]](#)

4. The Object of the Detention

De Jersey CJ in *Fardon* sought to justify the legislation by claiming that, rather than being punitive in nature, the object of the detention was community protection.[\[51\]](#) He asked why the community could not be protected from dangerous criminals, otherwise due for release, who were nevertheless sane.

Several comments may be offered by way of response. First, in answer to His Honour's rhetorical question, the obvious answer is that it is a strong tradition in our legal system, and a very sound tradition, that a sane person can only be held in incarceration because of something he/she has done, not because of something they may do. A person ordered to serve a criminal sentence for a defined period has a legitimate expectation that they will be released at the conclusion of the period, provided they have committed no further offences while in prison. It is offensive to the principle of separation of powers and of the rule of law, two hallmarks of our legal system, that a judge may order that a person be detained indefinitely because of something that may happen in future. The logical conclusion to the suggestion that the community is entitled to be protected against someone who may be dangerous but

sane is to imprison citizens shown by testing to be prone to criminal behaviour, but who have not been charged with any offence (or indeed committed any crime). It is trite to point out how dangerous this suggestion is.^[52] Williams responds to the non-punitive argument well:

The argument is put that if the system of incarceration can be classified as civil and non-punitive in nature, then the legal and ethical objections to detention based other than on desert are removed. Such an argument seems mistaken. The essence of incarceration from a punitive point of view is the deprivation of liberty, and this is in no way lessened by claiming the incarceration is civil ... such (preventive) incarceration is ... properly classified as a form of preventive detention akin to imprisonment. To make use of less harsh sounding labels is merely to seek to escape from the gravity of the issues inevitably involved in arguing in support of preventive detention.^[53]

Second, it may seem capricious to state that the object of the detention here is community protection rather than punishment.^[54] It is submitted that in most cases (at least those involving violent behaviour), in deciding on an appropriate criminal punishment, sentencing courts will have regard to the need for community protection as a relevant factor.^[55] Certainly the *Penalties and Sentences Act 1992* (Qld) directs the court, when considering punishment, to consider community protection as an element.^[56] It is submitted to be artificial to divorce the two and argue that imprisonment is not punishment because it is based on community protection (or what is the same thing, crime prevention). They are not mutually exclusive, and to the contrary are in fact closely linked. As Oliver Wendell Holmes Jr said it, 'prevention is the chief and only universal purpose of punishment'.^[57] A person being retained in custody, to prevent them committing future crimes and to protect society, is still being punished. The detention is punitive.^[58]

It is possible that the legislation was regarded as being justified on community protection grounds, rather than punishment grounds, because there is authority denying the power of a court to *punish* for future behaviour.^[59] Dicey's view of the rule of law, that a person 'may be punished for a breach of law, but he can be punished for nothing else'^[60] is likely also to be inconsistent with punishment for future behaviour.

However, whatever the rationale, it is submitted to be unacceptable reasoning. It certainly did not commend itself to the High Court in the *Kable* decision, when considering the *Community Protection Act 1995* (emphasis added). The legislation was still rightly seen as punitive in nature, although it may have been motivated by a genuine desire to protect the community. The genuine desire to protect the community did not change the (unconstitutional) nature of the law in *Kable*, and it is submitted it should not either in the Queensland Act of similar ilk.^[61]

V. CONCLUSION

It is hoped that the High Court will declare the legislation to be unconstitutional. It is submitted this would be consistent with its previous decision in *Kable*, with the doctrine of separation of powers, and with the fundamental human right that a person

should only be dealt with as a criminal because of something they have done in the past, not something they may do in the future. Bearing in mind the inaccuracy in predicting future behaviour, this kind of preventive detention legislation, whilst no doubt electorally popular, surely cannot stand.

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1 Historians Pollock and Maitland trace the use of preventive criminal measures at least back to the Anglo-Saxon period in England. A person suspected, but not convicted, of committing past crimes could be arrested, and treated as an outlaw unless they gave security for their future good behaviour: Sir Frederick Pollock and Frederic Maitland, *The History of English Law Before The Time of Edward I* (1968) 27, referred to in Alan Dershowitz, 'The Origins of Preventive Confinement in Anglo-American Law – Part I: The English Experience' (1974) 43 *University of Cincinnati Law Review* 1,13.

[2] John Rawls spoke of a system of 'telishment', establishing an institution and allowing its officials to subject any individual they thought fit to deprivation if that (in their opinion) would advance the public good. He criticized such a model thus:

Once one realizes that one is involved in setting up an institution, one sees that the hazards are very great. For example, what check is there on the officials? How is one to tell whether or not their actions are authorized? ... How is one to avoid giving anything short of complete discretion to the authorities to telish anyone they like? ... it is obvious that people will come to have a very different attitude towards their penal system when telishment is adjoined to it. They will be uncertain as to whether a convicted man has been punished or telished. They will wonder whether or not they should feel sorry for him. They will wonder whether the same fate won't at any time fall on them. If one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose ('Two Concepts of Rules' in Harry Acton (ed), *The Philosophy of Punishment* (1969) 113).

Though telishment allowed a person never convicted of a crime to be detained, while the Queensland model applies only to convicted sexual offenders, it is thought the objections raised above to such a system are equally applicable to the current version.

[3] For example, according to Lord Denning: 'It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do' (*Everett v Ribbands* (1952) 2 QB 198, 206), and Justice Jackson said that: 'The jailing of persons by the courts because of anticipated but as yet uncommitted crimes could not be reconciled with traditional American law. Imprisonment to protect society from predicted unconsummated offences is unprecedented in this country and fraught with danger of excess' (*Williamson v United States* (1950) 184 F 2d 280, 282 (2nd Cir)). To like effect, see Francis Wharton in his *Treatise on Criminal Law* (1932 12th ed) commenting that the idea of punishing a person before they have committed a crime 'contradicts one of the fundamental maxims of English common law, by which not a tendency to crime, but simply crime itself, can be made the subject of a

criminal issue', Jerome Hall's comment that 'ours is a legal order which does not recognize prevention as a sufficient ground for punishment' (Jerome Hall *General Principles of Criminal Law* (1960) 219, and Pollock and Maitland (above n 1, 507) commenting 'ancient law has as a general rule no punishment for those who have tried to do harm but have not done it' (recognizing a historical exception involving plots to kill the monarch).

[4] Fairall suggests preventive detention laws may be inconsistent with the right to equality of treatment before the law, guaranteed by Article 14.1 of the International Covenant on Civil and Political Rights, to which Australia is a signatory: Paul Fairall, 'Violent Offenders and Community Protection in Victoria – The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 46-47.

[5] An alternative argument against preventive detention may be that the general power of the State Parliament to pass laws for the peace, welfare and good government of the State, including preventive detention laws, should be subject to some restraints by reference to 'rights deeply rooted in our democratic system of government and the common law', an argument at least raised and left open by the High Court in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, referring to dicta in New Zealand case law *Drivers v Road Carriers* (1982) 1 NZLR 374, 390, *Fraser v State Services Commission* (1984) 1 NZLR 116, 121, and *Taylor v New Zealand Poultry Board* (1984) 1 NZLR 394, 398. This argument has not been developed further because the High Court has not addressed the issue again, apart from the judgment of Dawson J in *Kable v The Director of Public Prosecutions for New South Wales* (1997) 189 CLR 51,76 ('*Kable*') expressing disapproval of the suggestion.

[6] Or a term of imprisonment that includes a term of imprisonment for a serious sexual offence.

[7] Schedule Dictionary, regardless whether the offence was committed in Queensland or not.

[8] Section 13(4) refers to any other medical, psychiatric or psychological or other assessment relating to the prisoner, information indicating whether there is a propensity for the offender to commit serious sexual offences in future, whether there is any pattern of offending behaviour by the offender, efforts by the prisoner to address their offending behaviour including participation in rehabilitation programs, the prisoner's antecedents and criminal history, the risk that the prisoner will commit another serious sexual offence if released, the need to protect the community from this risk, and any other relevant matter.

[9] Section 13(6).

[10] Section 31.

[11] The Victorian *Community Protection Act* 1990 (Vic) applied to one named individual, Gary David. David had been jailed for two offences of attempted murder, and sentenced to 14 years' imprisonment. While in jail, he had threatened large-scale massacres, to poison the town water supply, had assaulted more than 15 inmates and

guards in jail, and had self-mutilated on several occasions. Experts diagnosed David as having a borderline personality disorder and antisocial personality disorder (a psychopath). This condition did not fall within the definition of mental illness in relevant legislation. As he was due for imminent release from prison, the Victorian Parliament passed the above legislation to allow David to be detained for a further period. The constitutional validity of this legislation was never tested, the Victorian Parliament eventually repealing the law. See David Wood, 'A One Man Dangerous Offenders Statute: The Community Protection Act 1990 (Vic)' (1990) 17 *Melbourne University Law Review* 497, David Wood, 'Dangerous Offenders and the Morality of Protective Sentencing' [1988] *Criminal Law Review* 424, David Wood, 'Dangerous Offenders and Civil Detention' (1989) 13 *Criminal Law Journal* 224, and Robert Williams 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising From the David Case' (1990) 16 *Monash University Law Review* 161.

[12] [Dangerous Prisoners \(Sexual Offenders\) Act 2003](#) (Qld), s 20.

[13] *Clyne v East* (1967) 68 SR (NSW) 385, *Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372, *Kable* (1997) 189 CLR 51, 92 (Toohey J), 118 (McHugh J).

[14] Because *Kable* raised the question of its constitutionality.

[15] Where the court differed was on the issue whether the clear separation of powers at federal level had been 'drawn down' into State courts exercising federal jurisdiction. The majority said it had been, the minority said it had not.

[16] *Kable* (1997) 189 CLR 51, 98 (Toohey J).

[17] *Kable* (1997) 189 CLR 51, 106-7 (Gaudron J); to like effect, see 122 (McHugh J).

[18] *Kable* (1997) 189 CLR 51, 132 (Gummow J).

[19] The majority also applied an aspect of incompatibility the court had mentioned in *Grollo v Palmer* (1995) 184 CLR 348, 365, that of 'the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution is diminished'. *Kable* (1997) 189 CLR 51, 98 (Toohey J) found that this was the effect of the *Community Protection Act* in this case, by asking the court to exercise non-judicial functions. Gaudron J elaborated on this point:

The integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process. Particularly, that is so in relation to criminal proceedings which involve the most important of all judicial functions, namely the determination of the guilt or innocence of persons accused of criminal offences. Public confidence cannot be maintained in the courts and their criminal processes if ... the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so. (*Kable* (1997) 189 CLR 51, 107).

Gaudron J claimed the legislation made a mockery of the judicial process and inevitably weakened public confidence in it (108); see to like effect McHugh J (121-122) and Gummow J (134).

[20] Gaudron J noted that the Federal *Constitution* required States to maintain at least one court to exercise the judicial power of the Commonwealth. Given that Federal courts exercising judicial power of the Commonwealth were required to observe the separation of powers, so too were State courts exercising judicial power of the Commonwealth. This was because the Constitution did not allow or imply that it 'permits different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament' (103); to like effect McHugh J (116-117).

[21] De Jersey CJ commented:

The constraint affirmed in *Kable* does not invalidate this legislation, substantially for the reasons assigned by the learned primary Judge in the course of his contrasting of the New South Wales and Queensland legislative regimes. The principal features of significance are the general application of the Queensland Act, the conferring of genuine discretionary power, that the criterion informing the exercise of the discretion is community protection rather than punishment, and the applicability to the court process of the rules of evidence. *A-G (Qld) v Fardon* [2003] QCA 416, [21]

[22] Section 13 allows the court to consider a broad variety of evidence, including psychiatric and other medical reports, the prisoner's criminal history including any pattern of violent behaviour, whether the prisoner has participated in any rehabilitation programs, the risk of re-offending, the need to protect members of the community from that risk, and 'any other relevant factor'.

[23] *Dangerous Prisoners (Sexual Offenders) Act 2003*, 16(3)(a).

[24] *A-G (Qld) v Fardon* [2003] QCA 416, [21].

[25] *Ibid* [30-31].

[26] It is possible that the legislation was regarded as being justified on community protection grounds, rather than punishment grounds, because there is authority denying the power of a court to punish for future behaviour. In declaring that the crime of conspiracy was unknown to the English law, Lord Simon of Glaisdale in *Director of Public Prosecutions v Withers* [1975] AC 842, 870 stated that 'in effect, the concept enjoins an English criminal court to act like a "people's court" in a totalitarian regime, and to declare punishable and to punish conduct held at large to be "extremely injurious to the public"'. As Dicey would similarly provide, 'Englishmen are ruled by law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else' (Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (1885) 202).

[27] *Chu Kheng Lim v Minister for Immigration and Local Government and Ethnic Affairs* (1992) [176 CLR 1](#).

[28] The traditional powers of the Parliament to punish for contempt, to detain an ‘alien’ while their application to remain in Australia was processed and of military tribunals to punish for breach of military discipline were also noted as exceptional cases.

[29] *Chu Kheng Lim v Minister for Immigration and Local Government and Ethnic Affairs* (1992) [176 CLR 1](#), 71.

[30] *Kruger and Ors v The Commonwealth; Bray and Ors v The Commonwealth* (1997) 190 CLR 1.

[31] *Ibid* 161-162.

[32] *A-G (Qld) v Fardon* [\[2003\] QCA 416](#), [101].

[33] *Ibid* [42]. There are many words the author might use to describe this regime, but ‘normal judicial processes’ are not among them.

[34] *Ibid* [103]. With respect, the author does not see how the ‘clear link between adjudgement of criminal guilt and the making of an order under the Act’ can possibly distinguish *Kable* from the present case. There was an obvious link between *Kable*’s original crime and the reasons why he was kept in prison indefinitely, just as there is a link in the current case between *Fardon*’s original crime and the reasons why the Attorney-General wished to keep him in prison. The author fails to see any relevant point of differentiation whatsoever.

[35] *Ibid* [78]. One example is [Part 10](#) of the [Penalties and Sentences Act 1992](#) (Qld) applicable where the offender is a serious danger to the community. Further, *Criminal Law Amendment Act 1945* (Qld) s 18 allows for the detention of a person ‘during Her Majesty’s pleasure’ once convicted of a sexual offence involving a child under the age of 16.

[36] *Ibid* [82].

[37] *Ibid* [84].

[38] *Ibid* [87].

[39] *Ibid* [88].

[40] *Ibid* [91].

[41] According to its architect Charles Montesquie

there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator.

Were it joined to the executive powers, the judge might behave with all the violence of an oppressor. Miserable indeed would be the case, were the same man, or the same body ... to exercise those three powers .. Most kingdoms of Europe enjoy a moderate government, because the prince who is invested with (legislative and executive powers) leaves the third to his subjects. In Turkey (sic), where these three powers are united in the Sultan's person, the subjects groan under the weight of tyranny and oppression". He added that the judgments should "always be conformable to the exact letter of the law. Were they to be the private opinion of the judge, people would then live in society without knowing exactly the obligations it lays them under . (*The Spirit of Laws* (1757) Book XI Chapter 6 paras [4]-[7], [17]).

[42] *A-G (Qld) v Fardon* [2003] QCA 416, [120].

[43] Stephen J in *Veen v The Queen* (1979) 143 CLR 458, 464 , citing Norval Morris, 'The Future of Imprisonment: Towards a Punitive Philosophy' (1974) 72 *Michigan Law Review* 1161, 1164-1173; and to like effect in the Canadian context: 'the evidence of a psychiatrist... is at times highly speculative and in certain instances a lay person is in as good a position to make predictions as to future dangerousness' (*Re Moore and the Queen* (1984) 10 C.C.C (3d) (Ont S.C.)) Vincent J of the Victorian Supreme Court and Chairman of the Adult Parole Board noted that: 'once a community starts to decide for itself that it will incarcerate an individual not for something that he has done but because of something it is feared he might do, the community is moving into dangerous waters' (Social Development Committee, *Strategies to Deal With Persons With Severe Personality Disorder who Pose a Threat to Public Safety* (May 1990) 50.

[44] Michael Dalton, *The Country Justice* (1661), cited in Dershowitz, above n 1, 25.

[45] Alan Dershowitz, 'The Law of Dangerousness – Some Fictions About Predictions' (1970) 23 *Journal of Legal Education* 26, 46; see to like effect Henry Steadman, 'Psychiatry, Dangerousness and the Repetitively Violent Offender' (1968) 69 *Journal of Criminal Law and Criminology* 226, Henry Steadman, 'We Can't Predict Who is Dangerous' (1975) 8 *Psychology Today* 22, Henry Steadman, 'The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence' [1976] *Rutgers Law Review* 1074; John Monahan and Jeffrey Cummings 'Social Policy Implications of the Inability to Predict Violence' (1975) 31 *Journal of Social Issues* 152, Anthony Bottoms, 'Reflections on the Renaissance of Dangerousness' (1977) 16 *Howard Journal of Penology and Crime Prevention* 494, Jean Floud, 'Dangerousness and Criminal Justice' (1982) 22 *British Journal of Criminology* 213, cf Nigel Walker, 'Dangerous People' (1978) 1 *International Journal of Law and Psychiatry* 37.

[46] As Grant succinctly puts it, 'psychiatrists' false positives are locked up in prisons or hospitals. Their false negatives may come back to haunt them in headlines or even law suits', and cites a United States decision where a psychiatrist was found negligent after releasing a patient without warning his future victim that he may be dangerous (*Tarasoff v Regents of the University of California* (1978) 551 P 2d 334): Isabel Grant, 'Dangerous Offenders' (1985) 9 *Dalhousie Law Journal* 348, 364.

[47] Paul Marcus 'Dangerous Sexual Offender Project' (1969) 11 *Canadian Journal of Correction* 198, 204. A similar study by Abrahamsen included on the list 'spelling errors, loneliness and excessive truancy': David Abrahamsen, *Our Violent Society* (1970) 218.

[48] Another example of the striking down of such a law on constitutional grounds is *People v Frontozak* (1938) 281 NW 534 .

[49] Henry Steadman 'The Baxstrom Patients: Background and Outcomes' (1971) 3 *Seminars on Psychiatry* 376, 'Follow Up on Baxstrom Patients' (1973) 130 *American Journal of Psychiatry* 317, 319; see also James Garofalo, 'Diagnosis and Treatment of Dangerousness' (1972) 18 *Crime And Delinquency*.371, 389 and Bernard Diamond 'The Psychiatric Prediction of Dangerousness' (1974) 123 *University of Pennsylvania Law Review* 439, 447.

[50] Harry Klein, 'The Dangerousness of Dangerous Offender Legislation' (1976) 18 *Canadian Journal of Crime and Corrections* 109, 112; see also Ernst Wenk 'Can Violence Be Predicted?' (1972) 18 *Crime and Delinquency* 393, 401.

[51] It is pertinent to recall Justice Brandeis' comments here: 'Experience would teach us to be most on our guard to protect liberty when the government's purposes are beneficent ... The greatest danger to liberty lies in the insidious encroachment of men of zeal, well-meaning but without understanding' (*Ormsstead v United States* (1928) 277 US 438).

[52] The lesson is also apparent in non-legal literature, including Lewis Carroll's *Alice in Wonderland*.

"There's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all."

"Suppose he never commits the crime?" asked Alice.

"That would be all the better, wouldn't it" the Queen responded.

Alice felt there was no denying that. "Of course it would be all the better," she said. "But it wouldn't be all the better his being punished."

"You're wrong ..." said the Queen. "Were you ever punished?"

"Only for faults," said Alice.

"And you were all the better for it, I know!" the Queen said triumphantly.

"Yes, but then I had done the things I was punished for," said Alice: "That makes all the difference."

"But if you hadn't done them," the Queen said, "that would have been better still: better, and better, and better!" Her voice went higher with each "better", till it got quite to a squeak ...

Alice thought, “There’s a mistake somewhere...” (cited in Grant, above n 45, 382).

[53] Williams, above n 11, 179. The court in *People v Frontczak* (1938) 281 NW 534,537 was not impressed with the argument either when considering the validity of legislation allowing the continuing detention of a convicted sex offender who had served his term: ‘Under this Act (the) defendant is under sentence for an overt sex deviation offense (sic) and, as a potential like offender, it is sought to keep him in confinement under exercise of the police power. The police power, under such circumstances, is not a civil proceeding, comparable to that in cases of insane persons’.

[54] Fairall is similarly unimpressed with the argument: ‘*The argument that preventive detention is not intended as, and therefore does not amount to, punishment may be dismissed out of hand. People are not sent to prison for punishment, but as punishment*’: Fairall, above n 4, 50.

[55] See the High Court’s comments in *Veen v The Queen* (1979) [143 CLR 458](#), *Veen v The Queen* (No 2)(1988) [164 CLR 465](#) . For example, Mason J explained in *Veen* (No 1) [143 CLR 458](#), 468 that

The court must, in sentencing a person who has been convicted of a very serious offence involving violence, if his record and the expert evidence plainly demonstrate that there is a real likelihood of his committing that kind of offence again if he is restored to liberty, ensure by the order that it makes that he will not be released whilst that likelihood continues. If it should appear that the propensities or predilections of the person convicted are such that the imposition of life imprisonment is necessary to protect the community from violent harm, then the court should impose that penalty.

[56] Section 9(1)(e) of the Act, referring to sentencing guidelines, includes as an object ‘to protect the Queensland community from the offender’. Section 9(4) states that when dealing with a violent offender, the court is to have regard to (a) the risk to the community if a custodial sentence is not imposed; and (b) the need to protect the community from risk.

[57] Oliver Wendel Holmes Jr, *The Common Law* (1881) 46.

[58] As Holmes (ibid) put it

when a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point ... If a man starts from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped and ... goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion (Ibid 68-69).

It is submitted that similar arguments can be made against pre-emptive preventive sentencing such as contained in the Queensland Act under consideration.

[59] In declaring that the crime of conspiracy was unknown to the English law, Lord Simon of Glaisdale in *Director of Public Prosecutions v Withers* [1975] AC 842, 870

stated that 'in effect, the concept enjoins an English criminal court to act like a 'people's court' in a totalitarian regime, and to declare punishable and to punish conduct held at large to be 'extremely injurious to the public'.

[60] Dicey, above n 26, 202.

[61] The author respectfully agrees with the conclusion of McMurdo P in *Fardon* that the legislation was punitive in nature (at [90]), contrary to the conclusion of the majority justices. It is not similar at all to the small number of cases where the Court has justified involuntary detention on non-punitive grounds, such as arrest prior to trial, persons suffering an infectious disease, or persons who are insane.

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