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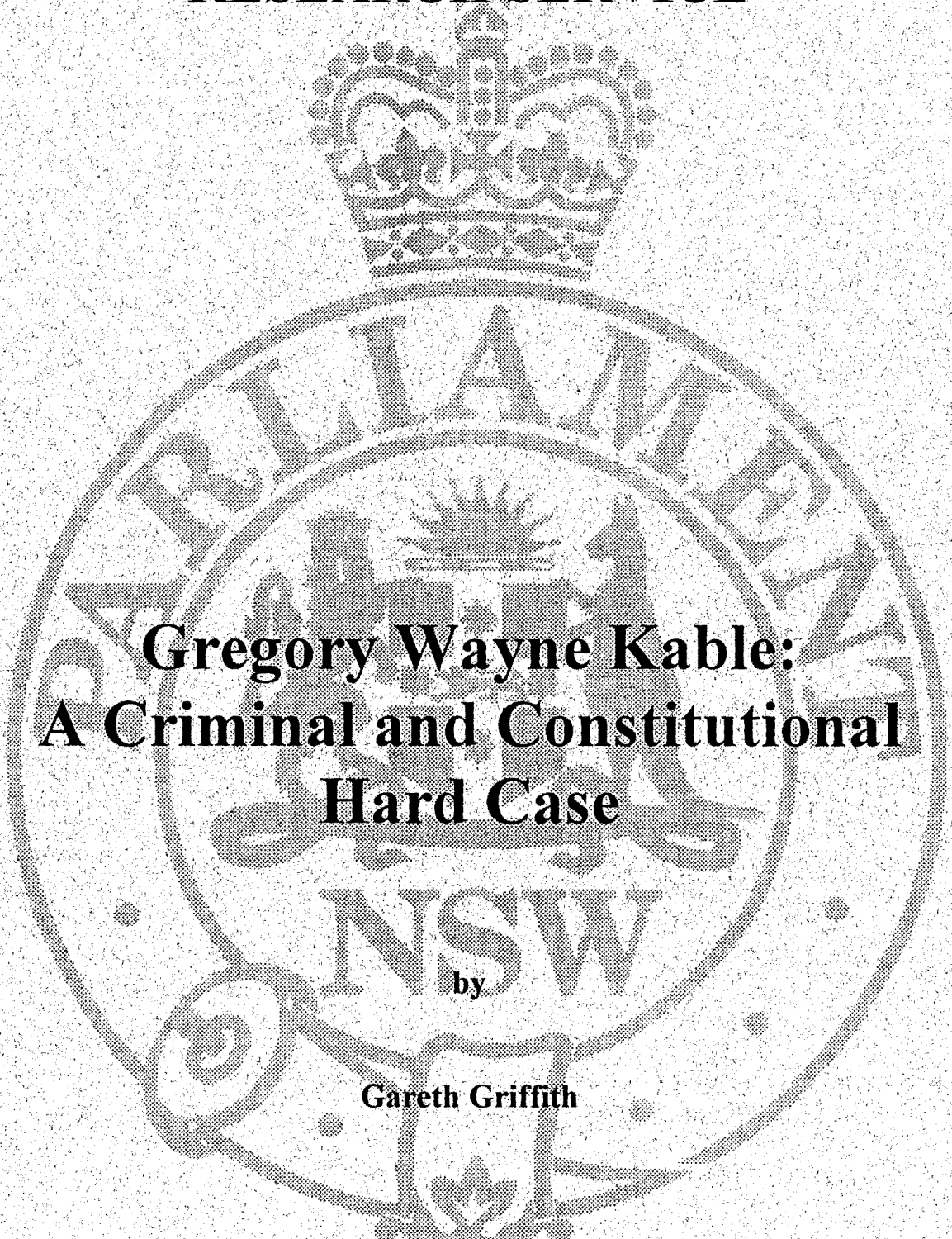

Gregory Wayne Kable: A Criminal and Constitutional Hard Case

by

Gareth Griffith

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ABSTRACT

The main purpose of this paper is to identify and critically assess the constitutional questions at issue in relation to the *Community Protection Act 1994* (NSW). That Act applies to only one person, Gregory Wayne Kable. It establishes a regime permitting his preventive detention after the expiry of his sentence. The constitutionality of the Act is the subject of an appeal to the High Court. The Kable case raises hard questions for criminal law in that it concerns the highly problematic issue of the preventive detention of the 'dangerous offender'. These criminal law matters were the primary focus of debate at the time when the NSW Parliament passed the Act. Subsequently, however, the focus shifted to the constitutional matters at issue and, in reviewing and critically assessing these, this paper presents an anatomy of the case, showing the extent to which these constitutional matters have altered as the case has proceeded through the courts. In particular, it is argued that by the time the case reached the High Court in December 1995 the focus had shifted quite substantially, away from the earlier emphasis on the limits of parliamentary power understood either in terms of common law rights or of certain rights implied in the text of the Commonwealth Constitution, towards issues concentrating on the usurpation of judicial power. It is contended, therefore, that the doctrine of the separation of powers was at the core of the nexus of issues considered before the High Court. Further, it is contended that this aspect of the case for Kable had two distinct limbs. One argument, based on the usurpation of judicial power by the Legislature, confronted the separation of powers doctrine primarily in terms of Part 9 of the NSW *Constitution Act 1902*. On the other hand, the second argument, concerning the vesting of non-judicial power in the NSW Supreme Court, confronted the separation of powers doctrine in relation to Chapter III of the Commonwealth Constitution. This paper contends that the difference rests on the consideration that the first argument focuses on reading down the powers of the NSW Parliament, whereas the second argument focuses on reading up the status of the NSW Supreme Court. If the usurpation of judicial power submission is found to apply, and if the subsequent discussion turns on Part 9 of the NSW Constitution, then the case can be expected to raise matters of great importance for the administration of justice in NSW. If the alternative submission is found to apply and the focus of discussion is on Chapter III of the Commonwealth Constitution, then the case can be expected to raise matters concerning the operation of the separation of powers doctrine under the Australian federal compact generally.

1. INTRODUCTION

The case at issue: The main purpose of this paper is to review and critically assess the constitutionality of the *Community Protection Act 1994* (NSW). That Act applies to only one person, Gregory Wayne Kable. It establishes a regime permitting the preventive detention of that person after the expiry of his sentence. The constitutionality of the Act was the subject of an appeal to the High Court, which was heard on 7 and 8 December 1995. The High Court reserved its decision. The *Community Protection Act 1994* (NSW) is set out at Appendix A.

The facts: In 1989 Gregory Wayne Kable's marriage fell apart and there developed an acrimonious conflict with his wife, Hilary Kable, over the custody of and access to his two children. On 5 September 1989 he stabbed his wife with a kitchen knife. She died later that day of her wounds. Gregory Wayne Kable (henceforth Kable) was charged with murder. He pleaded not guilty to murder but guilty to manslaughter. That plea was accepted by the Crown on the basis of diminished responsibility. Kable was sentenced to a total sentence of five years and four months imprisonment. He was due to be released from prison on 5 January 1995, exactly two months before the next State general election.

While in prison Kable wrote threatening letters to a couple who had custody of the two young children of his marriage. Professor Fairall explains that, 'A failure by the carers to comply with a Family Court order for access fuelled his anger. Kable was not physically violent in prison but his letters alarmed various medical officers. One psychiatrist saw the letter-writing as a form of psychological violence only slightly removed from extreme physical violence'.[1]

A detailed chronology of the subsequent events is found in the judgment of the New South Wales Supreme Court in *Kable v DPP*.[2] On 2 December 1994 the New South Wales Parliament passed the *Community Protection Act 1994*, which came into force on 9 December 1994 (henceforth, the CPAct). The provisions of the Act are considered in detail in Chapter 2. It is enough here to state that it provides for the preventive detention of Kable, by order of the Supreme Court made on the application of the Director of Public Prosecutions.

On 19 December 1994 Spender AJ in the Supreme Court refused an application for a permanent stay of the proceedings brought by the Director of Public Prosecutions to have Kable retained in preventive detention and rejected the constitutional challenge to the Act. In addition, his Honour made an Order requiring Kable to be psychiatrically examined by doctors selected by the Director of Public Prosecutions. On 30 December 1994 an Interim

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1 Fairall PA, 'Imprisonment without conviction in New South Wales: *Kable v Director of Public Prosecutions*' (1995) 17 *Sydney Law Review* 572-580 at 572. Fairall states, incorrectly, that Kable stabbed his wife on 5 May 1990.

2 (1995) 36 NSWLR 374 at 390-392.

Detention Order was made by Hunter J and 9 January 1995 was set as the date for the hearing of the full application to commence. Before then, however, on 5 January 1995 (the date the manslaughter sentence expired) Kable appeared in Waverley Local Court on fourteen charges of improper use of the postal services under section 85s of the *Crimes Act 1914* (Cth). Bail was refused

On 23 February 1995 Levine J in the Supreme Court made a six month Preventive Detention Order pursuant to section 5(1) of the CPAct. Bail was granted in respect to the charges relating to the improper use of the postal services. Kable's appeal against the Preventive Detention Order was rejected by the Court of Appeal on 9 May 1995.[3] Subsequently, Sully J, in the Common Law Division of the Supreme Court, made several orders that were favourable to Kable on 19 July 1995, including that he should have access to a professionally qualified psychotherapist in private professional practice, and that he should have regular opportunity for exercise and recreation.[4]

On 18 August 1995, four days before the Supreme Court declined to renew the Preventive Detention Order, the High Court granted Kable leave to appeal. The High Court was told that Kable would remain liable for detention under the CPAct, which meant that the issue in the application would never become an academic question so far as he was concerned.[5]

The issues in the case: The *Kable* case raises several important issues both for criminal and constitutional law. It is a hard case for the criminal law in that it concerns the highly problematic issue of the 'dangerous' offender and, along with that, the case leads into the many difficult matters, of sentencing principle and policy, which arise in relation to the controversial subject of preventive detention.

These criminal law issues were the primary focus of debate at the time when the New South Wales Parliament passed the *Community Protection Act 1994*. Subsequently, however, the focus has shifted to the constitutional matters which have been raised during the course of the case. As noted, the main purpose of this research project is to review and critically assess these matters and, by so doing, to present an anatomy of the case at hand, showing the extent to which the constitutional issues at stake have altered as the case has proceeded through the courts.

By way of a preliminary comment, following the release of Kable in August 1995, the question was asked in the New South Wales Parliament whether the *Community Protection Act 1994* would be repealed. In response, the Attorney General, Mr Shaw, made reference to the constitutional challenge to the CPAct pending before the High Court. He stated: 'Interesting and profound questions are raised as to the relationship between a sovereign

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3 *Kable v DPP* (1995) 36 NSWLR 374

4 *Kable v DPP* (SCNSW, unreported 19 July 1995 - 11667/95)

5 'Imprisonment by parliamentary order' (1995) 13 *Leg Rep* page C 17.

Parliament and the judicial system - questions about the separation of powers and whether that document [sic] is applicable to State constitutions and the like'.[6] More specifically, the main constitutional questions and issues which have been identified to this stage are as follows:

- what is the scope of the power of the New South Wales Parliament, in relation to the doctrines of parliamentary sovereignty or supremacy and, in particular, is that power in any way subject to a common law doctrine that there are rights so deeply embedded in our political and judicial systems that they cannot be modified or wholly repealed by Parliament?

- in light of the above, it can be asked whether the CPAct contradicts the doctrine of the rule of law?

- a further dimension to this issue is whether the Act is inconsistent with certain implications which are to be drawn from the Commonwealth Constitution, namely, that no Australian Parliament can exercise its legislative powers so as to discriminate between individuals under the criminal law and, furthermore, that it is not open to any Australian Parliament to legislate to impose criminal burdens on a single individual?

- stated in another way, is the legislative power of the State controlled by the doctrine of equality before the law?

- another question is whether section 80 of the Commonwealth Constitution implies that all serious offences must be tried by jury and if this implication applies both to Federal and to State offences?

- does the CPAct involve an exercise by the New South Wales Parliament of judicial power?

- if so, does the New South Wales Parliament possess only legislative powers further to the Constitution Statute (18 and 19 Vic c.54) and the Constitution Act (17 Vic No 41)?

- conversely, does the CPAct invest in the Supreme Court of the State a power which is non-judicial?

- further to this, as section 39 of the *Judiciary Act 1903* (Cth), pursuant to section 77(iii) of the Commonwealth Constitution, invests the judicial power of the Commonwealth in the Supreme Court of the States, is it inconsistent with the vesting of that jurisdiction for a State Act to impose a jurisdiction on a judge of that

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6 *NSWPD*, 19 September 1995, p 1031.

court which makes the performance of that invested jurisdiction inconsistent with the exercise of federal judicial power?

- in other words, is the CPAct invalid for reasons based on section 109 of the Commonwealth Constitution and flowing from the doctrine of the separation of powers inherent in Chapter III of the Commonwealth Constitution?

- whether, in any event, the doctrine of the separation of powers operates in relation to the State Constitution and, if so, is the CPAct inconsistent with that doctrine. Specifically, the question is whether the separation of powers is now entrenched under Part 9 of the *Constitution Act 1902* (NSW)?

- alternatively, whether the separation of powers doctrine applies to the CPAct as a result of the operation of Chapter III of the Commonwealth Constitution read in conjunction with section 106, which renders the constitutions of the States 'subject to' the Commonwealth constitution?

- by extension, the same question can be posed with respect to the doctrines of equality before the law and the prohibition against Acts of pains and penalties, as well as to the issue of implied constitutional rights. The broader question, therefore, relates to the appropriate interpretation of the scope and operation of section 106 of the Commonwealth Constitution.

Having set out some of the history of the CPAct and considered its major provisions in Part 2, this paper then seeks to trace the evolution of these constitutional questions as they have developed in the context of the Kable case. Part 3 deals with those questions which, it is argued, may not prove decisive in the case. Whereas Part 4 focuses on what is claimed to be the core constitutional question of the separation of powers.

2. THE *COMMUNITY PROTECTION ACT 1994* (NSW): A HARD CASE FOR THE CRIMINAL LAW

Concerns about Kable's release: The fact that Kable was due to be released on 5 January 1995 was reported in the press on 25 October 1994 when the then Attorney General, Mr Hannaford, issued a press release, in which he foreshadowed the introduction of legislation to provide for 'persons' who appear 'to present a significant risk to other members of the community but are not able to be detained under the prevailing criminal justice or mental health systems'. Mr Hannaford then spelt out his concerns in more specific terms, stating:

> There is particular concern about a prisoner, Mr K, convicted for the manslaughter of his wife in 1989...Mr K has allegedly written numerous threatening letters to the family of his victim, the Family Court and witnesses in the Family Court proceedings during his time in gaol because his application for guardianship of his two children was refused by the Family

> Court...A significant amount of information has been made available to me that cause me concern about the safety of the community should Mr K be released.[7]

The next day the Kable issue was discussed in an article in *The Sydney Morning Herald* where it was said that the foreshadowed legislation would be introduced following warnings that 'the release of one prisoner may result in another "Hoddle Street massacre"'. The same article included comment from the President of the NSW Council for Civil Liberties, Mr John Marsden, saying the Council was 'horrified' by the plan.[8]

The Community Protection Bill 1994: The Community Protection Bill 1994 was introduced into the New South Wales Legislative Council on 27 October 1994. The object of the proposed legislation was defined in clause 3, which provided:

> (1) The object of this Act is to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Attorney General) of persons who are, in the opinion of the Supreme Court, more likely than not to commit serious acts of violence.
>
> (2) In the construction of the Act, the need to protect the community from such persons is to be given paramount consideration.

At this stage, therefore, the proposed legislation was not specific to Kable and no actual mention of Kable was made in the Second Reading Speech for the Bill. The Attorney General repeated in the Second Reading Speech that 'The community must be protected from those persons who present a real danger, yet are unable to be otherwise lawfully detained'.[9]

The phrase 'serious act of violence' was defined in clause 4 to mean 'an act of violence committed by one person against another, that has a real likelihood of causing death or serious injury to the other person' or that involves sexual assault in the nature of an offence referred to in specified sections of the *Crimes Act 1900*.

The most significant aspects of the Bill are found in clauses 5 and 7, which set out the criteria for the making of preventive detention orders and interim detention orders respectively. In the form it was introduced, clause 5(1) provided that, where the Attorney General makes an application for a preventive detention order against a specified person, the Supreme Court may order the person be detained in prison for a specified period if it is satisfied, on reasonable grounds:

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7 NSW Attorney General, 'Fahey government to introduce community protection legislation', Press Release, 25 October 1994.

8 'Erosion of rights feared in detention', *The Sydney Morning Herald*, 26 October 1994.

9 *NSWPD*, 27 October 1994, pp 4790-4792.

(a) that the person is more likely than not to commit a serious act of violence; and

(b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

Clause 5(2) provided minimum and maximum periods for such orders of six months and twenty four months respectively. Clause 5(3) provided that a preventive detention order could be made against a person 'whether or not the person is in lawful custody, as a detainee or otherwise' and 'whether or not there are grounds on which the person may be held in lawful custody otherwise than as a detainee'. Under clause 5(4) more than one application for a preventive detention order could be made in relation to the same person. There was therefore no limit on the number of preventive detention orders which could be made sequentially against a person.[10]

Clause 7 would allow the Supreme Court to make interim detention orders of up to three months pending its determination of proceedings on an application for a preventive detention order. Such interim orders would be made: for the purpose of enabling the defendant to be examined by a doctor, psychiatrist or psychologist (under clause 17(1)(c)); or for a report on the defendant to be prepared (under clause 17(1)(d)); or to enable other proceedings to be brought for the purpose of committing the person to another form of custody (pursuant, for example, to the *Mental Health Act 1990*). Further, under clause 7(3) an interim detention order could be extended, on an application from the Attorney General or on the Court's own motion, for up to three months to allow for the determination of proceedings for a preventive detention order.

Importantly, clauses 14 and 15 respectively provided that proceedings under the proposed Act would be civil in nature and, consequently, that the case against a person was to be proved on the 'balance of probabilities'. Further, clause 14 stipulated that civil rules of evidence would apply.

Matters relating to the conduct of hearings were set out in clause 17 and clause 21 provided for the preparation of reports on the detainee while a preventive detention order remains in force.

Clause 22(1) provided that a detainee is taken to be a prisoner within the meaning of the *Prisons Act 1952*; whilst clause 22(4) stated that the *Sentencing Act 1989* would not apply to a detention order or a detainee. Thus, under the Bill a person could be detained in a prison for up to twenty four months, classified as a 'detainee' and therefore not dealt with under the sentencing legislation, yet taken for practical purposes to be a prisoner.

Under clause 24 detention orders could be made by a single judge of the Supreme Court. A right of appeal was provided for under clause 25 but only in relation to preventive

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[10] Clause 23(1) provided that a person detained under the proposed Act must be released at the expiration of a detention order, unless there is lawful reason for continuing to hold the detainee.

detention orders. The making of an appeal would not stay the operation of an interim detention order.

Criticisms of the Community Protection Bill 1994: This original version of the Bill received a stormy reception both in the NSW Parliament and beyond. It was variously described as 'flawed'[11] and 'draconian'.[12] Among the voices raised in opposition to it were those of the New South Wales Bar Association, the New South Wales Law Society, the Redfern Legal Centre, the Office of the Public Defender, the New South Wales Society of Labor Lawyers and the Lawyers Reform Association.[13] Mr Maurie Stack, Acting President of the Law Society, is reported to have written to the Attorney General, saying 'This is the most abhorrent piece of legislation, which fails to protect or even acknowledge the rights which are fundamental to our criminal justice system'.[14] Also, Mr Justice Michael Kirby, the then President of the NSW Court of Criminal, Appeal, said of the Bill: 'It is a complete departure from the longstanding principle of the common law. That is, that our criminal justice system does not punish people for what they might do in the future but for what they have been proved beyond reasonable doubt to have done'.[15]

In the Second Reading Speech for the Bill Mr Hannaford cited 'comparable' preventive detention legislation in Victoria, New Zealand and Canada, noting that these sentencing laws 'allow for the protective detention of dangerous persons, once they have been brought before the court for sentence on an existing offence'.[16] The difference between such laws and the Bill at issue was that the latter would allow for the preventive detention of a person where there was no past or existing offence, but only the likelihood that the person will commit a serious act of violence.

One question that was asked of Mr Hannaford was why, if Kable was the real subject of the Bill, could he not be charged under existing offences? For example, it was asked why Kable could not be charged with making threats of violence under section 31 of the *Crimes Act 1900*. In response, Mr Hannaford said that this and other provisions had proved 'inadequate' in the past and had failed 'to prevent anticipated violence by certain dangerous individuals'.[17]

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11 'Danger in the law', *The Sydney Morning Herald*, 8 November 1994.

12 Zdenkowski G, 'Draconian law a threat to our justice system', *The Sydney Morning Herald*, 14 November 1994.

13 *NSWPD*, 15 November 1994, p 4955.

14 'Detention without trial', *The Newcastle Herald*, 9 November 1994.

15 *NSWPD*, 15 November 1994, p 4965.

16 *NSWPD*, 27 October 1994, pp 4790-4792.

17 *NSWPD*, 16 November 1994, p 5091. The Minister had in fact been advised by the Crown law officers that charges of this nature could not be brought against Kable.

Also, it seemed that provisions under the *Mental Health Act 1990* providing for the involuntary detention of mentally ill persons did not apply.[18]

Amending the Bill: The ALP opposed the Bill,[19] but at the same time suggested amendments to it should it be given a second reading.[20] In the event, the Government agreed, with the concurrence of the ALP and the Independent members of the Upper House, to limit the Bill to Kable alone. Mr Hannaford stated at this point that one individual had in fact prompted the introduction of the Bill[21]. Following the amendments which were agreed to on 16 November 1994 the objects and application of the Act in section 3 were defined thus:

> (1) The object of this Act is to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable.
>
> (2) In the construction of this Act, the need to protect the community is to be given paramount consideration.
>
> (3) This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.
>
> (4) For the purposes of this section, Gregory Wayne Kable is the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable.

Further to an amendment proposed by the Labor Party, as a means of depoliticising the process, proceedings under the Act were to be brought by the DPP, and not the Attorney General. Also, section 5(2) of the Act was amended so that the maximum period to be specified in a preventive detention order is '6 months', and not '24 months'.

The other amendment related to the evidentiary provisions in section 17 of the CPAct. The documents or reports available to the Court were set out in more detail in section 17(1)(b); further, section 17(3) was added which provides:

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18 'Mental illness' is defined in section 9(1)(b) of the *Mental Health Act 1990* in terms which include the involuntary detention of a person 'for the protection of others from serious physical harm'. After hearing expert evidence it was decided by Levine J that Kable did not suffer a mental illness, but that he had a personality with certain traits, including 'an obsession, an inflexible focus of thinking about *his* rights' - *DPP v Kable* (SCNSW, unreported 23 February 1995 - 13152/94) at 179-183.

19 Shaw J, Shadow Attorney General, 'Labor opposes Fahey's Community Protection Bill', Press Release, 9 November 1994.

20 *NSWPD*, 15 November 1994, p 4951.

21 *NSWPD*, 16 November 1994, p 5091. A Private Member's Bill which had the same effect was read a second time in the Legislative Assembly on 17 November 1994. It did not proceed any further.

> Despite any Act or law to the contrary, the Court must receive in evidence any document or report of a kind referred to in subsection (1), or any copy of any such document or report, that is tendered to it in proceedings under this Act.

This was included on the advice of senior Victorian law officers, based on their experience in the Gary David matter. Mr Hannaford explained: 'Given the nature of the proceedings under the proposed legislation, many instances may arise of hearsay statements in reports which would not otherwise be admissible'.[22]

The Garry David precedent: The one obvious precedent for the CPAct is the Victorian legislation passed for the exclusive purpose of keeping Garry David in preventive detention, the *Community Protection Act 1990* (Vic). At the time this was said to be 'unique in Australian legal history as being the only occasion on which an Act of Parliament has been passed for the expressly stated purpose of enabling the detention of a named individual'.[23] The Act has been the subject of considerable controversy and comment.[24] Whilst it raises the same issues as have been identified in the Kable case, the constitutional validity of the legislation was never challenged. As Fairall comments, 'An opportunity to test such legislation was lost in 1992 when David died in Pentridge prison'.[25]

The comment was made in *Attorney-General v David* [26] that the David legislation was passed owing to a 'lacuna' in Victoria's legislative framework, namely, the lack of habitual offenders' legislation which might otherwise provide for the preventive detention of persons who may not be mentally ill for the purposes of mental health legislation but are, nonetheless, considered to be 'dangerous offenders'. In contrast, there is in force in this State the *Habitual Criminals Act 1957*. However, it seems Kable could not have been detained under it.[27]

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22 *NSWPD*, 16 November 1994, p 5101.

23 Williams CR, 'Psychopathy, mental illness and preventive detention: issues arising from the David case' (1990) 16 *Monash University Law Review* 161-183.

24 See for example Gerull SA and Lucas W (eds), *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform*, Australian Institute of Criminology 1993.

25 Fairall P, op cit, p 575. The same author discussed the constitutional issues arising from the David case in:- Fairall PA, 'Violent offenders and community protection in Victoria - the Gary David experience' (1993) 17 *Criminal Law Journal* 40-54.

26 [1992] 2 VR 46 at 80.

27 Under the Act a person must have served at least 2 separate terms of imprisonment (section 4(1)). Cumulative terms do not count as separate terms (section 4(4)). It seems Kable's sentence comprised of a minimum sentence of 4 years for manslaughter and an additional sentence of one year and 4 months in relation to 2 counts of threatening murder. Whether the habitual criminals legislation could have been used in relation to Kable, therefore, is a moot point.

Detaining the dangerous offender: The mere existence of the habitual criminals legislation indicates that preventive detention is hardly a novel concept in New South Wales, or for that matter in most other Australian jurisdictions. Indeed, the last few years has witnessed a revival of legislation providing for indeterminate sentences, designed specifically to detain 'dangerous' offenders. As noted, Mr Hannaford referred to these in the Second Reading Speech for the Community Protection Bill 1994. One example is the *Sentencing (Amendment) Act 1993* (Vic), which empowers a court to impose indefinite sentences on persons convicted of serious offences where it is satisfied, on a 'high degree of probability', that the offender is a 'serious danger to the community'.[28]

That a State Parliament has the power to pass preventive detention legislation that is of general application is not in doubt.[29] Equally clear is the fact that preventive detention and indeterminate sentencing generally is a controversial issue within criminology. *Veen (No2)* is authority for the proposition that 'The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender'.[30] However, the Court did acknowledge that 'the protection of society' can be 'a material factor in fixing an appropriate sentence'.[31] Deane J (dissenting) went further to argue on behalf of a statutory system of preventive detention to the protect the community from a person who has been convicted of a violent crime and who, 'while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence'. Deane J had in mind a system based on 'periodic orders of detention in an institution other than a gaol'.[32] In any event, *Veen (No 2)* did not involve the interpretation of statutory provisions permitting preventive detention and does not touch, therefore, the question of the constitutional validity of such provisions. A provision of that kind was considered in *Chester's* case, specifically section 662 of the *Criminal Code* of Western Australia. The High Court was unanimously of the opinion that indeterminate detention was a 'stark and extraordinary' form of punishment and that, with particular reference to the provision at issue, indeterminate sentences should be restricted to violent crimes and then used only in 'very exceptional cases where the exercise of the power is

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28 For an account of such legislation see:- Pratt J, 'Dangerousness, risk and technologies of power' (1995) 28 *The Australian and New Zealand Journal of Criminology* 3-31; Griffith G, *The Habitual Criminals Act 1957*, NSW Parliamentary Library Briefing Note 19/1994.

29 At least that would seem to be the case prior to the High Court's recent uncovering of certain implications affecting civil liberties in the Commonwealth Constitution.

30 *Chester v R* (1988) 165 CLR 611 at 618.

31 *Veen v R (No 2)* (1987) 164 CLR 465 at 473 (per Mason CJ, Brennan, Dawson and Toohey JJ).

32 Ibid at 495.

demonstrably necessary to protect society from physical harm'.[33]

Without dealing with the issue of the 'dangerous' offender in detail it is enough to say that preventive sentences based on forecasts of dangerousness raise two key issues. One is that the capacity to predict dangerousness is limited. For example, the Floud Report of 1981 from the United Kingdom reported no more than a 50% success rate in predicting future dangerousness.[34] As suggested above, the second is that preventive detention offends against notions of proportionality. As von Hirsch and Ashworth observe:

> Whereas the proportionate sanction chiefly reflects the gravity of the crime of conviction, predictions rely mainly on quite ulterior matters, relating to previous criminal history and social and psychological factors. If the protective sentence is justifiable at all, then, it could only be in cases of such 'vivid danger' as to warrant overriding in the public interest the fairness requirements which the principle of proportionality embodies.[35]

Criminal law issues and the Kable case: Important as these issues are they have not proved ultimately to be the central matters at stake in the Kable case, which has instead turned on the questions of the constitutional validity of the CPAct. The most concerted analysis of the human rights and criminal law issues raised in the case is found in the judgment of Mahoney JA in the NSW Court of Appeal where it is acknowledged that an Act which authorises preventive detention may infringe 'the basic human rights which should underlie the laws of a modern democratic society'.[36] His Honour noted that the applicant, in his submissions, had tended to suggest that such a law 'is necessarily an unmitigated evil, an evil of such dimensions as warrants the conclusion that it is beyond the powers of the New South Wales Parliament to enact it'.[37] Whilst sensible of the dangers inherent in such legislation, Mahoney JA observed that the position is more complicated 'than such submissions suggest'. He continued: 'it is proper to accept that there are circumstances in which such legislation may be justified. There is no breach of human rights if the circumstances warrant such an enactment'.[38] In the event he accepted that this was a special

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33 (1988) 165 CLR 611 at 618. The order was set aside.

34 Ashworth A, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson 1992, p 160.

35 Von Hirsch A and Ashworth A, 'Protective sentencing under section 2(2)(b): the criteria of dangerousness' [1996] *Crim LR* 175-183 at 182. The article discusses the dangerous offender provisions under the *Criminal Justice Act 1991* (UK).

36 *Kable v DPP* (1995) 36 NSWLR 374 at 376.

37 Ibid at 377.

38 Ibid at 379.

case: 'There was a clear, weighty and present danger posed by Mr Kable's release'.[39]

This conclusion was based to a significant extent on the facts as these were set out in Levine J's judgment of 23 February 1995. There Levine J held that the civil standard of proof under the Act, concerning the likelihood of Kable committing future acts of serious violence, required proof to a high degree of satisfaction of the 'substantial likelihood' of the commission of such acts.[40] His Honour accepted on the facts that the test had been satisfied in this case. At the same time he said of the CPAct that it 'is discrete, unique and operates in its own peculiar context'[41]; also, he commented that the defendant in his submissions seemed to ignore the fact that the proceedings under the CPAct were civil in nature, notwithstanding that were an order to be made the defendant would become a 'prisoner'. For all that, Levine J's dissatisfaction with the legislation, which he described as 'flawed', was clear.[42] His Honour stated the dilemma raised by the Kable case in these terms: 'The interests of the community and of the liberty of the citizen have been brought into a particular state of tension by this legislation directed to one member of the community, one citizen, namely Mr Kable, alone'.[43] Confirming judicial disquiet on the point, Sully J, in the Common Law Division, observed that, if legislation is to be passed permitting preventive detention, then 'a non-punitive regime' must be involved: 'This must entail, surely, that persons held in preventive detention otherwise than as part of a lawful sentence of imprisonment imposed as punishment for a crime actually committed, are not simply dumped into the ordinary, and manifestly overburdened gaol system'.[44]

In the Court of Appeal, Clarke JA encapsulated the matter at issue thus:

> The position in which the Court finds itself is relatively straightforward, notwithstanding that the Act presents to me as, prima facie, an unjustified infringement on the appellant's basic human rights. If the Act is valid the Court is bound to enforce it.[45]

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39 Ibid at 380.

40 *DPP v Kable* (SCNSW, unreported 23 February 1995 - 13152/94): among the authorities cited was *Briginshaw v Briginshaw* (1938) 60 CLR 336. The same issue was discussed by Mahoney JA in *Kable v DPP* (1995) 36 NSWLR 374 at 389.

41 *DPP v Kable* (SCNSW, unreported 23 February 1995 - 13152/94) at 148.

42 Ibid at 189. Levine J thought that preventive detention legislation, if necessary, should in fact be of general application

43 Ibid at 140.

44 *Kable v DPP* (SCNSW, unreported 19 July 1995 - 11667/95)

45 *Kable v DPP* (1995) 36 NSWLR 374 at 395

In the event, Clarke JA agreed with Mahoney JA on the question of the CPAct's validity. That validity was said to be founded primarily on the doctrine of the 'sovereignty' or 'supremacy' of Parliament.[46] On the other side, Kable submitted to the High Court that 'The question is not about preventive detention in general terms. It is about preventive detention of one person, and the intrusion of the legislature into the judicial process'.[47] The focus must therefore turn to the constitutional issues at stake.

3. COMMON LAW RIGHTS, IMPLIED RIGHTS AND PARLIAMENTARY SUPREMACY

Constitutional challenges in the NSW Supreme Court and beyond: Constitutional questions raised by the CPAct were considered by the New South Wales Supreme Court on four occasions: (i) on 19 December 1994 when Spender JA refused an application for a permanent stay of the proceedings brought by the DPP; (ii) on 30 December when Hunter J made an Interim Detention Order; (iii) on 23 February 1995 when Levine J made a six month Preventive Detention Order against Kable; and (iv) in the 9 May 1995 ruling of the Court of Criminal Appeal. Subsequently, constitutional questions were considered on 18 August when the High Court granted Kable leave to appeal and, afterwards, when the case was heard on 7 and 8 December 1995 before Brennan CJ, and Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

The High Court, common law rights and parliamentary supremacy: The immediate legal background to the constitutional challenge are those recent decisions by the High Court which have seen, in the words of one commentator, the Court creatively uncovering 'constitutionally entrenched' fundamental common law rights and civil liberties.[48] According to another commentator, 'Using its own and British jurisprudence as a springboard, the Court is rejuvenating the traditional doctrine of the rule of law...It has begun to extend the concept of the rule of law into the area of substantive, as distinct from formal, equality. Finally, it has elevated certain rights to the status of a new and potent "common law" of the Constitution'.[49] What can be said is that Kable, along with such other cases as *McGinty*[50] and *Langer*[51], is a good test of how far the Court is prepared to go down this path of judicial creativity.

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46 'Sovereignty' was the term preferred by Mahoney JA (at 387), whilst Spender AJ said the Parliament was 'supreme' ([1994] 75 A Crim R 428 at 435).

47 Appellant's submission in reply to respondent's submissions, 5 December 1995.

48 Lane PH, 'The changing role of the High Court' (1996) 70 *ALJ* 246- 251 at 247.

49 Bailey P, 'Righting" the Constitution without a Bill of Rights' (1995) 23 *Federal law Review* 1-36 at 1.

50 *McGinty v WA* (1996) 134 ALR 289.

51 *Langer v Commonwealth of Australia* (1996) 134 ALR 400.

As noted, informing the debate on the other side is the established doctrine of parliamentary sovereignty or supremacy. That case was put by Spender JA in these terms:

> The powers of the New South Wales Parliament are not subject to a Bill of Rights, nor to any doctrine that there are rights so deeply embedded in our political and judicial systems that they cannot be modified or wholly repealed by the Parliament. Acting within its own constitutional sphere, Parliament is supreme and may do what it wishes...If laws are passed which are fundamentally unjust, the answer lies with the ballot box, not the courts.[52]

This theme is familiar enough and its implications for the relationship between the doctrines of parliamentary sovereignty (or supremacy) and the rule of law has been the subject of much analysis.[53] The broad question is whether there are rights so deeply embedded in our political and judicial systems that they cannot be modified or wholly repealed by Parliament? The specific case argued by Kable before the High Court was that the NSW Parliament derived its constituent power from section 4 of the Constitution Statute of 1855 and that, under that statute, 'The Parliament is part of the society governed by the rule of law, it is not above it. One of the essentials of the rule of law was that no person could be imprisoned except upon conviction of a legally defined crime. Another was equality before the law'. It was submitted further that the Parliament cannot 'diminish rights deeply rooted in the democratic system'.[54] The Act in question, it was said:

> subjects the appellant [Kable] to imprisonment for no offence and without conviction and is invalid. Freedom of the person under law is mandated in a parliamentary democracy...Those rights are imperilled by a law which provides gaol without a crime and without a conviction.[55]

On the other side, the NSW DPP contended that the power of colonial legislatures to pass laws repugnant to the fundamental principles of English law was confirmed by section 3 of the *Colonial Laws Validity Act 1865* and that, in addition, the doctrine of the rule of law incorporates the principle of parliamentary supremacy. Building on Mahoney JA's comments, it was submitted further that the mere fact that the Act sanctions loss of liberty without a finding of guilt does not take it outside the Parliament's power. Several examples

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52 (1994) 75 *A Crim R* 428 at 435-436.

53 Griffith G, 'The rule of law and the sovereignty of parliament - rival or companion doctrines?' (1994) 6 *Political Theory Newsletter* 43-50.

54 Summary of argument of the applicant, 18 August 1995.This was said to be 'mentioned' in *Union Steamship* (at 10) and supported by *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 and *L v M* [1979] 2 NZLR 519 at 527 (per Sir Robin Cooke P). Further, it was contended that Lord Reid's remarks should be confined to their British context.

55 Appellant's written submissions, 4 December 1995. Citing Dicey, it was submitted that 'The rule of law requires that a citizen may only suffer loss of liberty upon conviction of an offence'.

of involuntary detention imposed, subject to judicial safeguards, with the purpose of protecting society were cited, including: bail; quarantine; mental health legislation; wartime security; habitual criminals legislation; and immigration controls.[56]

Judicial authority for the proposition that certain rights are too deeply embedded to be modified or repealed by Parliament is sparse indeed. The issue has usually been considered in the context of section 5 of the New South Wales *Constitution Act 1902*, or its equivalents in other jurisdictions, which provides that Parliament has 'power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever'. In the *BLF* case Street CJ (and Priestley JA) found in the words of section 5 'the source of power in the courts to exercise an ultimate authority to protect our parliamentary democracy...in a general sense as limiting the power of Parliament'.[57] In the event, that proved to be a minority opinion, with Kirby P, for example, observing that 'if the legislation is clear, and though the judge considers it to be unjust or even oppressive, it is not for him to substitute his opinion for that of the elected representatives assembled in Parliament'.[58] In *Union Steamship*[59] the High Court confirmed that view: the words of section 5 were 'not words of limitation' and the power of Australian Parliaments, within the limit of the grant, was said to be 'as ample and plenary as the power possessed by the Imperial Parliament itself'.[60] This would seem to be fatal to Kable's submission that the powers of the NSW Parliament are limited because it is a 'subordinate legislature' established by imperial statute. Indeed as early as 1885 the Privy Council said that the power to make laws for 'the peace, order and good government' of a colony conferred 'the utmost discretion of enactment'.[61] Kable's submission was based to a large extent on the distinction between the terms 'sovereignty', which applies to the Westminster Parliament, and 'supremacy', which is the more appropriate term in an Australian context.[62] That much was conceded by the NSW Solicitor General who argued, however, that the issue was of semantic interest only and that, in relation to Kable, it involved a distinction without a difference.[63]

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56 Respondent's written submissions, 4 December 1995.

57 (1986) 7 NSWLR 372 at 382.

58 Ibid at 406.

59 (1988) 166 CLR 1.

60 Ibid at 10. See also - *Polyukhovich v Commonwealth of Australia* (1993) 172 CLR 501 at 605 (per Deane J) and 714 (per McHugh J); however Dawson J at 636 did suggest that there may be an exception 'for quite extraordinary circumstances'. Mahoney JA seemed to respond to this possibility when he noted, 'If there be limits upon what a sovereign State may do in this regard, the present Act does not in my opinion go beyond them' - (1995) 36 NSWLR 374 at 388.

61 *Riel v R* (1885) 10 App Cas 675 at 678.

62 Appellant's submissions in reply to respondent's submissions, 5 December 1995.

63 Respondent's outline of submissions, 4 December 1995.

Remaining with the *Union Steamship* case for a moment, the Court added there the tantalising comment: 'Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law, which Lord Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore'.[64] On this basis, it was suggested by counsel for Kable that a question mark of some kind may still hang over the validity of 'unjust' statutes.[65]

Again, however, the basis for this proposition would seem to be tenuous at best. The Court has noted the fragility of common law rights in the face of express legislative intervention. As Brennan J said in *Nationwide News*, 'Freedoms or immunities recognized by the common law are, generally speaking, liable to impairment or abrogation by legislation'.[66] To abrogate fundamental freedoms, a Parliament need only be 'unmistakably clear' in its intent.[67] The general point is that, to suggest that legislative power is limited generally by fundamental principles of the common law would seem to take us back, as Goldsworthy has suggested, to the doctrine expounded by Boothby J which the *Colonial Laws Validity Act 1865* was designed to remedy, with the difference that it is the common law of Australia laid down by the High Court, rather than the "law of England" which would provide the limiting factor today.[68] A further obstacle to note here relates to the nature of constitutional review itself which, it has been said, starts with 'the constitutional text and not some other material, no matter how basic or fundamental to our legal tradition'.[69]

Constitutional implications and the limits of parliamentary supremacy: In *Nationwide News* Brennan J went on to say that in Australia the doctrine of parliamentary supremacy

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64 (1988) 166 CLR 1 at 10.

65 (1993) 172 CLR 501 at 687 (per Toohey J). For a review of the extra-judicial comments made on this issue by Mason CJ and Toohey J see - Horrigan B, 'Is the High Court crossing the Rubicon? - a framework for balanced debate' (1995) 6 *Public Law Review* 284-306.

66 (1992) 177 CLR 1 at 48.

67 *Re Bolton: Ex parte Bean* (1987) 162 CLR 514 at 523; Williams G, 'Civil liberties and the constitution - a question of interpretation' (1994) 5 *Public Law Review* 82-103 at 83.

68 Goldsworthy J, 'Implications in language, law and the Constitution' from *Future Directions in Australian Law* by Lindell G (ed), The Federation Press 1994, p 175.

69 Booker K, Glass A and Watt R, *Federal Constitutional Law: An Introduction*, Butterworths 1994, p 235. This observation was confirmed in Williams G, op cit, p 85. Williams stated: 'The court cannot, without altering the balance of the Australian polity or undermining its own legitimacy, pronounce the existence of constitutionally enforceable freedoms unless such freedoms are derived from the Constitution by a sustainable interpretative scheme'.

must be understood in the context of limits defined in a written Constitution.[70] It would seem therefore that a more fruitful line of argument for Kable to develop is that the Act is inconsistent with certain implications which may be drawn from the Commonwealth Constitution, relating to specific provisions or otherwise, an approach which Bailey refers to as 'the common law of the Constitution'.[71] On this point, in *Nationwide News* Deane and Toohey JJ referred to implied limitations on federal power as including those 'the fundamental implications of the doctrines of government upon which the Constitution as a whole is structured and which form part of its fabric'. These are, notably, the concept of a federal system and the doctrine of the separation of powers. Their Honours then continued by referring to the 'more particular implications which either are to be discerned in particular provisions of the Constitution or which flow from the fundamental rights and principles recognized by the common law at the time the Constitution was adopted as the compact of the Federation'.[72] Further to this second category, Zines has commented:

> The idea that 'injustice' or 'fundamental' common law principles can limit the power of the political organs of government opens up a vast and uncertain area of constitutional limitations.[73]

Several important issues flow from this observation. One refers to the relationship between the State and Commonwealth Constitutions; that is, whether, or to what extent, any implications in the Commonwealth Constitution can be said to apply to the constitutions of the States? More mundanely, a further issue is whether any of the second category of constitutional implications are in fact relevant to Kable's case.

Section 80 of the Commonwealth Constitution: Both issues were raised in the Court of Appeal in relation to section 80 of the Commonwealth Constitution. On that basis, and presumably having regard to the more expansive interpretation of the section adopted by the High Court in *Cheatle v R*,[74] Dr Woods QC submitted to the Supreme Court that there is an assumption that 'all serious offences may be tried only by indictment and accordingly by jury'; further, that this 'implication' applies both to Federal and to State offences. It was

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70 (1992) 177 CLR 1 at 48. It is in that context that the term 'supremacy' is to be preferred over 'sovereignty' when defining the powers of Australian Parliaments - Kinley D, 'Constitutional brokerage in Australia: constitutions and the doctrines of parliamentary supremacy and the rule of law' (1994) 22 *Federal Law Review* 194-204.

71 Bailey P, op cit, p 24.

72 (1992) 177 CLR 1 at 69.

73 Zines L, 'A judicially created Bill of Rights?' (1994) 16 *Sydney Law Review* 166-184 at 181. There is now a substantial body of literature dealing with this issue. Among the most interesting for present purposes is - Goldsworthy J, op cit, pp 150-184. Both Zines and Goldsworthy are critical of 'recent judicial impositions of unexpressed limits to legislative power'.

74 (1993) 177 CLR 541.

argued in this light that 'the [Community Protection] Act creates a criminal offence, that it does not provide for trial by jury, and that accordingly it is invalid'. The reason why section 80 was claimed to apply to State laws was not set out, but it could have been on the basis of section 106 of the Commonwealth Constitution, the relevance of which is discussed in detail later.

In any event, in the Court of Appeal Mahoney JA was brisk in his dismissal of this argument. Citing *Kingswell v R* and *Brown v R*, he said that the reasoning should not be accepted:

> I do not accept that s. 80 and such implications as are to be drawn from it, apply to State laws which create State criminal offences and which provide for the mode of trial of them....It is, in my opinion, open to a State to create an offence of whatever seriousness and to provide for trial of it in such manner as is appropriate under State law.[75]

On this matter the New South Wales DPP had submitted, *inter alia*, that section 80 is binding on the courts of the States only so far as they are exercising Federal jurisdiction, which was not the case here. Section 80, it was said, does not mandate a jury trial for what were after all civil proceedings under a New South Wales Act.[76] Significantly, the matter was not raised before the High Court by Kable.

Equality before the law: Another early casualty was the attempt by Kable to argue that the constitutional doctrine of equality before the law was relevant to his case. This was at the forefront of his submission requesting special leave to appeal to the High Court. However, it did not form part of either Kable's written or oral submissions at the main hearing on 7 and 8 December 1995. Indeed, counsel for Kable, Sir Maurice Byers, said in response to a question from Brennan CJ that it had been pointed out to him, 'I think on the special leave application, with no absence of firmness, that I stood little ground there'.[77]

Briefly, therefore, the status of the constitutional doctrine of legal equality, which holds in effect that all persons 'subject to law must be treated equally unless there is a rational ground for discriminating between them',[78] is by no means certain. In *Leeth's* case[79], the

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75 (1995) 36 NSWLR 374 at 388.

76 Outline of respondent's submissions on constitutional issues, NSW Solicitor General, 1 March 1995.

77 Transcript of proceedings, 8 December 1995, p 132. In fact, Sir Maurice had misheard the question from the Chief Justice who had not intended to refer to the doctrine of legal equality at all.

78 Detmold MJ, 'The new constitutional law' (1994) 16 *Sydney Law Review* 228-249 at 232.

79 (1992) 174 CLR 455. It was submitted by the plaintiff that Federal legislation providing that, *inter alia*, minimum sentences for federal offenders serving sentences in a State or Territory were to be determined by the laws of those jurisdictions was discriminatory in that offenders would be liable to

doctrine was supported by Deane, Toohey, and Gaudron JJ, but rejected by Mason CJ, Dawson and McHugh JJ, with Brennan J deciding the matter on other grounds . Leading the innovative approach, Deane and Toohey JJ based their interpretation on the doctrine of the underlying equality of the people of the Commonwealth under the law and before the courts',[80] a proposition that was derived both from the reference to 'the people' in the Preamble to the Constitution, as well as from Chapter III. As to the latter, the argument seems to be that Chapter III guarantees substantive due process against the Commonwealth.

Further to this, Kable relied on 'an implied term of the Commonwealth Constitution that laws made by the Parliament of the Commonwealth, or of a State, shall treat all persons subject to such laws as equal before courts and tribunals'.[81] For Kable it was submitted therefore that the Act was both 'unequal and invalid'.[82] Fairall agreed in his commentary on the legislation, stating that 'it violates the principle that like cases be treated alike...Kable is treated differently from all other prisoners, even those with relevant similar characteristics that is, those who have killed and are likely to kill again'.[83]

Against this, for the NSW DPP it was submitted, *inter alia*, that there is no general prohibition of discriminatory laws in the Commonwealth Constitution and, besides, that even Deane and Toohey JJ did not contend that the legislative power of a State is controlled by the principle of equality.[84] Alternatively, it was said that a constitutional doctrine of legal equality is not infringed by a State law which addresses a particular issue in a rational and relevant manner, 'merely because its benefit or detriment is not extended universally'. On the basis of the argument put forward by Kable any number of State laws would be invalid, including laws creating sexual offences capable (in law) of applying only to males. Thirdly, addressing the issues canvassed by Mahoney JA as to the 'necessity' of the legislation, it was submitted that there were 'rational and relevant' grounds for confining the Act to Kable: 'The under-inclusiveness of the CPAct is not a mask for a discriminatory legislative motive. Rather it is recognition of the significance of individual liberty and the need for extreme caution in closing "the gap" identified by Mahoney JA...'.[85] Stated another way, there was

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different sentences under different State and Territory laws. This was said to involve the 'unequal treatment of equals' (at 462). For an analysis of the views of the various High Court judges see - Lee HP, 'The Australian High Court and implied fundamental guarantees' (Winter 1993) *Public Law* 606-629.

80 (1992) 174 CLR 455 at 486.

81 Cited in 'Outline of respondent's submissions on constitutional issues', 1 March 1995.

82 Summary of argument of the applicant, Special Leave Application, 9 August 1995.

83 Fairall PA (1995), op cit, p 576-577.

84 Summary of argument of the respondent, 11 August 1995.

85 Respondent's outline of submissions, 4 December 1995.

therefore a rational ground for discriminating between Kable and other persons.

Evidently, some or all of these arguments were accepted by the High Court, the upshot of which is that the status of the doctrine of legal equality must wait to be tested on another occasion. An indication of the Court's thinking on this issue may perhaps be gained from the recent decision in *McGinty's* case where Brennan CJ confirmed the established view that 'No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure'.[86] To this McHugh J added the observation that he could not accept the view expressed by Deane and Toohey JJ in *Nationwide News* 'that a constitutional implication can arise from a particular doctrine that "underlies the Constitution"'.[87]

Section 106 of the Commonwealth Constitution: Very briefly again, it was also submitted by Kable that the constituent power of the NSW Parliament is subject to section 106 of the Constitution and that, as a consequence, any restraint on the Federal Parliament is a restraint on its State counterparts. Section 106 provides for the continuance of the constitutions of the States 'subject to' the Commonwealth Constitution. Some assistance for Kable's approach may be found in *Theophanous*,[88] in particular in the judgment of Deane J, as well as from the more cryptic comments of Mason CJ, Toohey and Gaudron JJ in *Stephens*[89]. However, to the extent that that approach may be said to extend beyond the specific implications considered in those cases (notably freedom of political communication) and in other circumstances where the Constitution has clear application to the States, it was rejected in *McGinty* by the three members of the High Court who dealt with the matter.[90] Toohey clarified his own position thus:

> Section 106 does not effect a blanket importation of the Australian Constitution into State constitutions. To interpret s. 106 in this way unduly subjects State constitutions to the Australian Constitution at the price of the other stated aims of the section. Its primary aim is to guarantee the

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86 (1996) 134 ALR 289 at 295.

87 Ibid at 345.

88 (1994) 182 CLR 104 at 164-7.

89 (1994) 182 CLR 211 at 232.

90 (1996) 134 ALR 289 at 297-301 (per Brennan CJ); at 311 (per Dawson CJ); and at 326-328 (per Toohey J). Most open to interpretation were the comments of Brennan CJ who observed: 'The Constitutions of the several States are, by force of s. 106, subject to the Commonwealth Constitution, the provisions of which may be either expressed in its text or implied in its text and structure' (at 298). His opinion as to the limits of that doctrine were then clarified in his discussion of the principle of representative democracy which his Honour said applies only to the process of electing the members of the Federal Parliament (at 300). Toohey J comments that other decisions 'treating s. 106 as protective of State Constitutions' are *A-G (NSW) v Ray* (1989) 90 ALR 263 and *S (a Child) v R* (1995) 12 WAR 392.

continuation of State constitutions after Federation, though subject to the Constitution.[91]

Summing up: By the time the case reached the High Court in December 1995 the focus of the submissions on behalf of Kable had shifted quite substantially, away from the earlier emphasis on the limits of parliamentary power understood either in terms of common law rights or of certain rights implied in the text of the Commonwealth Constitution, towards issues concentrating on the usurpation of judicial power. At the core of the nexus of issues considered before the High Court, therefore, was the doctrine of the separation of powers.

4. SEPARATION OF POWERS, JUDICIAL POWER AND THE STATES

An outline of the issues involved: The comment has been made by Zines that the concept of judicial power in section 71 of Chapter III of the Commonwealth Constitution 'looks like being a great reservoir of rights'. However, he added that one of the disadvantages of 'using Chapter III, even on the broadest construction, is that it refers only to federal judicial power'.[92] A second, or perhaps alternative hurdle, which Kable must overcome is the seemingly settled view that the doctrine of the separation of powers does not apply with respect to the constitutions of the States.[93]

This begs the question whether the CPAct does in fact involve an exercise of judicial power by the Legislature or, alternatively, whether it vests in the NSW Supreme Court a power which is non-judicial. Either way, it would fall foul of the separation of powers doctrine, if that is found to apply in some form.

For Kable, both arguments were submitted. The former centred on the claim that the CPAct amounts to a Bill of Pains and Penalties and in this respect his submission was linked with the leading cases of *Liyanage*[94] and *Polyukhovich*[95]. This argument, based on the usurpation of judicial power by the Legislature, confronted the separation of powers doctrine primarily in terms of Part 9 of the NSW Constitution. On the other hand, the latter argument,

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91 Ibid at 328. The argument that the separation of powers doctrine can be implied into the State constitutions directly through the operation of section 106 would fail on this basis. A second point to make is that the Chapter III argument, which is discussed below, if valid would stand independently of section 106.

92 Zines L (1994), op cit, p 167.

93 *Clyne v East* (1967) 68 SR (NSW) 385; *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Collingwood v State of Victoria [No 2]* [1994] 1 VR 652.

94 [1967] 1 AC 259.

95 (1991) 172 CLR 501.

concerning the vesting of non-judicial power, was linked to the case of *Grollo*[96] in Kable's submission and it confronted the separation of powers issue more in relation to Chapter III of the Commonwealth Constitution.

In a sense the two arguments are but two sides of the same coin. However, if stated only in a rather crude way, the difference rests on the consideration that the argument concerning the usurpation of judicial power focuses on reading down the powers of the NSW Parliament which, pragmatically, Kable contends will be achieved by reference to recent changes to the NSW Constitution. Whereas the argument concerning the vesting of non-judicial power focuses in a sense on reading up the status of the NSW Supreme Court which, Kable contends, can be achieved by reference to Chapter III of the Commonwealth Constitution.

The case for Kable in the High Court: In more particular terms, Kable's case regarding the usurpation of judicial power by the Parliament was based notably on an interpretation of sections 3 and 5 of the CPAct. It was argued that the Legislature was effectively directing the judiciary to imprison Kable. In particular, under section 3(1) the object of the Act is said to be to 'protect the community by providing for the preventive detention' of Kable; whilst, section 3(2) provides that 'In the construction of this Act, the need to protect the community is to be given paramount consideration'. To this is added section 33 of the *Interpretation Act 1987* which directs that a construction of legislation which promotes its object is to be preferred. Taken together, therefore, these provisions would seem to pre-empt any judicial decision that is to be made under section 5(1)(b), namely, that it must be satisfied, on reasonable grounds, that 'it is appropriate, for the protection of a particular person or persons or the community generally, that the person [Kable] be held in custody'. Thus, it was submitted:

> The appellant is thus subjected by the Act to a liability unique to him and inescapable by him. The liability is to an order or orders for his imprisonment conditioned upon and by legislative directions to the judge designed to place him in prison. The statutory liability is in substance equivalent to a legislative exercise of judicial power.
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> Alternatively the provisions of section 3(1) and (2) and 5(1)(a) and (b), read with sections 14, 15 and 17(3), are a legislative attempt to dictate the way in which judicial power is to be exercised and the end to be reached - ostensible [sic] because the legislature has effectively assumed the power to decide the issue.[97]

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96 (1995) 131 ALR 225.

97 Appellant's written submissions, 5 December 1995.

In addition, it was submitted that section 17(3) abrogates the traditional judicial control of the evidence before the court and that laws which change the rules of evidence for the purpose of conviction infringe the judicial power.

In Kable's first written submission this purported usurpation of judicial power was said to fail either because the NSW Parliament was never invested with the powers of a court and could not therefore exercise judicial power, or on the basis that the entrenchment of Part 9 of the NSW *Constitution Act 1902* had in fact imported the doctrine of the separation of powers into what had been, in that respect at least, an uncontrolled constitution.

Alternatively, Kable introduced on 4 December 1995 the submission that the CPAct was invalid because it imposed on a court, invested with the judicial power of the Commonwealth, a function that is incompatible with the possession and/or exercise of the judicial power, or a condition that is incompatible with Chapter III of the Commonwealth Constitution. It was argued, therefore, that Chapter III applies to the States:

> Since Chapter III envisages the courts of the States as capable of investiture with and exercise of the judicial power of the Commonwealth, it grants to them or prevents their deprivation of those characteristics required of recipients of the judicial power of the Commonwealth. A State law which controlled the State court in the exercise of jurisdiction granted by the State is invalid because it is inconsistent with the court's possession of the Constitutional characteristics. Chapter III means that the separation of the judicial from the legislative power applies to courts created by the constitution and by the legislatures of the Commonwealth and of the States.[98]

Additionally, the CPAct was said to be invalid, pursuant to section 109 of the Commonwealth Constitution, as it was inconsistent with the investiture of the judicial power of the Commonwealth by virtue of section 39(2) of the *Judiciary Act* (Cth).

The case against Kable in the High Court: On the other side, in relation to the issue of the legislative usurpation of judicial power, it was argued against Kable that the provision in section 3 of the CPAct, whilst stating an object and a purpose, cannot be equated to reducing the court to an 'automaton'. Section 5(1)(a) after all does require the Court to be satisfied, on reasonable grounds, that 'the person [Kable] is more likely than not to commit a serious act of violence'. The application of the Act is therefore a matter of judicial discretion. Moreover, unlike the Garry David legislation, the CPAct cannot be said to amount to 'detention by executive directive'.[99] This Act, on the other hand, can be said to

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98 Written submissions of the appellant, 4 December 1995.

99 Keon-Cohen B, 'Can the Victorian Parliament abolish fundamental rights?' from Gerull SA and Lucas W (eds), *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform*, AIC 1993, p 75.

confer a discretion on an independent officer, the DPP, to invoke a statutory jurisdiction given to an independent body, the Supreme Court. Moreover, that jurisdiction is exercisable on specified criteria, set out in section 5, which are in fact 'avoidable' by Kable. Indeed, he did avoid it on the second occasion. The NSW Solicitor General argued: 'no matter how much one construes section 5 up in order to try and bring about invalidity, which is not the normal way one construes an Act of this nature, one cannot escape that it is ultimately a conferral of a function upon a court to be satisfied itself that a person has fallen within a sufficiently defined and prescribed criterion, but a criterion that that person is free to avoid by his own conduct'.[100]

Those aspects of the case against Kable relating to Chapter III and section 109 of the Commonwealth Constitution are considered later under the relevant subject heading.

Bills of Pains and Penalties and the usurpation of judicial power: Much of the foregoing debate rests on the question of what constitutes judicial power under Chapter III and whether the limitations it implies in the Commonwealth sphere can be said to apply to the States. A good starting point, which connects the former question to the doctrine of the separation of powers, is the following statement from Toohey J in *Polyukhovich*:

> The provisions of Ch. III of the Constitution function to achieve the independence of the judiciary for two related ends. First, they ensure the institutional separation of the site of judicial power from those of executive and legislative powers so that the courts may operate as a check, through review, on the other arms of government. Secondly, the independence of the judiciary is protected so as to ensure that cases are decided free from domination by other branches of government and in accordance with judicial process: see *Harris v Caladine*.[101]

It has been said that the notion of judicial independence is the crucial defining characteristic of judicial power, and is thus central to the separation of powers issue: 'This principle makes clear the current trend toward a more "modern" version of the separation of powers test, one which focuses on the extent to which the exercise of administrative power by judges has an inconsistent or incompatible impact on the ability of judges to exercise their judicial power'.[102]

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100 Transcript of proceedings, 7 December 1995, p 72.

101 (1991) 172 CLR 501 at 684-685.

102 Brown AJ, 'The wig or the sword? Separation of powers and the plight of the Australian judge' (1992) 21 *Federal Law Review* 48 at 50.

In *Polyukhovich*[103] it was decided that the Commonwealth Parliament could not enact a Bill of Pains and Penalties (or a Bill of Attainder)[104], a law inflicting punishment upon specified persons without a judicial trial, on the grounds that it would be inconsistent with the separation of judicial power provided for in section 71 of the Commonwealth Constitution.[105] Following American jurisprudence, it has been held that such a Bill is a law: (1) directed to an individual or a particular group of individuals; (2) which punishes that individual or individuals; and (3) without the procedural safeguards involved in a judicial trial.[106] Under a Bill of this sort the court would be required only to determine whether the person charged was the person, or member of the class, specified in the Act. In this way, the person's guilt would be declared by the legislature.

Clearly, the CPAct satisfies the first of the indicia set out above.[107] The second can be debated on the grounds that the purpose of the Act is protective in nature and that the detention for which the Act provides is merely that which is 'reasonably necessary to achieve the non-punitive object' of protecting the community.[108] As to the third indicia, the argument was put against Kable that the Act does not attribute guilt to anyone or arbitrarily deem that any person be punished, but rather allows the court to order detention where it has determined that specified criteria are satisfied. Citing *Polyukhovich*, the NSW Solicitor General maintained that the CPAct is not a 'legislative act which inflicts punishment without a judicial trial'; that it leaves it to the Court to determine judicially whether Kable fits within 'properly general proscriptions duly enacted in advance'; and that, therefore, it does not involve 'the substitution of legislative judgment for the judgment of the courts'.[109] The vice

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103 (1991) 172 CLR 501.

104 *Lim v Minister for Immigration* (1992) 176 CLR 1 at 69 (per McHugh J). McHugh J explained: 'At common law, special Acts of Parliament under which the legislature inflicted punishment upon persons alleged to be guilty of treason or felony "without any conviction in any ordinary course of judicial proceedings" were known as Bills of Attainder and Bills of Pains and Penalties. The term 'Bill of Attainder" was used in respect of Acts imposing sentences of death, the term "Bills of Pains and Penalties" in respect of Acts imposing lesser penalties'.

105 For a discussion of the High Court's views generally on Bills of Attainder see - Parker C, 'Protection of judicial process as an implied constitutional principle' (1994) 16 *Adelaide Law Review* 341-357. Parker comments (at 350), 'Although there is no case where legislation has been struck down as a bill of attainder, it now seems clear that all seven members of the High Court think that if legislation does amount to a bill of attainder it is invalid'.

106 *Lim v Minister for Immigration* (1992) 176 CLR 1 at 70 (per McHugh J).

107 Respondent's outline of submissions, 4 December 1995. The NSW Solicitor General argued that 'Merely because a statute operates against a named individual does not make it a bill of attainder: *Nixon v Administrator of General Services* 433 US 425 (1977); *Plaut v Spendthrift Farm Inc* 131 L Ed 2d 328, 355 n9 (1995).

108 Ibid at 71 (per McHugh J).

109 Respondent's outline of submissions, 4 December 1995.

of a Bill of Pains and Penalties, he added, is not that it designates a specific person instead of laying down a rule of general application, but that is forecloses the issue of criminal guilt without a judicial trial.

In proceedings before the High Court interest centred on the scope of judicial discretion under the CPAct. In particular, the point was made (and conceded by the respondent) that it is difficult to see how there would be a discretion left in the Supreme Court to refuse a Preventive Detention Order once the criteria in section 5 had been satisfied.[110]

The leading case, relevant to an uncontrolled constitution, invalidating legislation for interfering with the judicial process is *Liyanage*,[111] which formed the basis of one line of argument for Kable in this respect. *Liyanage* was a case where the Privy Council examined the Constitution of Ceylon, as it then was, with respect to legislation which attempted to circumscribe the judicial process on the trial of particular prisoners charged with particular offences on a particular occasion and to affect the way in which judicial discretion as to sentence was to be exercised so as to enhance the punishment of those prisoners. The Act in question covered an abortive coup d'etat in 1962 in which the appellants took part. Of the Act the Privy Council said that its 'aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences'.[112] Also, the fact that the judges 'declined to convict some of the prisoners' was 'not to the point'.[113] For the Privy Council the Act 'constituted a grave and deliberate incursion into the judicial sphere'.[114] The parallels with Kable are clear enough.

However, it may be that *Liyanage* can be distinguished from Kable in at least two respects. First, at issue in *Liyanage* (as in *Polyukhovich*) was a retrospective criminal law. Secondly, the finding of invalidity was based on the discovery of an implied separation of powers in the Ceylonese Constitution, Part 6 of which was headed 'The Judicature'. Moreover it is worth noting in this context the comment made by the Privy Council that ad hominem and ex post facto legislation 'directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary'.[115] The Privy Council

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110 Transcript of proceedings, 7 December 1995, p 48; Transcript of proceedings, 8 December 1995, p 108.

111 [1967] 1 AC 259.

112 Ibid at 290.

113 Ibid at 289.

114 Ibid at 290.

115 [1967] 1 AC 259 at 290. To this Winterton adds the observation: 'Conversely, legislation which is more general may nevertheless fall on the wrong side of the line' - Winterton G, 'The separation of judicial power as an implied Bill of Rights' from *Future Directions in Australian Constitutional Law*

commented that 'Each case must be decided in the light of its own facts and circumstances, including...the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific circumstances'.[116]

Does the CPAct constitute a usurpation of judicial power on these terms?. The criteria in section 5 does need to be satisfied and it may be that the integrity of the judicial process remains intact. The Victorian Solicitor General submitted on this theme that the CPAct 'does not direct the Court as to the judgment at which it is to arrive. What it does is to create what might be called a new regime of rights and liabilities in relation to the appellant'.[117] On this basis, it was submitted that the Act does not interfere with the judicial process, which was the point in question in *Liyange*, but only with the substantive rights at issue in the proceedings.[118]

Part 9 of the NSW Constitution Act 1902 and the separation of powers: If the CPAct is found to involve a usurpation of judicial power, however defined, Kable argues that the main basis for a finding of invalidity would rest in the entrenchment of the independence of the judiciary under Part 9 of the NSW *Constitution Act 1902*.

To set the issue in context, the traditional view is that the parliaments of the States are able to confer non-judicial powers on their respective courts. That is certainly reflected in practice. Another established view is that the separation of powers doctrine does not apply to the States. The consequent scope of the power of State legislatures was spelt out in relation to the South Australian Constitution by the Privy Council in these terms:

> plenary power to confer upon the Supreme Court first established under the Ordinance and continued in existence by subsequent enactments, whatever jurisdiction parliament thought fit, not withstanding that such jurisdiction might involve the exercise of powers which do not fall within the concept of judicial power as it has been applied to constitutions based upon the separation of powers - which the state constitution of South Australia is not.[119]

Likewise, in *Ammann v Wegener* Mason J thought it 'well known that 'State courts may exercise functions that are administrative in character'.[120] As noted the leading case in this

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by Lindell G (ed), The Federation Press 1994, p 197.

116 [1967] 1 AC 259 at 290.

117 Transcript of proceedings, 8 December 1995, p 103.

118 (1986) 161 CLR 88 at 96.

119 *Gilbertson v SA* [1978] AC 772 at 783; affirmed in *S (A Child) v R* (1995) 12 WAR 392 at 403.

120 (1972) 129 CLR 415 at 442.

State on the issue is the *BLF* case,[121] which upheld the validity of legislation passed to 'remove doubts' and validate certain Ministerial acts in relation to the cancellation of the registration of the Union which were at issue in an appeal to be heard before the Court of Appeal.

However, in this context Kirby P at least indicated that it was the complete absence of the provision for and recognition of the judiciary and the separation of powers generally in the NSW Constitution (as it was in 1986) which led to the conclusion that the State Parliament has the power to exercise judicial power: 'Indeed, the [NSW Constitution in 1986] makes no relevant provision in respect to the judicature at all. Therefore, neither from its structure nor its terms can a Montesquieuian separation of powers be derived'.[122]

Kable's submission is that the situation has altered radically with the insertion into the NSW Constitution of Part 9, dealing with the independence of the judiciary, by the *Constitution (Amendment) Act 1992*, together with its subsequent entrenchment following the referendum of 25 March 1995. This means that Part 9 can only be amended in the future if the amending legislation is passed by both Houses of Parliament as well as receiving approval at a referendum of the people.[123] Part 9 is headed 'The Judiciary' and its key provision is the protection of tenure for 'judicial officers' under section 53, the effect of which is consistent with section 72(ii) of the Commonwealth Constitution. The referendum question itself was based on the long title for the Constitution (Entrenchment) Amendment Bill 1992 which was in this form: 'An Act to prevent Parliament from changing laws about *the independence of judges and magistrates* without a referendum' (emphasis added). For Kable the sum of this reform was to insert an implied separation of powers doctrine into the NSW Constitution, based on the core concept of the independence of the judiciary.

Against this argument the NSW Solicitor General presented the following submissions:

- on a practical note, incorporating the *Boilermakers* principle into the NSW Constitution would have wide-ranging practical consequences for the State's judicial and administrative arrangements;

- Part 9 does not in any event insert a separation of powers doctrine into the NSW Constitution. The *Boilermakers* principle was found to apply to the Commonwealth Constitution as a result of its structural separation matters relating to the legislature, the executive and the judiciary, an argument which cannot be carried over into the NSW Constitution. Furthermore, the effect of Part 9 is limited to entrenching a

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121 (1986) 7 NSWLR 372.

122 Ibid at 400.

123 For the background to this reform see - Mullen V and Griffith G, *The Independence of the Judiciary: Commentary on the Proposal to Amend the NSW Constitution*, Parliamentary Library Briefing Paper No 9/1995.

personal right on the individual judicial office holder not to be deprived of that office. However, under section 56(1) it expressly preserves parliament's right to abolish a judicial office (subject to the qualification that the office holder be appointed to another judicial office in the same court or in a court of equivalent or higher status) and with that the right to change the nature of the jurisdiction. Unlike Chapter III, Part 9 does not purport to be 'an exhaustive statement of the manner in which the judicial power of the [State] is or may be vested';[124] and

- but even if that were not the case, the CPAct was passed and came into effect before the entrenchment of Part 9. In fact that entrenchment came into effect on 2 May 1995 and therefore subsequent to Levine J making his order on 23 February 1995. The CPAct was valid when it was passed, at which time Part 9 of the NSW Constitution was a statute open to repeal or amendment by Parliament in the normal way: 'If there is an inconsistency, which we deny, the general principle would be that the later and more specific provision of the CPAct would prevail, but it cannot have been intended that there would have been an inconsistency'.[125]

The NSW Solicitor General looked to *Collingwood v Victoria [No 2]*[126] for assistance where it was found that sections 18 and 85 of the *Constitution Act 1975* (Vic) did not embody the doctrine of separation of powers, even to the limited extent of proscribing legislative interference with the judicial process. Section 85 read with section 18 (2A) entrenches the powers and jurisdiction of the Supreme Court, to the extent that a provision repealing or amending section 85 would have to be passed by an absolute majority of both Houses of parliament. Similar entrenchment procedures relate to section 77 of the Victorian Constitution which provides security of tenure for Supreme Court judges. However, the decision in *Collingwood* was based to a significant extent on the observation that Part III of the Victorian Constitution 'deals not with the judicature but only with the Supreme Court' and, therefore, it could not be 'suggested that the [Constitution] Act vests the judicial power of Victoria in the Victorian judicature as the Commonwealth Constitution vests the federal judicial power in the federal judicature'.[127] On the other hand, Part 9 of the NSW Constitution is headed 'The Judiciary' and could be interpreted as forming one limb of an implied separation of powers, standing alongside Part 2 - Powers of the Legislature and Part 4 - The Executive.

It can be suggested that if the entrenched Part 9 does apply to the CPAct, which remains in doubt, then it would have to satisfy the limited separation of powers test proscribing legislative interference with judicial process. One question is whether such a test would

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124 (1956) 94 CLR 254 at 270.

125 Transcript of proceedings, 7 December 1995, p 73.

126 [1994] 1 VR 652.

127 Ibid at 663.

incorporate the *Boilermakers* prohibition against investing federal courts with non-judicial power. At the very least it can be said that the ground has shifted somewhat since the *BLF* case, to the extent that the relevance of the *Liyanage* precedent cannot be discounted. The basis in the latter case for finding an implied separation of powers doctrine would now seem to be in place in the NSW Constitution. If Kable's Part 9 argument is found to be valid then *Liyange* may be expected to cast a long shadow over this case.

A further observation is that, if the separation of powers doctrine were found to apply to the States, then the courts would look, for guidance in its interpretation, to the jurisprudence relating to the Commonwealth Constitution. Consideration would be given, for example, to the suggestion made by Brennan, Deane and Dawson JJ in *Lim*[128] that a Federal Act imposing incarceration on a citizen would be in breach of the separation of powers. Their view was that, putting aside exceptional cases, citizens can only be detained involuntarily pursuant to a sentence imposed by a court after a criminal trial. The 'adjudgment and punishment of criminal guilt' was said to be an exclusively judicial function and in this respect 'the Constitution's concern is with substance and not mere form'. In a statement of particular relevance to Kable, their Honours continued:

> It would, for example, be beyond the legislative power of the [Federal] Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.[129]

Asserting the principle of the rule of law they declared a constitutional immunity 'from being imprisoned by Commonwealth authority to an order by a court in the exercise of the judicial power of the Commonwealth'.[130]

The *Boilermakers* doctrine and the question of non-judicial power: If Kable were to fail on the above Part 9/usurpation of judicial power argument, then the High Court could yet find the CPAct invalid on the basis of Chapter III and the vesting of non-judicial power. This takes us back to the issue of what constitutes judicial power at the federal level.

It is often said in this context that State judges have power conferred on them, such as review on the merits of the exercise of administrative discretions, that could not be exercised by Federal judges.[131] In the Federal sphere, where the issue is considered in the context of

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128 (1992) 176 CLR 1 at 27.

129 Ibid, p 27.

130 Ibid at 28-29.

131 *Final Report of the Constitutional Commission*, Volume One, AGPS 1988, p 393.

the *Boilermakers*[132] doctrine of the separation of powers, it has been said that 'An exhaustive definition of judicial power has proved elusive'; and that 'The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another'.[133] The issue, therefore, remains to be determined by a mixture of 'history, the values involved in the separation of powers and by social policy, as well as by strict analysis'.[134] For guidance, various judgments are cited which emphasise that judicial power involves: (i) a controversy; (ii) about existing rights and based on objective, ascertainable tests or standards derived from legislation or the common law; and (iii) a binding, conclusive and authoritative determination.[135] Where these elements are present the function belongs exclusively to the judiciary. Conversely, under the *Boilermakers* doctrine, Federal courts cannot be vested with non-judicial powers, except to the extent that this is incidental to their judicial functions. However, by recourse to the doctrine of *persona designata*, in *Hilton v Wells*[136] that restriction on the conferral of non-judicial power was diluted. In that case, on a bare majority the High Court declared that a non-judicial function, the issue of a warrant to intercept communications, could be conferred on a judge of the Federal Court. That same matter, albeit under amended statutory provisions, was reconsidered recently in *Grollo v Commissioner of Australian Federal Police*.[137]

***Grollo's* case, the incompatibility of function test and the integrity of the judiciary:** Leaving aside for the moment the question of how the restriction on the conferring of non-judicial power is to be applied to the State courts, the point can be made that Kable relied

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132 (1956) 94 CLR 254; (1957) 95 CLR 529. It has been suggested that the *Boilermakers* doctrine is in decline at a federal level - de Meyrick J, 'Whatever happened to Boilermakers? Part I' (1995) 69 *ALJ* 106 at 111. However the decision in *Brandy v The Human Rights and Equal Opportunity Commission* (1995) 127 *ALR* 1 would seem to reaffirm the principle that judicial powers may only be exercised by persons who are protected by a Constitutional guarantee of their independence and freedom from executive interference, and is not in a manner which is inconsistent with our traditional judicial processes. See - Mullen V, *Industrial Regulation in NSW: The Difficult Dichotomy of Judicial and Arbitral Power*, NSW Parliamentary Library Briefing Paper No 25/1995, p 19.

133 *Lim v Minister for Immigration* (1992) 176 CLR 1 at 66-67 (per McHugh J).

134 Zines L, *The High Court and the Constitution*, 3rd ed, Butterworths 1992, p 152.

135 Ibid, p 162; *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (per Griffith CJ); *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (per Kitto J). Judicial power has been defined as being 'concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the moment the proceedings are instituted': *Waterside Workers ' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463.

136 (1985) 157 CLR 57.

137 (1995) 131 ALR 225.

on this aspect of the *Boilermakers* doctrine and, in particular, on the discussion of this in *Grollo's* case.

In *Grollo* the High Court (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ; McHugh J dissenting) upheld the validity of the relevant provisions of the *Telecommunications (Interception) Act 1979* (Cth). For one thing it was said by the majority that Parliament's intention to apply the *persona designata* doctrine had been clarified by the statutory amendments made in 1987. In any event that doctrine would not apply in reference to the CPAct where the power to issue orders is clearly conferred on judges as members of the Supreme Court and not as designated persons.

Having made it clear that the *persona designata* doctrine did apply in *Grollo*, the majority then considered whether that would undermine the *Boilermakers* principle, to the extent that permits the legislative or executive branches of the state 'to repose non-judicial power in individual judges when that power cannot be reposed in the courts they constitute'.[138] This was discussed under the heading, 'incompatibility of function'. This followed from the conditions expressed on the power to confer non-judicial functions on judges as designated persons, as formulated by Mason and Deane JJ (dissenting) in *Hilton v Wells*. The second, 'incompatibility condition', which was approved in *Grollo*, provides that 'no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'.[139] For elucidation the majority cited the observation in *Mistretta v United States*, stating: 'The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch'.[140] At issue, therefore, is whether the integrity of the judiciary is undermined by the assignment of a function which leaves it dominated in some way by another branch of the state. This may be achieved by direct or indirect means. Indeed, one of the arguments in *Grollo* was that the method used to appoint judges of the Federal Court as 'eligible judges' was 'merely a device which, in substance, vests non-judicial power in the judges of that court'.[141] Commenting on this, the majority again referred to *Mistretta* where it was said: 'The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action'.[142]

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138 Ibid at 233.

139 Ibid at 235.

140 Ibid at 235.

141 Ibid at 230.

142 Ibid at 236.

This is one possible interpretation of the CPAct, that it undermines judicial integrity by reducing the Supreme Court to a mere device for the fulfilment of the legislative intention of detaining Kable. Viewed in that light it amounts to a form of disguised legislative punishment, which achieves its purpose by imposing on the Supreme Court a non-judicial function. That at least is how the argument is put where Kable relies on Chapter III as the basis for the invalidity of the CPAct.

Assuming the validity of the incompatibility of function argument for a moment, the key question then is 'can it be applied to the States'?

Chapter III and the judicial power of State courts: As noted, with the absence of a separation of powers doctrine operating for the States these fine distinctions between judicial and non-judicial power have been less relevant in this sphere. Where they do arise is in relation to the vesting of Federal jurisdiction in the State courts pursuant to section 77(iii) of the Commonwealth Constitution. Basically, the established view seems to be that the Commonwealth cannot confer non-judicial power in a State court, but a State parliament can.[143] Also, as noted a State parliament can, under present doctrine, exercise non-judicial power.

The novel aspect of Kable's case in this respect is the proposition that, given that the *Judiciary Act* invests the judicial power of the Commonwealth in the Supreme Court of the States, it is inconsistent with the vesting of jurisdiction for a State Act to impose a jurisdiction on a judge of that court which makes the performance of that purportedly invested jurisdiction, inconsistent with the exercise of Federal judicial power.

This was argued both on the basis of inconsistency, pursuant to section 109, and as a direct consequence of Chapter III of the Commonwealth Constitution. As Brennan CJ indicated these are really two aspects of the same basic argument, in the sense that section 39 of the *Judiciary Act* relates to the investing of Federal jurisdiction in State courts, whilst the Chapter III argument relates to the availability for vesting that jurisdiction.[144]

The proposition that Chapter III requires the State courts to keep themselves free from the incompatibility of function discussed above in order to be suitable receptacles of the judicial power of the Commonwealth was described by Dawson J as 'very novel'.[145]

In support of the argument that Chapter III courts and State courts belong to different judicial institutions extensive reference was made by the NSW Solicitor General to *Le*

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143 Zines L, *The High Court and the Constitution*, 3rd ed, Butterworths 1992, p 180.

144 Transcript of proceedings, 7 December 1995, p 46.

145 Transcript of proceedings, 7 December 1995, p 34.

Mesurier v Connor,[146] including the following statement from the joint judgment of Knox CJ, Dixon and Rich JJ:

> The Constitution, by Chapter III, draws the clearest distinction between Federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilize the judicial services of State Courts recognizes in the most pronounced and equivocal way that they remain 'State Courts'. The Parliament may create Federal Courts, and over them and their organization it has ample power. But the courts of a State are the judicial organs of another Government. They are created by State law; that law, primarily at least, determines the constitution of the Court itself, and the organization through which its powers and jurisdiction are expressed.[147]

This case has been said to be authority for the proposition that the power conferred by section 77(iii) of the Constitution on the Federal Parliament to invest a State court with federal jurisdiction is subject to the limitation that Parliament 'cannot change the constitution, the structure or the organization of the court'; the power is confined 'to investing jurisdiction'.[148] At the same time, however, it has been recognised that 'the particular power conferred by s.77(iii) has not been comprehensively considered'.[149]

Section 77(iii) provides that the Federal Parliament may make laws 'Investing any court of a State with federal jurisdiction'. Kable submitted on this basis, in conjunction with section 71, that the Commonwealth Constitution treats all the judicial institutions of Australia as one institution, whether created by the Federal Parliament or by a State Parliament. Thus, section 71 equates the courts of the States with the High Court and federal courts so far as vesting of the judicial power of the Commonwealth is concerned. Then section 77(iii) makes the power to invest State courts with federal jurisdiction explicit. In doing so, it assumes the existence of those courts. But more than that 'The constitutional grant of legislative power to the Parliament of the Commonwealth necessarily diminishes the pre-existing powers of the Parliament of the States. It did so in order that there be uniformity in the nature of those invested with judicial power whether under Federal or State laws'.[150] Under Chapter III the State courts, therefore, are the recipients of Commonwealth judicial power. Furthermore, once the Supreme Court is invested with federal judicial power, a State cannot make it exercise a jurisdiction which is inconsistent with the discharge of that power.[151]

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146 (1929) 42 CLR 481.

147 Ibid at 495-496.

148 *Russell v Russell: Farrelly v Farrelly* (1976) 134 CLR 495 at 535 (per Mason J).

149 Ibid.

150 Written submissions of the appellant, 4 December 1995.

151 Transcript of proceedings, 7 December 1995, pp 22-27.

Thus, whilst section 71 refers only to federal judicial power, read together with section 77(iii) it forms the basis of an argument, suggested by Dawson J, that if the nature of the Supreme Court has been altered by it being required to exercise some incompatible function, then that prevents the Commonwealth from investing it with jurisdiction, on the grounds that it is no longer a court within the meaning of Chapter III.[152] McHugh J suggested a different approach, namely, that the CPAct may be inconsistent with section 39 of the *Judiciary Act* because that Act has invested the Supreme Court with federal jurisdiction on the basis that it is a court, whereas the CPAct may alter the nature of the Supreme Court so that it is no longer a court for the purpose of Chapter III.[153]

Against Kable it was contended that the power to invest federal jurisdiction in a State court, pursuant to section 77(iii) of the Commonwealth Constitution, is limited by the principle that the Federal Parliament takes the State courts as it finds them. Reference was made in this respect to *Le Mesurier v Connor*,[154] which was discussed above. This further statement was relied upon:

> But the provisions of s. 77 and s. 79, which explicitly give legislative power to the Commonwealth in respect of State Courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, like the similar powers of Congress, must not be interpreted as authorizing legislation giving jurisdiction to State Courts.[155]

The submission was also made that the jurisdiction of the NSW Supreme Court in this case is not dependent on a federal statute and that there was no need to rely on federal power or authority for jurisdiction to make a Preventive Detention Order. As for the question of inconsistency with section 39(2) of the *Judiciary Act*, the provision was described as 'both non-specific and ambulatory' in nature and it was said that it did not 'in terms, or by its field, purport to limit State Parliaments, to define, modify or abolish State jurisdiction'. There could be no basis, therefore, for a section 109 inconsistency. To this the NSW Solicitor General added:

> We are not aware of any case in which the [High] Court has had to consider the limitations, if any, upon State power to change or interfere with the jurisdiction of a State court. Our submission is that the principle that the Commonwealth takes the courts as it finds it carries with the corollary that it is State law that can change, even, if necessary, abolish those courts. If the consequence is that the court ceases to become a vehicle for a 39(2)

152 Transcript of proceedings, 7 December 1995, p 30.

153 Ibid at 31.

154 (1929) 42 CLR 481.

155 Ibid at 496.

> investiture, so be it, but it does not follow that the State law is invalid.[156]

Bearing in mind the 'novelty' of the proposition(s) argued by Kable, it is hard to determine its reception by the High Court. However, at least one member of the Court, Gummow J, indicated his acceptance of it in *McGinty*, stating:

> Section 77 presupposes the existence from time to time and the operation of a system of State courts in original States and in those later admitted into or established by the Commonwealth, the jurisdiction and powers of which under State law are compatible with the exercise of the judicial power of the Commonwealth upon investment by the parliament with federal jurisdiction with respect to matters of the description in ss. 75 and 76 of the Constitution'.[157]

Usurpation of judicial power or the vesting of non-judicial power?: Yet, the threshold question remains as to whether the CPAct constitutes either a usurpation of judicial power or a vesting of non-judicial power in the Supreme Court. Perhaps the strongest argument on Kable's behalf is that his imprisonment requires an order by the Supreme Court, but that the terms of the CPAct, as explained above, dictate how that order is to be made. It achieves this not only by the statement of its objects but, in addition, by altering the rules of evidence, as well as by adopting a civil standard of proof. In this way the court is invited to impose a form of punishment, which is appropriate to a finding of criminal guilt, on the basis of civil proceedings, with the all the dangers to the liberty of the individual citizen that entails. That the Act in question applies only to one person makes it all the more problematic. In these circumstances the Court is merely a device of the Legislature. The judicial process is thus compromised, as is the rule of law itself. Moreover, these consequences flow both from the vesting of a non-judicial function on the NSW Supreme Court, as well as from the usurpation of judicial power. Both arguments flow from the central proposition that, under the Act, the liberty of Kable is subordinated, as a matter of legislative intention, directed to the judge. On this reasoning, the critical issue is whether the separation of powers is best supported by Part 9 of the NSW Constitution or Chapter III of the Commonwealth Constitution.

The case against Kable has already been stated in some detail. It enough here to note the argument that section 5(1)(a) of CPAct does in fact establish an objective, ascertainable legal standard as a basis for the making of a Preventive Detention Order, a standard which incorporates an appropriate judicial discretion. A new regime of rights and liabilities is created but, on this submission, the judicial process remains intact and with it the independence of the judiciary. The harshness and specificity of the legislation should not be confused with interference in the judicial function, it was said. Indeed, the argument was

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156 Transcript of proceedings, 8 December 1995, p 89.

157 (1995) 134 ALR 289 at 393.

made that the CPAct would be valid even if it were a Federal Act: 'The very fact that the power was given to the Supreme Court brings with it an independent body, a body with obligations to construe legislation strictly, to give effect to the rules of natural justice'.[158] There is a suggestion here of the comment made by the majority in *Grollo* regarding the 'professional experience and cast of mind of a judge', exercised independently of the Executive, being a desirable guarantee of natural justice: 'It is the recognition of that independent role that preserves public confidence in the judiciary as an institution'.[159] Adding to the complexity of the situation, Gaudron J, who 'generally adopts a very liberal approach to the implications of the separation of federal judicial power',[160] stated in *Lim* that she was: 'not presently persuaded that legislation authorising detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch. III'.[161] The argument against Kable is that the detention for which the CPAct provides is merely that which is 'reasonably necessary to achieve the non-punitive object' of protecting the community.[162]

What can be said in general terms is that the key issue of judicial discretion is very much one of degree, in the interpretation of which regard will be had to history, analysis and policy, but which in the end will turn to a significant extent on its own facts. This much is clear from an analysis of such comparable cases as *Liyanage*,[163] *Grollo*, and *Lim*. In *Liyanage* the Privy Council noted the difficulty in 'tracing where the line is to be drawn between what will and what will not constitute such an interference'.[164] Thus, whilst opinions seemingly favourable to Kable can be found in relation to all the relevant High Court judges, supporting the integrity of the judicial process, upholding the separation of powers and defending the rule of law, an attempt to pre-judge how they will decide this aspect of the case would only represent a victory for temerity over prudence.

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158 Transcript of proceedings, 7 December 1995, p 69. Having set out in detail the discussion of the relevant powers of the legislature and the judiciary in *Palling v Corfield* (1970) 123 CLR 52 the NSW Solicitor General observed: 'It is...a proper recognition of the nature of judicial power that it is engaged with reference to laws made by Parliament, and as long as the judicial function is to determine the application of those laws to persons who, by their own conduct, bring themselves within the prohibition or otherwise, then there is no infringement of the separation of powers doctrine even on a full Chapter III basis'.

159 (1995) 131 ALR 225 at 237 (per Brennan CJ, Deane, Dawson and Toohey JJ).

160 Winterton G, op cit, at 193.

161 (1992) 176 CLR 1 at 55.

162 Ibid at 71 (per McHugh J).

163 [1967] 1 AC 259.

164 Ibid at 289-290.

5. CONCLUSIONS

The purpose of this paper is not to pre-empt the High Court's decision in the Kable case but, rather, to set out the constitutional questions at issue and to identify which of these are likely to prove most significant. The disquiet felt by members of the NSW Supreme Court in relation to the CPAct has been noted. Levine J went so far as to describe the decision he made 'as a melancholy moment in the law and the history of the administration of justice in this State'.[165] If such comments are any guide then there may be reasonable grounds for concluding that the CPAct will be found to usurp judicial power or to invest the court with a non-judicial function. If the former is found and the subsequent discussion turns on Part 9 of the NSW Constitution, then the case will raise matters of great importance for the administration of justice in NSW. Presumably, the principles which underlie the *Boilermakers* doctrine would be found to apply in full, concerned as that is at its core with upholding the independence of the judiciary. Those principles would almost certainly operate if the Chapter III/ vesting of non-judicial power submission were to be upheld, with the difference that the separation of powers doctrine would then apply to every Australian jurisdiction. Whether, *inter alia*, policy considerations would restrain the High Court from arriving at a conclusion of this kind is a moot point. In any event, the case should raise interesting and profound constitutional questions, both of a technical nature and of a more general kind, concerning the doctrines of parliamentary supremacy and the separation of powers under the Australian federal compact.

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165 *DPP v Kable* (SCNSW, unreported 23 February 1995 - 13152/94) at 187.

APPENDIX A

THE COMMUNITY PROTECTION ACT 1994 (NSW)

COMMUNITY PROTECTION ACT 1994 No. 77

NEW SOUTH WALES

TABLE OF PROVISIONS

COMMUNITY PROTECTION ACT 1994 No. 77

NEW SOUTH WALES

Act No. 77, 1994

An Act to protect the community by providing for the preventive detention of persons who are, in the opinion of the Supreme Court, more likely than not to commit serious acts of violence. [Assented to 6 December 1994]

The Legislature of New South Wales enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Community Protection Act 1994.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Objects and application of Act

3. (1) The object of this Act is to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable.

(2) In the construction of this Act, the need to protect the community is to be given paramount consideration.

(3) This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.

(4) For the purposes of this section, Gregory Wayne Kable is the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable.

Definitions

4. In this Act:

"**assessor**" means an assessor appointed by the Court under section 11;

"**Court**" means the Supreme Court of New South Wales;

"**defendant**" means a person against whom proceedings under this Act are being taken;

"**detainee**" means a person who is subject to a detention order;

"**detention order**" means a preventive detention order or an interim detention order;

"**interim detention order**" means an order referred to in section 7;

"**preventive detention order**" means an order referred to in section 5;

"**prison**" means a prison within the meaning of the Prisons Act 1952;

"serious act of violence" means an act of violence, committed by one person against another, that has a real likelihood of causing death or serious injury to the other person or that involves sexual assault in the nature of an offence referred to in section 61I, 61J, 61K, 66A, 66B, 66C, 66D, 66F, 78H, 78I, 78K, 78L or 80A of the Crimes Act 1900.

PART 2—DETENTION ORDERS

Division 1—Detention orders

Preventive detention orders

5. (1) On an application made in accordance with this Act, the Court may order that a specified person be detained in prison for a specified period if it is satisfied, on reasonable grounds:

(a) that the person is more likely than not to commit a serious act of violence; and

(b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

(2) The maximum period to be specified in an order under this section is 6 months.

(3) An order under this section may be made against a person:

(a) whether or not the person is in lawful custody, as a detainee or otherwise; and

(b) whether or not there are grounds on which the person may be held in lawful custody otherwise than as a detainee.

(4) More than one application under this section may be made in relation to the same person.

Arrest warrants

6. (1) On an application made in accordance with this Act, the Court may issue a warrant for the arrest of the person against whom proceedings on an application for a preventive detention order are pending if it is satisfied, on the basis of the information given to the Court in connection with the application, that there are reasonable grounds on which a preventive detention order may be made.

(2) A warrant may be transmitted to the person to whom it is addressed by facsimile transmission, in which case the copy produced by the transmission is taken to be the original document.

(3) A person who is arrested under the authority conferred by a warrant under this section must be brought before the Court as soon as practicable and, in any case, within 72 hours of arrest.

Interim detention orders

7. (1) On an application made in accordance with this Act, the Court may order that the defendant in any proceedings on an application for a preventive detention order be detained in prison for such period (not exceeding 3 months) as the Court determines.

(2) In particular, such an order (an **"interim detention order"**) may be made so as to enable:

(a) the defendant to be examined as referred to in section 17 (1) (c); or

(b) reports on the defendant to be prepared as referred to in section 17 (1) (d); or

(c) other proceedings to be brought for the purpose of committing the defendant to custody or other involuntary detention,

before the Court determines the application.

(3) On an application made in accordance with this Act or on its own motion, the Court may extend the period of an interim detention order for such further period (not exceeding 3 months) as the Court determines if it appears that the proceedings on the application for a preventive detention order will not be determined during the period currently specified in the interim detention order.

(4) An interim detention order ceases to have effect, regardless of its terms, when the proceedings on the application for a preventive detention order are determined.

(5) An interim detention order may be made, and its period extended, in the absence of the defendant.

Director of Public Prosecutions to make certain applications

8. Only the Director of Public Prosecutions may make an application referred to in section 5, 6 or 7.

Detention orders generally

9. (1) A detention order may be made subject to such conditions (including a condition specifying the particular prison in which the detainee is to be detained) as the Court may determine.

(2) A detention order takes effect on the date on which it is made or such later date as is specified in the order.

Detention orders may not be made against persons under 16

10. A detention order may not be made against a person who is under the age of 16 years.

Orders appointing assessors

11. On or as soon as practicable after making a preventive detention order, the Court must make a further order appointing one or more duly qualified medical practitioners, psychiatrists or psychologists as assessors to observe and report on the detainee during the period for which the order is in force.

Orders for medical, psychiatric or psychological treatment

12. On making a detention order, or at any time while a detention order is in force, the Court may make a further order directing the Commissioner of Corrective Services to make specified medical, psychiatric or psychological treatment available to the detainee.

Amendment and revocation of preventive detention orders

13. (1) On the application of the Director of Public Prosecutions or a detainee, the Court:

(a) may amend a preventive detention order by reducing the period for which it is in force; or

(b) may revoke a preventive detention order.

(2) In determining an application under this section, the Court must have regard to the most recent reports prepared under section 21.

(3) More than one application under this section may be made in relation to the same preventive detention order.

Division 2—Procedure before the Court

Nature of proceedings

14. Proceedings under this Act are civil proceedings and, to the extent to which this Act does not provide for their conduct, they are to be conducted in accordance with the law (including the rules of evidence) relating to civil proceedings.

Standard of proof

15. The Court must not make a detention order against a person unless it is satisfied that the Director of Public Prosecutions' case has been proved on the balance of probabilities.

Conduct of proceedings generally

16. (1) Proceedings on an application for a preventive detention order are to be commenced by summons in accordance with rules of court.

(2) The Court may hear and determine an application for a preventive detention order in the absence of the defendant if it is satisfied:

(a) that the summons has been duly served on the defendant; or

(b) that the summons has not been duly served on the defendant but that all reasonable steps to do so have been taken.

Hearings

17. (1) In any proceedings under this Act, the Court:

(a) is bound by the rules of evidence; and

(b) may order the production of documents of the following kind in relation to the defendant:

(i) medical records and reports;

(ii) records and reports of any psychiatric in-patient service or prison;

(iii) reports made to, or by, the Offenders Review Board;

(iv) reports, records or other documents prepared or kept by any police officer;

(v) the transcript of any proceedings before, and any evidence tendered to, the Mental Health Review Tribunal; and

(c) may order an examination of the defendant to be carried out by one or more duly qualified medical practitioners, psychiatrists or psychologists; and

(d) may require the preparation of reports as to the defendant's condition and progress by such persons as it considers appropriate; and

(e) must have regard to any report made available to it under paragraph (d); and

(f) may, if the interests of justice so demand, exclude any person (other than a party to the proceedings or the party's legal representative) from the whole or any part of the proceedings.

(2) This Act does not affect the right of any party to proceedings under this Act:

(a) to appear, either personally or by the party's legal representative; or

(b) to call witnesses and give evidence; or

(c) to cross-examine witnesses; or

(d) to make submissions to the Court on any matter connected with the proceedings.

(3) Despite any Act or law to the contrary, the Court must receive in evidence any document or report of a kind referred to in subsection (1), or any copy of any such document or report, that is tendered to it in proceedings under this Act.

Orders prohibiting publication of material that may identify persons

18. (1) The Court may, in or in connection with any proceedings under this Act, make an order prohibiting persons generally, or any named person or persons, from publishing or broadcasting the name of any person:

(a) who is a defendant or witness in the proceedings; or

(b) to whom the proceedings relate; or

(c) who is mentioned or otherwise involved in the proceedings.

(2) Such an order has effect both during the proceedings and after the proceedings are disposed of.

(3) For the purposes of this section, a reference to the name of a person includes a reference to any information, photograph, drawing or other material that identifies the person or is likely to lead to the identification of the person.

Division 3—Administration of preventive detention orders

Detention orders sufficient authority for detainees to be held in custody

19. A detention order is sufficient authority for the person against whom it is made to be held in custody in accordance with the terms of the order.

Detention orders ineffective while detainees are otherwise in custody

20. A detention order does not have effect while the person against whom it is made is lawfully in custody otherwise than under the order.

Reports to be prepared

21. (1) While a preventive detention order is in force:

(a) the assessor or assessors appointed for the detainee; and

(b) the Commissioner of Corrective Services,

are to make reports to the Director of Public Prosecutions on the detainee's condition and progress.

(2) Reports under this section must be prepared:

(a) at least once during the period for which the preventive detention order is in force; and

(b) whenever else the Director of Public Prosecutions so requires.

(3) A report prepared by an assessor or by the Commissioner of Corrective Services must contain particulars with respect to the following matters:

(a) a description of the general behaviour of the detainee during the period to which the report relates;

(b) an opinion as to whether or not the detainee is still more likely than not to commit a serious act of violence;

(c) an opinion as to whether or not it is still appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody;

(d) an opinion as to whether the detainee should remain in the prison in which the detainee is currently detained or be transferred to another prison.

(4) A report prepared by an assessor must also contain particulars with respect to the following matters:

(a) a description of the current state of the detainee's medical, psychiatric and psychological condition;

(b) a description of any medical, psychiatric or psychological treatment made available to the detainee during the period to which the report relates;

(c) a description of any medical, psychiatric or psychological treatment undergone by the detainee during the period to which the report relates;

(d) an opinion as to whether any medical, psychiatric or psychological treatment (whether of the same kind as that made available during the period to which the report relates or of another kind) should be made available to the detainee during the remainder of the period for which the detention order is in force.

(5) Particulars of an opinion must include particulars of the grounds on which the opinion is formed.

Detainees taken to be prisoners for certain purposes

22. (1) A detainee is taken to be a prisoner within the meaning of the Prisons Act 1952.

(2) A detainee is taken to be required by law to be in custody in prison for the purposes of section 352AA of the Crimes Act 1900.

(3) In any other Act (other than the Sentencing Act 1989) or any instrument under any such Act:

(a) a reference to a sentence of imprisonment includes a reference to a detention order; and

(b) a reference to a term of imprisonment includes a reference to the period for which a detention order is in force.

(4) The Sentencing Act 1989 does not apply to or in respect of a detention order or a detainee.

Discharge of detainees from prison

23. (1) A detainee must be discharged from prison at the expiry of the detention order to which the detainee is subject unless there is lawful reason for continuing to hold the detainee in custody.

(2) A detainee must not be discharged from prison, or allowed leave of absence from prison, otherwise than:

(a) at the expiry of the detention order to which the detainee is subject; or

(b) in accordance with an order made by the Court.

(3) This section applies despite any other Act or law to the contrary.

Division 4—General

Exercise of jurisdiction by single Judge

24. The jurisdiction of the Court under this Act is exercisable by a single Judge.

Right of appeal

25. (1) An appeal to the Court of Appeal lies from any determination of the Court to make, or to refuse to make, a preventive detention order.

(2) An appeal may be on a question of law, a question of fact or a question of mixed law and fact.

(3) The making of an appeal does not stay the operation of a detention order.

Jurisdiction of Court apart from Act not limited

26. Nothing in this Act limits the jurisdiction of the Court apart from this Act.

PART 3—MISCELLANEOUS

Costs

27. (1) A person is entitled to legal aid within the meaning of the Legal Aid Commission Act 1979 for the costs incurred by or on behalf of the person for or in connection with:

(a) proceedings brought against the person under this Act; or

(b) proceedings by way of appeal from any decision of the Court in proceedings brought against the person under this Act.

(2) The nature and extent of legal aid to which a person is entitled under this section, and the terms and conditions on which it is to be provided, are to be determined by the Legal Aid Commission in accordance with the Legal Aid Commission Act 1979.

Protection of certain persons from liability

28. No action lies against any person (including the State) for or in respect of any act or omission done or omitted by the person so long as it was done or omitted in good faith for the purposes of, or in connection with the administration or execution of, this Act.

Bail Act 1978 not to apply

29. The Bail Act 1978 does not apply to or in respect of a person who is a defendant in proceedings under this Act.

Rules of court

30. (1) Rules of court may be made under the Supreme Court Act 1970 for regulating the practice and procedure of the Court in respect of proceedings under this Act.

(2) This section does not limit the rule-making powers conferred by the Supreme Court Act 1970.

Functions of Director of Public Prosecutions

31. (1) The Director of Public Prosecutions has the powers, authorities duties and functions conferred or imposed on the Director of Public Prosecutions by this Act.

(2) This section does not limit the powers, authorities duties and functions conferred or imposed on the Director of Public prosecutions by or under any other Act.

[*Minister's second reading speech made in—*
Legislative Council on 27 October 1994
Legislative Assembly on 23 November 1994]

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SELECT BIBLIOGRAPHY

1. Cases

Ammann v Wegener (1972) 129 CLR 415

Attorney General (Cth) v R; Ex parte Australian Boilermakers' Society (1957) 95 CLR 529

Attorney General (NSW) v Ray (1989) 90 ALR 263

Attorney General (Vic) v David [1992] 2 VR 46

Brandy v The Human Rights and Equal Opportunity Commission (1995) 69 ALR 1

Briginshaw v Briginshaw (1938) 60 CLR 336

Building Construction Employees and Builders' Labourerers Federation of NSW v Minister for Industrial Relations (1986) 7 NSWLR 372

Chester v R (1988) 165 CLR 611

Collingwood v State of Victoria [No 2] [1994] 1 VR 652

DPP v Kable (SCNSW, unreported 23 February 1995)

Gilbertson v SA [1978] AC 772

Grollo v Commissioner of Australian Federal Police (1995) 131 ALR 225

Hilton v Wells (1985) 157 CLR 57

Huddart Parker and Co Pty Ltd v Moorehead (1909) 8 CLR 330

Kable (1994) 75 A Crim R 428

Kable v DPP (1995) 36 NSWLR 374

Kable v DPP (SCNSW, unreported 19 July 1995)

L v M [1979] 2 NZLR 519

Leeth v Commonwealth of Australia (1992) 174 CLR 455

Le Mesurier v Connor (1929) 42 CLR 481

Lim v Minister for Immigration (1992) 176 CLR 1

Liyanage v R [1967] 1 AC 259

McGinty v Western Australia (1996) 134 ALR 289

Nationwide News Ltd v Wills (1992) 177 CLR 1

Nixon v Administrator of General Services 433 US 425 (1977)

Palling v Corfield (1970) 123 CLR 52

Plant v Spendthrift Farm Inc 131 L Ed 2d 328 (1995)

Polyukhovich v Commonwealth of Australia (1993) 172 CLR 501

R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254

R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361

Re Bolton; ex parte Bean (1987) 162 CLR 514

Riel v R (1885) 10 App Cas 675

Russell v Russell; Farrelly v Farrelly (1976) 134 CLR 495

S (a Child) v R (1995) 12 WAR 392

Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104

Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1

Veen v R (No 2) (1987) 164 CLR 465

Waterside Workers' Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434

2. Books and articles

Ashworth A, *Sentencing and criminal justice*, Weidenfeld and Nicolson 1992.

Australian Constitutional Commission, *Final Report of the Constitutional Commission*, Volume One, AGPS 1988.

Bailey P, 'Righting the Constitution without a Bill of Rights' (1995) 23 *Federal Law Review* 1.

Booker K, Glass A and Watt R, *Federal constitutional law: an introduction*, Butterworths 1994.

Brown AJ, 'The wig or the sword? Separation of powers and the plight of the Australian judge' (1992) 21 *Federal Law Review* 48.

Detmold MJ, 'The new constitutional law' (1994) 16 *Sydney Law Review* 228.

Fairall PA, 'Violent offenders and community protection in Victoria - the gary david experience' (1993) 17 *Criminal Law Journal* 40.

Fairall PA, 'Imprisonment without conviction in New South Wales: Kable v Director of Public Prosecutions' (1995) 17 *Sydney Law Review* 572.

Gerull SA and Lucas W (eds), *Serious violent offenders: sentencing, psychiatry and law reform*, Australian Institute of Criminology 1993.

Goldsworthy J, 'Implications in language, law and the Constitution' in *Future Directions in Australian Law* by Lindell G (ed), The Federation Press 1994.

Griffith G, *The Habitual Criminals Act 1957*, NSW Parliamentary Library Briefing Note 19/1994.

Griffith G, 'The rule of law and the sovereignty of parliament - rival or companion doctrines?' (1994) 6 *Political Theory Newsletter* 43.

Horrigan B, 'Is the High Court crossing the Rubicon? - a framework for balanced debate' (1995) 6 *Public Law Review* 284.

Keon-Cohen B, 'Can the Victorian Parliament abolish fundamental rights?' in *Serious violent offenders: sentencing, psychiatry and law reform* by Gerull SA and Lucas W (eds), Australian Institute of Criminology 1993.

Lane PH, 'The changing role of the High Court' (1996) 70 *ALJ* 246.

Lee HP, 'The Australian High Court and implied fundamental guarantees' (Winter 1993) *Public Law* 606.

Mullen V, *Industrial regulation in NSW: the difficult dichotomy of judicial and arbitral power*, NSW Parliamentary Library Briefing Paper 25/1995.

Mullen V and Griffith G, *The independence of the judiciary: commentary on the proposal to amend the NSW Constitution*, NSW Parliamentary Library Briefing Paper 9/1995.

Parker C, 'Protection of judicial process as an implied constitutional principle' (1994) 16 *Adelaide Law Review* 341.

Pratt J, 'Dangerousness, risk and technologies of power' (1995) 28 *The Australian and New Zealand Journal of Criminology* 3.

Von Hirsch A and Ashworth A, 'Protective sentencing under section 2(2)(b): the criteria of dangerousness' [1996] *Criminal Law Review* 175.

Williams CR, 'Psychopathy, mental illness and preventive detention: issues arising from the David case' (1990) 16 *Monash University Law Review* 161.

Williams G, 'Civil liberties and the constitution - a question of interpretation' (1994) 5 *Public Law Review* 82.

Winterton G, 'The separation of judicial power as an implied Bill of Rights' in *Future directions in Australian constitutional law* by Lindell G (ed), The Federation Press 1994.

Zdenkowski G, 'Draconian law a threat to our justice system', *The Sydney Morning Herald*, 14 November 1994.

Zines L, *The High Court and the Constitution*, 3rd ed, Butterworths 1992.

Zines L, 'A judicially created Bill of Rights?' (1994) 16 *Sydney Law Review* 166.

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