

CONSTITUTIONAL LIMITATIONS ON DETENTION ‘AT
HER MAJESTY’S PLEASURE’:
POLLENTINE V ATTORNEY-GENERAL (QLD) [2014] HCA

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LILY HANDS*

In *Pollentine v Attorney-General (Qld)* (*‘Pollentine’*),¹ the High Court held that a law which permits a State court to direct the indefinite detention of a sex offender as a precursor to an executive power to continue or terminate detention does not infringe the principle identified in *Kable v Director of Public Prosecutions (NSW)* (*‘Kable’*).² In upholding the validity of the relevant provisions, their Honours emphasised the fact that the executive power to detain was subject to a criterion which admitted of judicial review. This case note contends that the Court’s reasoning coincides with the principle in *Kirk v Industrial Court of NSW* (*‘Kirk’*)³ that the power to grant relief for jurisdictional error is a defining characteristic of a State Supreme Court. However, *Pollentine* illustrates that the statutory criteria against which the lawfulness of indefinite preventive detention is tested may nonetheless admit of a significant risk of executive abuse. Finally, the case note considers some of the ramifications of the Court’s strict conceptual separation between the respective judicial and executive functions provided for under the relevant legislation.

I THE PRINCIPLE IN *KABLE*

The principle first identified in *Kable* is that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, States may not enact a law which is repugnant to or incompatible with the institutional integrity of a State court.⁴ Relevant applications⁵ of this prohibition include:

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¹ [2014] HCA 30 (14 August 2014).

² (1996) 189 CLR 51.

³ (2010) 239 CLR 531, [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴ *Kable v DPP (NSW)* (1996) 189 CLR 51; *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591 (Gleeson CJ); most recently, see *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) [38] (French CJ).

⁵ *Baker v The Queen* (2004) 223 CLR 513, 541 (Kirby J); *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) [38] (French CJ).

- (a) effecting an impermissible executive intrusion into the processes or decisions of a court;⁶
- (b) authorising the Executive to enlist a court to implement decisions of the Executive in a manner incompatible with that court's institutional integrity;⁷ and
- (c) conferring upon a court a function (judicial or otherwise) which is incompatible with the role of that court as a repository of federal jurisdiction.⁸

II FACTS

The plaintiffs, Edward Pollentine and Errol George Radan, were each convicted of sexual offences committed against a child and detained indefinitely under s 18 of the *Criminal Law Amendment Act 1945* (Qld) ('CLA Act').⁹ Section 18 the CLA Act provides that a judge presiding at the trial of a person found guilty of an offence of a sexual nature committed upon or in relation to a child under 16 years may direct that two or more medical practitioners inquire as to whether the offender's mental condition is such that the offender is incapable of exercising proper control over their sexual instincts. If the medical practitioners report that the person is so incapable, and the trial judge considers the matters in the reports to be 'proved',¹⁰ the trial judge may declare that the offender is so incapable, and direct indefinite detention in an institution 'at Her Majesty's pleasure'.¹¹ Detention may be directed either addition to, or in lieu of imposing any other sentence.¹² Once detained, the offender's detention cannot be unconditionally terminated until the Governor-in-Council is satisfied on the report of two medical practitioners that it is expedient to release the offender.¹³

⁶ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) [38] (French CJ).

⁷ See, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51, 104 (Gaudron J), 121 (McHugh J), 133-134 (Gummow J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 615 [91] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J), 92-93 [236] (Hayne J); *Mistretta v United States* 488 US 361, 407 (1989).

⁸ *Kable v DPP (NSW)* (1996) 189 CLR 51; *Wainohu v New South Wales* (2011) 243 CLR 181, 210 [46] (French CJ and Kiefel J); see also *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) [38] (French CJ).

⁹ *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [12]-[13].

¹⁰ The offender may cross-examine the medical practitioners and bring evidence to rebut the reports: *Criminal Law Amendment Act 1945* (Qld) s 18(3A).

¹¹ *Criminal Law Amendment Act 1945* (Qld) s 18(1), (3).

¹² *Criminal Law Amendment Act 1945* (Qld) s 18(3).

¹³ *Criminal Law Amendment Act 1945* (Qld) s 18(6A). The offender may not be granted conditional release unless the Parole Board is satisfied, additionally to the usual criteria for parole, that the

The plaintiffs joined proceedings in the original jurisdiction of the High Court challenging the validity of s 18 on the basis that it infringes the principle identified in *Kable*.¹⁴ To this end, the plaintiffs submitted that s 18:

- (a) impermissibly delegates the power to determine the duration of an offender's punishment to the Executive;
- (b) provides different criteria for directing detention from those which govern release from detention, thereby cloaking a wide political discretion in 'the neutral colours of judicial action'; and
- (c) does not provide sufficient safeguards to preserve the institutional integrity of the Court.

III DECISION

In a joint judgment, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ rejected the plaintiff's challenge to s 18. First, their Honours observed that the sentencing court has discretion as to whether to order detention under s 18 according to ordinary criminal processes.¹⁵ Moreover, as the executive power to continue detention depends on danger to the community posed by the offender's incapacity, there is no delegation of the task of fixing the extent of punishment.¹⁶ In addition to being constrained by statutory criteria, the decision to release is, and is seen to be, made by the Executive, rather than being cloaked in the neutral colours of judicial action.¹⁷ Finally, the fact that the sentencing court does not have the ability to vary or revoke an order for indefinite detention under s 18, or to regularly review the plaintiffs' detention as in the similar case of *Fardon v Attorney-General (Qld)* ('*Fardon*'),¹⁸ does not produce inconsistency with the institutional integrity of Queensland courts, as executive decisions to continue or terminate detention are justiciable.¹⁹

In a separate judgment, Gageler J also upheld the validity of s 18. Unlike

offender does not represent an unacceptable risk to the safety of others: *Criminal Law Amendment Act 1945* (Qld) s 18E. The relevant parole provisions under the *Corrective Services Act* apply as if the person were serving a life sentence: *Criminal Law Amendment Act 1945* (Qld) s 18B(1). Given the lifelong conditions that might attach to parole, it is unsurprising that the plaintiffs in *Pollentine* had never applied for parole but instead sought termination of their indefinite detention by the Governor-in-Council.

¹⁴ See *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹⁵ *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [44].

¹⁶ *Ibid* [45].

¹⁷ *Ibid* [47].

¹⁸ (2004) 223 CLR 575.

¹⁹ *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [50]–[51].

the plurality, who held that the original sentencing order could be for punitive, preventive or reformatory purposes, for Gageler J the validity of s 18 rested largely on the 'wholly protective' nature of both the judicial direction and the nature of the executive power of release.²⁰ First, a judicial decision to make a direction for indefinite detention under s 18 is entirely discretionary.²¹ Second, a direction is made on the basis of an assessment that detention under s 18 is warranted to protect society from an unacceptable risk of harm arising from the offender's incapacity to exercise sufficient self-control to prevent reoffending.²² Such detention involves regular medical examinations and release if the Governor is satisfied on the basis of medical evidence that it is expedient to do so – that is, that continued detention is no longer warranted to protect society from the same unacceptable risk which originally precipitated the offender's detention.²³ The Governor's decision is ultimately constrained by the statutory requirement that the offender remains incapable of exercising sufficient self-control to prevent him committing a further offence if released.²⁴ As the criteria for detention and release are complementary and the judicial and executive powers share a common protective purpose, there can be no 'cloaking' of an unconstrained executive power.²⁵ Like the plurality, Gageler considered the justiciability of the power conferred on the executive as a sufficient safeguard to preserve the integrity of the State court.²⁶

IV COMMENTARY

A *The Kable doctrine as a bar on judicial enlivenment of unreviewable executive powers*

Interestingly, the plurality characterised the plaintiffs' challenge to the validity of s 18 as 'animated by' the prospect that, in the absence of legal control of punishments (especially indeterminate punishments), there is the risk of 'administrative arbitrariness'.²⁷ The notion of administrative arbitrariness had previously been foreshadowed by Gummow J in *Fardon*; however, as there was no involvement of the executive in that particular legislative scheme, the legal

²⁰ Ibid [64].

²¹ Ibid [62].

²² Ibid [64].

²³ Ibid [63]–[64].

²⁴ Ibid [75].

²⁵ Ibid [74]–[75].

²⁶ Ibid [76].

²⁷ Ibid [21]–[22].

source of the prohibition, and extent to which administrative arbitrariness offends the *Kable* principle, was left unexplored.²⁸ In *Pollentine*, both the plurality and Gageler J acknowledged and rejected the plaintiffs' contention that the CLA Act lacks provision for sufficient legal control over detention. Importantly, their Honours emphasised that, as a matter of construction,²⁹ the executive discretion to continue detention under s 18 turns on a statutory criterion – the offender's incapacity to exercise proper control over his sexual instincts – which is precise enough to admit of judicial review.³⁰ Accordingly, *Pollentine* can be read as authority for the proposition that a law which empowers a State court to enliven an executive power will only be compatible with the institutional integrity of a State court if the executive power is justiciable.

Somewhat puzzlingly, the High Court did not identify the *legal or constitutional basis* for the prohibition on a court enlivening unconstrained executive powers, even though the relevant authority exists in the Court's own recent case law. In *Kirk*, the High Court held that the supervisory review jurisdiction of a State Supreme Court over the exercise of State executive³¹ power is one of its defining characteristics.³² That jurisdiction is entrenched by s 73(ii) of the *Commonwealth Constitution*³³ and extends to granting relief for jurisdictional error in the exercise of State executive power.³⁴ Since *Kirk*, the Court has also recognised that possession of the defining or essential characteristics of a court constitutes a court's 'institutional integrity', compatibility with which is essential for a law's consistency with the *Kable* principle.³⁵ When read together, these decisions thus provide that States may not enact a law which is repugnant to or incompatible with the constitutionally-mandated minimum level of judicial review as expressed in *Kirk*.³⁶ Accordingly,

²⁸ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 602 [47] (Gummow J).

²⁹ *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [21]–[22].

³⁰ *Ibid* [34], [44]–[45] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); [73] (Gageler J).

³¹ *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ).

³² *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³³ *Ibid*.

³⁴ *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ); for an earlier, similar principle established in Western Australia, see *Wilsmore v Court* [1983] WAR 190, 195 (Burt CJ), 200 (Wickham J).

³⁵ *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J).

³⁶ See generally Edward Fearis, 'Kirk's New Mission: Upholding the Rule of Law at the State Level' (2012) 3 *Western Australian Jurist* 61; Wendy Lacey, 'Kirk v Industrial Court of NSW: Breathing Life into Kable' (2010) 34 *Melbourne University Law Review* 641, 667; Mark Aronson, 'Commentary on

both the Court's engagement with the notion of 'administrative arbitrariness' and the emphasis placed on judicial review are justified by the underlying principle in *Kirk*.

B *The vanishing scope of judicial review*

The decision in *Pollentine* stresses the justiciability of executive decision-making as a panacea to inconsistency with the *Kable* doctrine. However, the particular facts of the case demonstrate that the required statutory constraints on preventive detention may be so indefinite as to render the scope for judicial review almost non-existent. First, both the plurality and Gageler J accepted that whether it is 'expedient' for the Governor to release a detainee depends on the risk of reoffending and the nature of the offences that the detainee might commit if released unconditionally.³⁷ This assessment must be based on a medical report directed to whether the offender is capable of exercising proper control over his sexual instincts, which is essentially directed to, and will often be expressed in terms of, the degree of risk or likelihood of recidivism.³⁸ Moreover, even if (as suggested by the plurality) incapacity requires a 'well-nigh inevitable'³⁹ risk of reoffending, such definitions will always admit of an inherently uncertain latitude to continue or terminate detention which will not be susceptible of judicial review.⁴⁰

There is also the practical reality that, as an entity which is accountable to the Parliament and the electorate,⁴¹ the Executive often has a strong political incentive to prolong detention where release would expose the community to even the smallest risk of harm. Acting on the advice of the Minister,⁴² the Governor is thus likely to capitalise on the indeterminate margins of risk assessment in favour of continuing detention. When consideration is also given to the fact that the Governor is not required to give reasons for his or her

"The entrenched minimum provision of judicial review and the rule of law" by Leighton McDonald' (2010) 21 Public Law Review 35, 39.

³⁷ *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [34], [36].

³⁸ *Ibid* [24]–[25] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); [67] (Gageler J).

³⁹ *Ibid* [26].

⁴⁰ Similar dilemmas involving preventive detention were considered in the pre-*Kable* cases of *Wilsmore v Court* [1983] WAR 190, 204 (Kennedy J) and *South-Australia v O'Shea* (1987) 163 CLR 378, 388 (Mason CJ), 410 (Brennan J).

⁴¹ *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [67] (Gageler J).

⁴² *Ibid* [47].

decision,⁴³ it is clear how nominal and potentially ineffective the safeguards against executive abuse may be without attracting inconsistency with Chapter III of the *Constitution*. For example, in the context of legislation such as the CLA Act, there are very few circumstances under which medical professionals would express a risk of recidivism in sufficiently insignificant and unqualified terms as to *mandate* unconditional release.⁴⁴ Only a refusal to release following the discovery and treatment of an underlying physical cause of the incapacity,⁴⁵ or the acquisition of a physical incapacitation which would entirely preclude recidivism by the offender, would likely be considered as beyond power. Nonetheless, it is important to recall the statement of Gleeson CJ in *Fardon*⁴⁶ that ‘it is the effect of the legislation upon the institutional integrity of the Supreme Court, rather than its effect upon the personal liberty of the [individual], that is said to conflict with the requirements of the *Constitution*.’ *Pollentine* may thus be taken as an illustration of the very limited scope of both *Kable* and *Kirk* to prevent States from conferring broad and amorphous powers of preventive detention on the Executive.

C *The separation of judicial and executive tasks and the purpose of detention*

Two additional and interrelated features of the reasoning in *Pollentine* demand further consideration. First, *Pollentine* is premised on the conceptualisation of the judicial task of sentencing and the executive task of ordering release as matters of separate determination, attributable only to the branch of government making the relevant decision. This is evident in the plurality’s observations that the sentencing court exercises discretion over whether to direct indefinite detention,⁴⁷ and that the decision to release is, and is seen to be, made by the executive.⁴⁸ Similarly, for Gageler J the direction and

⁴³ Ibid [76] (Gageler J), citing *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.

⁴⁴ See Daniel Piggott, ‘During Her Majesty’s Pleasure: *Pollentine v R*’ (1999) 20 *University of Queensland Law Journal* 126, 129; Stephen Smallbone and Janet Ransley, ‘Legal and Psychological Controversies in the Preventive Incapacitation of Sexual Offenders’ (2005) 28(1) *University of New South Wales Law Journal* 299, 304-305. Anthony Gray also draws attention to the evidence that psychiatrists are prone to over-prediction: see ‘Detaining Future Dangerous Offenders: Dangerous Law’ (2004) 9 *Deakin Law Review* 243, 255. For an example of the generally qualified and guarded nature of relevant medical opinion, see *Pollentine v Attorney-General* [1995] 2 Qd R 412.

⁴⁵ For example, paedophilic impulses have exceptionally been attributed to curable brain tumours: see, eg, Lisa Claydon, ‘Are There Lessons to Be Learned from a More Scientific Approach to Mental Condition Defences?’ (2012) 35(2) *International Journal of Law and Psychiatry* 88, 91.

⁴⁶ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 586 [2].

⁴⁷ *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [44].

⁴⁸ Ibid [47].

determination of indefinite detention are also matters of separate assessment.⁴⁹ The result is that, notwithstanding the prohibition on *judicial* enlivenment of an unreviewable executive power, the conferral of a reviewable executive power to determine detention is not repugnant to the institutional integrity of State courts *per se*.⁵⁰ However, this would not exclude other implied constitutional limitations such as that which confines the imposition and determination of *punitive* detention exclusively to State courts.⁵¹

Second, the Court unanimously held that, as a matter of construction, the continuation of detention by the executive under s 18 is determined only by reference to the risk of harm posed by the offender and is therefore *protective* in nature.⁵² The plurality's treatment of the judicial and executive tasks under the CLA Act as matters of separate determination culminated in their Honours finding no inconsistency in asserting that the sentencing court can validly order indefinite detention under s 18 for punitive, reformatory or protective reasons,⁵³ while the continuation of detention may turn only on whether the detainee remains incapable of exercising proper control.⁵⁴ However, if indefinite detention can be ordered for punitive purposes, to say that the executive does not then determine the *extent* of punishment is to postulate something of a legal fiction,⁵⁵ particularly given the scope of executive discretion adverted to above. On this basis (and purely as a matter of construction of the CLA Act), Gageler J's position that s 18 a direction for detention is wholly protective is to be preferred. On the other hand, to the extent that both judgments rely on the distinction between punitive and protective detention to avoid invalidity, they revive the vexed question (particularly agitated by critics after the similar case of *Fardon*)⁵⁶ of whether a meaningful distinction can ever be drawn between the

⁴⁹ Ibid [75].

⁵⁰ Ibid [51].

⁵¹ *Baker v The Queen* (2004) 223 CLR 513 549 [104] (Kirby J); *Fardon v A-G (Qld)* [151]–[152] (Kirby J).

⁵² *Pollentine v A-G (Qld)* [2014] HCA 30 (14 August 2014) [32], [37] (French CJ, Hayne, Crennan, Bell, Gageler and Keane J), [73] (Gageler J).

⁵³ Ibid [30].

⁵⁴ Ibid [45].

⁵⁵ *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) [115] – [119] (Hayne J).

⁵⁶ See, eg, Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 100, 105, 108; Mark Brown, 'Preventive Detention and the Control of Sex Crime: Receding Visions of Justice in Australian Case Law' (2011) 36(1) *Alternative Law Journal* 11; cf Oscar Roos, 'Commonwealth Legislative Power and 'Non-Punitive' Detention: A Constitutional Roadmap' (2005) 1(3) *High Court Quarterly Review* 142, 144.

categorically indeterminate concepts of ‘punitive’ and ‘protective’ detention.⁵⁷

V CONCLUSION

Like earlier cases involving ‘dangerous’ offenders,⁵⁸ *Pollentine* allows for the continuation of detention according to broad and amorphous criteria. However, no earlier case had involved committing the determination of release to the Executive, thereby restricting the supervisory role of the courts to judicial review. While bare justiciability has a minimal practical effect in respect of legislative schemes such as the CLA Act, it is nonetheless an important safeguard against abuse in exceptional cases. It is therefore regrettable that the Court did not fully articulate the scope and origin of the constitutionally-entrenched status of judicial review at a State level.

⁵⁷ *Fardon v A-G (Qld)* (2004) 223 CLR 575, 647 [196] (Hayne J).

⁵⁸ *Baker v The Queen* (2004) 223 CLR 513; *Fardon v A-G (Qld)* (2004) 223 CLR 575.

QUEENSLAND V CONGOO: THE CONFUSED RE-EMERGENCE OF A RATIONALE OF EQUALITY?

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In State of Queensland v Congoo [2015] HCA 17 (13 May 2015), the High Court applied principles of extinguishment to determine the effect of military orders under reg 54 of the National Security (General) Regulations 1940 (Cth) on the native title rights and interests of the Bar-Barrum People. The Court's split decision casts questions of extinguishment back to the 'legal jungle'. Amongst the thicket, the re-emergence of a 'rationale of equality' can be glimpsed in the statutory majority's emphasis on the standard of 'clear and plain intention'. The requirement of a clear and plain legislative intention to expropriate existing property rights without compensation is well established. On the 800th anniversary of the Magna Carta, its extension to the extinguishment of native title would accord with the fundamental rule of law in c 29 that '[n]o Freeman shall... be desseised... but by... the law of the Land'.

I INTRODUCTION

*Queensland v Congoo*¹ is the most recent High Court decision regarding the common law principles of extinguishment of native title. The case concerned the effect of military orders under reg 54 of the *National Security (General) Regulations 1940* (Cth) ('*Regulations*') over land that was later subject to a native title claim by the Bar-Barrum People in 2001. Despite all purporting to apply the test of inconsistency of rights in *Western Australia v Ward*,² the Court delivered a decision split three to three. Pursuant to s 23(2)(a) of the *Judiciary Act 1903* (Cth), the appeal from the decision of the Full Federal Court in *Congoo v Queensland*³ was dismissed. Consequently, the Full Federal Court's decision that the orders did not extinguish native title rights and interests was affirmed. The divide hinged on whether the *Regulations* and orders conferred 'exclusive possession' on the Commonwealth in the sense of an unqualified

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¹ [2015] HCA 17 (13 May 2015) ('*Congoo*').

² (2002) 213 CLR 1 ('*Ward*').

³ [2014] FCAFC 9 (21 February 2014).