AD HOMINEM PAROLE LEGISLATION, CHAPTER III AND THE HIGH COURT[1]

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This article explores the difficulties of bringing a Chapter III constitutional challenge to parole legislation. The province of the executive domain and becoming increasingly politicised, parole arises for consideration after the judicial sentencing process is complete. This means that parole lacks the same constitutional limits of the Kable*-guarded judicature, even in cases where parole legislation is* ad hominem *and has the practical effect of removing parole eligibility.*

> *…because we should not delude ourselves and imagine that this is the last time there will be a clamour from somewhere for a person who becomes eligible for parole to have that eligibility legislated away.*[2]

I INTRODUCTION

Section 74AA of the *Corrections Act 1986* (Vic) is an extraordinary provision. *Ad hominem* in nature, the Victorian section is directed to the '[c]onditions for making a parole order for Julian Knight'. Its level of particularity is set down in s 74AA(6) which clarifies that 'Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder'. Extraordinariness alone does not, however, determine a provision's legal validity. State parole legislation such as this affecting Julian Knight presents a range of difficulties for a constitutional challenge. This article explores these challenges. In particular, it focuses on the central obstacle of recent High Court endorsement of the considerable discretion that States have to regulate parole within the State executive domain.

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[1] This is an extended version of a post that initially appeared on AUSPUBLAW on 29 August 2017: https://auspublaw.org/2017/08/knights-watch/.

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[2] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 2014, 829 (Martin Pakula).

II *KNIGHT*'S WATCH

Knight was 19 years old when sentenced by the Victorian Supreme Court in 1988 for the Hoddle Street massacre committed in Clifton Hill on 9 August 1987.[3] He was given a life sentence for seven separate counts of murder and a sentence of imprisonment for 10 years for each of the 46 counts of attempted murder (each sentence to be served concurrently). Hampel J imposed a non-parole period of 27 years explaining that:

> an unduly high minimum term would defeat the main purpose for which it is fixed, namely your rehabilitation and possible release at a time when you would still be able to adjust to life in the community.[4]

In the Second Reading Speech introducing s 74AA, the Victorian Minister for Police and Emergency Services declared that 'the Victorian community can be certain that they are protected forever from the possibility that Julian Knight will one day be free to commit another atrocity.'[5] The Opposition, although cognisant of such legislative responses needing to be 'rare', was similarly supportive of Knight's long-term imprisonment:

> … for the term of his natural life. We believe that the vast majority of Victorians also support this. Julian Knight is an individual who took seven lives and destroyed many more lives than that. He is an individual who has shown no sign of remorse for his actions and who has continued to seek to contact the families of victims…The offences that he is responsible for were heinous. They destroyed and affected many more lives than those of the seven direct victims who were killed during his rampage in Hoddle Street all those years ago.[6]

Enacted one month before Knight's minimum term expired, s 74AA limits the Victorian Adult Parole Board's ability to make a parole order for Knight to circumstances where the Board:

> (3) (a) is satisfied (on the basis of a report prepared by the Secretary to the Department) that the prisoner—

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[3] State Library of Victoria, 'Hoddle Street Massacre', <http://ergo.slv.vic.gov.au/explore-history/rebels-outlaws/city-criminals/hoddle-street-massacre>.
[4] *R v Knight* [1989] VR 705, 711.
[5] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, 747 (Kim Wells, Minister for Police and Emergency Services).
[6] *Parliamentary Debates*, above n 2, 828-9.

> (i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and
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> (ii) has demonstrated that he does not pose a risk to the community; and
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> (b) is further satisfied that, because of those circumstances, the making of the order is justified.

It goes on to exclude the application of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'),[7] including s 31(7),[8] which provides a sunset period for Charter override declarations. While the Minister for Police and Emergency Services concluded that the Bill was compatible with the Charter, including the right to liberty, the right to freedom of movement, equality before the law and the freedom from cruel, inhuman or degrading treatment, he recognised that there was a possibility of a court finding otherwise and therefore sought to exclude the Charter's operations on the grounds:

> of the need to ensure that the life sentences imposed by the Supreme Court for these egregious crimes are fully or almost fully served and to protect the community from the ongoing and real risk of serious harm presented by Julian Knight.[9]

III THE CONTENTIONS IN *KNIGHT*

Knight brought a Chapter III constitutional challenge to s 74AA in the High Court of Australia's original jurisdiction.[10] This was based on its exceptional *ad hominem* drafting which particularised 'the prisoner Julian Knight' and his sentence made 'by the Supreme Court in November 1988' of 'life imprisonment for each of 7 counts of murder'. He argued that s 74AA compromised the institutional integrity of a 'court of a State' in two ways. First, as a matter of substance, it interfered with Hampel J's original sentence, compromising the institutional integrity of the Supreme Court, in eradicating the benefits of the minimum term or non-parole period of 27 years set by Hampel J because of the

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[7] *Corrections Act 1986* (Vic) s 74AA(4).
[8] Ibid s 74AA(5).
[9] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, 746 (Kim Wells, Minister for Police and Emergency Services).
[10] *Knight v Victoria* (2017) 91 ALJR 824.

Plaintiff's youth and prospects of rehabilitation. Second, the Plaintiff contended that the parole Board's function was contrary to Chapter III of the *Commonwealth Constitution* in that it contemplated vesting an incompatible function in a State judicial officer. This argument was based on the legislation's contemplation, but not stipulation, that a sitting judge could be appointed to the parole board. There was, however, no sitting judge appointed to the parole board at the time it considered Knight's case.

Knight's argument relied on an application of the *Kable* principle. In *Kable v Director of Public Prosecutions (NSW)*[11] the High Court found, by majority, that the *Community Protection Act 1994* (NSW) which, empowered the Supreme Court of New South Wales to make an *ad hominem* preventative detention order in relation to Gregory Wayne Kable, was unconstitutional. This was because the State parliament was vesting a function in the New South Wales Supreme Court that would compromise public confidence in the Court's impartiality[12] and would frustrate the Court's ongoing ability to be vested with Commonwealth judicial power under Chapter III of the *Commonwealth Constitution*. While a strict separation of powers does not exist at the State level,[13] McHugh J referred to State courts as being 'part of an integrated [court] system' such that no parliament within the federation can enact legislation which 'might alter or undermine the constitutional scheme set up by Ch III' or the capacity of State courts to be 'repositories of federal judicial power.'[14]

Since *Kable* the principle has been refined in a series of High Court decisions, to replace the 'public confidence' inquiry with a focus on whether a function is substantially incompatible with a State court's 'institutional integrity'.[15] As Hayne, Crennan, Kiefel and Bell JJ explained in *Assistant Commissioner Condon v Pompano Pty Ltd* 'the continued institutional integrity of the State courts directs attention to questions of independence, impartiality and fairness.'[16] Its focus is on the essential characteristics of State

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[11] (1996) 189 CLR 51.
[12] Ibid 107 (Gaudron J), 124 (McHugh J), 133 (Gummow J).
[13] Ibid 67 (Brennan CJ), 77-8 (Dawson J), 93 (Toohey J), 109, 118 (McHugh J), 132 (Gummow J).
[14] Ibid 114-6.
[15] See, eg, *Baker v The Queen* (2004) 223 CLR 513, 542 [79] (Kirby J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 593 (Gleeson CJ), 617-8 [102] (Gummow J), 629-31 [144] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1, 49-50 [73] (French CJ).
[16] (2013) 252 CLR 38, 103 [169].

courts being retained so that they can continue to serve their functions within the Australian court hierarchy contemplated by Chapter III.[17]

Relying on *Kable* presented a range of difficulties for Knight. Quite apart from the fact that 'the severity… of laws'[18] does not determine constitutionality under the *Kable*[19] principle, the restriction in *Kable* is centred on protecting the 'institutional integrity' of State *courts*. This meant that the factual context of *Kable* was markedly different to that parole setting in *Knight*.[20] The problem for *Knight* was that the Victorian legislation was an almost exact replica of New South Wales legislation that had been considered by the High Court in *Crump*[21] (s 154A *Crimes (Administration of Sentences) Act 1999* (NSW)), albeit the Victorian provision was *ad hominem* in its application. In *Crump*, parole was confirmed to be an *executive* function, determining whether a sentence could be continued to be served in the community but quite separate from the judicial sentencing role, and subject to the applicable parole guidelines of the day.[22] As parole eligibility is determined after the judicial process is complete, it is a purely executive determination and does not entail an enlistment of the court (but may, as is possible with the Victorian Parole Board, include State judges sitting on the Board).

A *Interference with Sentence*

The Victorian Government at the time of introducing the Knight Bill, the *Corrections Amendment (Parole) Bill 2014* (Vic), were conspicuously aware that it could be construed as a constitutional overreach or usurpation of the judicial sentencing role. The Minister for Police and Emergency Services in the

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[17] Ibid 71-2 [67] (French CJ), 105 [177] (Gageler J); *Kuczborski v Queensland* (2014) 254 CLR 51, 72-3 [38] (French CJ), *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, 580-1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[18] *Kuczborski v Queensland* (2014) 254 CLR 51, 113 [207] (Crennan, Kiefel, Gageler and Keane JJ).

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

[20] Gabrielle Appleby, 'The High Court and *Kable*: A Study in Federalism and Rights Protection' (2014) 4 *Monash University Law Review* 673, 692.

[21] *Crump v New South Wales* (2012) 86 ALJR 623. For a discussion of *Kable*'s potentially chilling effect on law and order innovation by states see: Appleby, above n 20. See also Jeremy Gans, 'Current Experiments in Australian Constitutional Criminal Law' (Paper presented at Australian Association of Constitutional Law, Sydney, 9 September 2014) 16.

[22] *Crump v New South Wales* (2012) 86 ALJR 623, 631-2 [28] (French CJ), 637 [59] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 639 [72] (Heydon J).

Bill's Statement of Compatibility stated that the amendment was not enlarging the deprivation of liberty bestowed by Knight's original sentence.[23] Instead, s 74AA affected the 'conditions' in which the Board was entitled to grant parole while leaving the 'head sentence of imprisonment' untouched.[24]

In the Court's first unanimous constitutional law joint judgment since *Day*,[25] their Honours rejected the contention that the provision 'in its legal form' or 'substantial practical operation' interfered with Hampel J's sentence.[26] Aligning the Victorian legislation with that considered in *Crump*, the Court held that it did not interfere with the Supreme Court's sentence because the minimum term was not pinpointing Knight's release date and the determination of his release 'was simply outside the scope of the exercise of judicial power constituted by the imposition of the sentences.'[27] The fact that it was likely that Knight would remain in prison did not alter the minimum term itself or the severity of the sentence which had been judicially determined by Hampel J.[28]

Distinguishing *Crump* proved quite intractable for Knight. Not only was the relevance of s 154A's more general application disputed[29] but French CJ had referred in *Crump* to the legislative objects of the *Crimes (Administration of Sentences) Act 1999* (NSW) as having '[a]n ad hominem component'.[30] To the extent that *Crump* was indistinguishable and the legislation 'identical in substance to the legal and practical operation of s 74AA', the Court was not willing to reconsider or overrule *Crump's* findings.[31]

The Court in *Knight* dismissed the 'more specific' *ad hominem* character of s 74AA as 'a distinction without a difference'.[32] Nonetheless, the

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[23] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, 745 (Kim Wells, Minister for Police and Emergency Services).
[24] Ibid.
[25] *Day v Australian Electoral Officer (SA)* (2016) 90 ALJR 639.
[26] *Knight v Victoria* (2017) 91 ALJR 824, 826 [6].
[27] Ibid 830 [28].
[28] Ibid 830 [29].
[29] Ibid 829-30 [25].
[30] Ibid 829 [22].
[31] Ibid 829-30 [25].
[32] Ibid.

rule of law, contested as it is,[33] favours general laws over those aimed at individuals. In *Momcilovic v R*, Crennan and Kiefel JJ put hope into the notion that the rule of law could 'imply a limitation' on State legislation.[34] While the principle was unspoken in *Knight,* the Court was quick to dismiss the constitutional relevance of the legislative targeting of Julian Knight. In *Nicholas*, Gaudron J commented that '[i]f legislation which is specific rather than general is such that, nevertheless, it neither infringes the requirements of equal justice nor prevents the independent determination of the matter in issue, it is not, in my view, invalid.'[35] However, the Court in *Knight* was careful to not rule out the significance of *ad hominem* legislation full stop. They noted, citing *Nicholas*[36] and *Liyanage*[37] that, 'the party-specific nature of legislation can be indicative of the tendency of that legislation to interfere with an exercise of judicial power.'[38] This suggests that *ad hominem* legislation may put a court on notice of the risk of legislative usurpation, a risk that did not materialise for Knight.

The Plaintiff repeatedly stressed that s 74AA(6)'s reference to a particular sentence made 'by the Supreme Court in November 1988' played more than an identifying role and that within the 'political charged context…undermines the institutional integrity of the court that is being targeted by the legislation.'[39] The question was what impact the provision had on the sentencing determination. As the Victorian Scrutiny of Acts and Regulations Committee noted, '[t]he practical effect of …the Bill may be equivalent to replacing that order with an order that his sentence not include any parole eligibility date.'[40] Keane J suggested, in argument, that the legislation 'is not disapproving of the sentence' but 'disapproving or expressing a lack of confidence in the executive organs of government that are charged with ameliorating it...'[41] Similarly, in *Crump*, French CJ had made clear that while

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[33] For an excellent recent exposition on the subject see: Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).
[34] (2011) 245 CLR 1, 215-6 [562]-[563].
[35] *Nicholas v The Queen* (1998) 193 CLR 173, 211-2 [83].
[36] Ibid.
[37] *Liyanage v The Queen* [1967] 1 AC 259.
[38] *Knight v Victoria* (2017) 91 ALJR 824, 830 [26].
[39] Transcript of Proceedings, *Knight v State of Victoria* [2017] HCATrans 61 (28 March 2017).
[40] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Alert Digest No 3 of 2014 (2014) 5.
[41] Transcript of Proceedings, *Knight v State of Victoria* [2017] HCATrans 61 (28 March 2017).

the legislative intervention in parole 'altered a statutory consequence of the sentence. It did not alter its legal effect.'[42]

Attorney-General (Qld) v Lawrence[43] provides an interesting contrast to *Knight*. In this 2013 decision, the Queensland Court of Appeal invalidated amendments to the *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) which empowered the executive to make a 'public interest declaration' so as to 'deprive a "relevant person" of supervised liberty granted to that person by an order of the Supreme Court'.[44] This was construed by the Court of Appeal as 'undermin[ing] the authority of the Supreme Court by impugning every order made' such that each Supreme Court determination made 'must be regarded as provisional'[45] and effectively subject to executive override. The amendments meant that 'substantial effect' of the executive order 'was equivalent to a reversal of the Court's order'[46] and they were therefore unconstitutional as a violation of Chapter III of the *Commonwealth Constitution*. While *Lawrence* did not go on appeal to the High Court, the key to distinguishing the decisions seems to rest in the relationship between the judicial and executive order and whether the latter interferes with the former. For Knight, the recognised assignment of parole as an executive function, independent of the judicial sentence, made establishing this interference problematic.

B *Incompatibility and the Role of a State Judicial Officer*

The Court held that that it did not need to determine the second argument, that judicial officers sitting on the Parole Board would be vested with functions incompatible with their Chapter III role. This was avoided because sitting judicial officers had not been assigned parole board functions in considering Knight's application under s 74AA. While s 64(2) provided that a 'division of the Board' required 'at least 3 members' it only required one sitting Judge or Magistrate or a retired Judge or Magistrate.

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[42] *Crump v New South Wales* (2012) 86 ALJR 623, 633 [36].
[43] [2014] 2 Qd R 504.
[44] Ibid 527-8 [34] (Holmes, Muir and Fraser JJA).
[45] Ibid 530 [41].
[46] Ibid.

Knight contended that constitutional invalidity could turn on the 'potential involvement'[47] of sitting judges in a s 74AA determination, exercised *persona designata*. In *Wainohu v New South Wales*[48] a majority of the High Court extended the incompatibility principle in *Kable* to functions conferred on State judges in a personal capacity. Applied by Knight here, the contention was that the s 74AA function's conferral on a judicial officer was incompatible when holistically assessed as it conferred an executive function, to be applied on an *ad hominem* basis, and without the restrictions of natural justice.[49]

Their Honours concluded that it was not necessary to decide this point when it would involve conclusions as to whether 'a legislative provision would have an invalid operation in circumstance which have not arisen'.[50] Regardless, following the path taken in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[51] the Court concluded that s74AA would be able to be read down in accordance with s 6 of the *Interpretation of Legislation Act 1984* (Vic)[52] so as to exclude a judicial officer from sitting should it be a function that would be invalid for a judge to exercise.[53]

IV CONCLUDING THROUGHTS – *KNIGHT* AND THE POLITICISATION OF PAROLE

The recent high profile parole breaches,[54] and the public and private responses to them, ensure that the future mirroring by Australian States of provisions such as s 74AA is a likelihood. Section 74AA was itself a more personalised blueprint of the New South Wales legislation upheld in *Crump*. South Australia, Western Australia, Queensland and New South Wales (along with

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[47] Knight (Plaintiff), 'Plaintiff's Submissions', Submission in *Knight v Victoria*, No M251/2015, 16 December 2016, [50].
[48] (2011) 243 CLR 181.
[49] Knight (Plaintiff), 'Plaintiff's Submissions', Submission in *Knight v Victoria*, No M251/2015, 16 December 2016, [58]-[64]. For more detailed consideration of these issues in the parole context see: Arie Freiberg and Sarah Murray, 'Constitutional Perspectives on Sentencing: Some Challenging Issues' (2012) 36 *Criminal Law Journal* 335, 349-50.
[50] *Knight v Victoria* (2017) 91 ALJR 824, 830-1 [33].
[51] (1996) 189 CLR 1.
[52] (1996) 189 CLR 1, 831 [34].
[53] Ibid 831 [37].
[54] See Rick Sarre and Lorana Bartels, 'Tougher National Parole Laws Won't End the Violence', *The Conversation* (online), 7 June 2017 <https://theconversation.com/tougher-national-parole-laws-wont-end-the-violence-78985>; Lorana Bartels, 'Parole and Parole Authorities in Australia: A System in Crisis?' (2013) 37 *Criminal Law Journal* 357.

the Commonwealth) also intervened in the action in *Knight* which suggests an interest if not also an intimation as to the policy's likely future relevance.
It has long been recognised that justice policies are highly changeable, and these changes can have a significant impact on the length of imprisonment actually served by prisoners, especially for those detained for longer terms.[55] In *Crump*, French CJ highlighted that the very nature of parole meant that such changes could even see parliament eliminating parole entitlements.[56]

What *Crump* and now *Knight* highlight is the potential for even greater politicisation of parole. This is most evident in the comment by the Premier of Victoria that even without the introduction of s 74AA it was 'extremely unlikely that Mr Knight would have been given parole'.[57] In June 2017, the Prime Minister announced that the risk of terrorism required greater control by State Attorneys-General of parole board decisions.[58] As Keane J indicated in *Knight* such moves begin to shed doubt on the faith placed in the executive to make appropriate parole determinations.[59] There is a clear risk that the role of the parole board is weakened as a result.[60] Such politicised moves also render it more likely that sitting judges will be found to be exercising incompatible functions should they form part of a parole board.

In the shadow of *Kable*, such options are all the more attractive to State parliaments when, as *Knight* confirms, the executive sphere of parole lacks the same constitutional limits of the *Kable*-guarded judicature. It is far from certain,[61] however, that the broader State executive domain is not subject to

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[55] *Baker v The Queen* (2004) 223 CLR 513, 520-1 [7] (Gleeson CJ).
[56] *Crump v New South Wales* (2012) 86 ALJR 623, 633 [36].
[57] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 February 2014, 269 (Denis Napthine, Premier).
[58] Fergus Hunter, 'Malcolm Turnbull pushes for national parole laws to keep terror offenders locked up', *Sydney Morning Herald* (online), 7 June 2017 <http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-pushes-for-national-parole-laws-to-keep-terror-offenders-locked-up-20170606-gwlyzw.html>.
[59] Transcript of Proceedings, *Knight v State of Victoria* [2017] HCATrans 61 (28 March 2017).
[60] 'No need for Knight Law' [2014] (April) *Law Institute Journal* 15.
[61] For an excellent discussion of the uncertainty and policy implications caused by *Kable* see: Appleby, above n 20.

some limits[62] and it remains to be seen whether such limits will begin to crystallise in the future.

[62] See, for example, obiter dicta in *South Australia v Totani* (2010) 242 CLR 1, 50-1 [76] (French CJ), 67 [147] (Gummow J) and *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 596-7 [44]-[45] (French CJ, Kiefel and Bell JJ). Cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 600 [40] (McHugh J).