# *Before the High Court*

## Imprisonment Without Conviction in New South Wales: *Kable v Director of Public Prosecution*

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In a democracy no person should be subject to imprisonment except for a distinct breach of the criminal law proved according to the law governing criminal trials. The only modern exception to this rule is the involuntary detention of those suffering from mental illness.

The *Community Protection Act* 1994 (NSW)[1] provides for Gregory Wayne Kable to be detained in prison for successive periods of up to six months without a criminal trial. The Act applies *only* to Kable. No other person can be detained under the Act. The New South Wales Court of Appeal upheld the validity of the legislation.[2] Kable has appealed to the High Court. Meanwhile, he has been released from prison after the Supreme Court refused to renew an earlier preventive detention order made under the Act.

The appeal raises questions of critical importance. Is the Act open to challenge under a doctrine of equality before the law? Does the Act violate an entrenched right not to be deprived of liberty without a criminal trial? Is preventive detention a political concept and if so, is it protected by an implied right relating to citizenship? If the Act "infringes a fundamental safeguard of the democratic rights of individuals in our community",[3] as noted by Sheller JA in the Court of Appeal, what can be done about it?

### *1. The Facts*

On 5 May 1990 Kable stabbed his wife to death following a bitter custody dispute. He was charged with murder. A plea of manslaughter by diminished responsibility (based on acute depression) was accepted by the Crown. Kable was sentenced to penal servitude for five years and four months, made up of a minimum sentence of four years and an additional sentence of one year and four months in relation to two counts of threatening murder.[4] He wrote a number of threatening letters during four years in prison. The letters were directed to the carers of his two young children. A failure by the carers to comply with a Family Court order for access fuelled his anger. Kable was not

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1 Hereafter the "Act".

2 Unreported, Supreme Court of New South Wales, Court of Appeal, Mahoney, Clarke, Sheller JA, 9 May 1995 (CA 40067/95; CLD 3152/94). Special leave to appeal to the High Court of Australia was granted (S67 of 1995); the case is listed for hearing on 7 December 1995.

3 Appeal Book id at 204; at 1 per Sheller JA.

4 *Crimes Act* 1900 (NSW) s31(1).

physically violent in prison but his letters alarmed various medical officers.[5] One psychiatrist saw the letter-writing as a form of psychological violence only slightly removed from extreme physical violence.[6]

Kable's pending release from prison became a political issue. The government responded with the *Community Protection Act* which came into force on 6 December 1994. As noted above it applies only to Kable.[7] It allows the Supreme Court to order detention for successive six month periods.[8] The Court must be satisfied that it is more probable than not[9] that he will commit a serious act of violence.[10] The Act provides for interim orders to be made in the absence of the defendant.[11] The rules of civil procedure apply.[12]

On 30 December an interim detention order was made. On 5 January 1995 the manslaughter sentence expired. On the same day Kable appeared in Waverley Court charged with 14 counts of improper use of the postal services under section 85S of the *Crimes Act* 1914 (Cth). Bail was refused.[13] On 23 February the Supreme Court granted a six month preventive detention order under the Act.[14] Bail was granted on the "improper use" counts to allow the order to take effect. On 9 May the Court of Appeal rejected an appeal. Special leave to appeal to the High Court was granted on 18 August. Four days later the Supreme Court declined to renew the preventive detention order. Grove J stated that the legislation did not authorise detention "merely to avoid a perceptible risk".[15] Kable's release does not end the matter. He, and he alone, remains subject to the Act.

As noted above, Kable was charged on various counts relating to misuse of the post. He was bailed to allow the preventive detention order made on that day to take effect. The criminal trial of those offences was thus delayed, and he was sent to prison for six months essentially for that misconduct, that is, misusing the postal services. He was punished without a criminal trial. He served an extra six months in prison. He may also be subject to further punishment in respect of the same conduct should the Crown seek to proceed on the outstanding letter-writing counts.

This is not the first occasion for the use of "one person" preventive detention legislation. The Victorian Gary David was the first Australian held in prison subject to an Act of parliament[16] applicable only to him.[17] An opportunity to test

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5 For example, Dr Baguley, a general practitioner, and Dr Thompson, a psychiatrist; Appeal Book above n2 at 182.
6 Dr Westmore, Appeal Book above n2 at 53.
7 Section 3(3).
8 Sections 5(2) and 5(4).
9 Section 15.
10 Section 5(1)(a).
11 Section 7(5).
12 Section 14.
13 He was in any event subject to the interim order made on 30 December.
14 Unreported, Supreme Court of New South Wales, 23 February 1995, Levine J (No 13152 of 1994).
15 *The Sydney Morning Herald*, 22 August 1995.
16 *The Community Protection Act* 1990 (Vic).
17 At the time of David's death the original preventive detention order had been twice extended, thus adding to an already lengthy sentence for attempted murder.

such legislation was lost in 1992 when David died in Pentridge prison. The David case was a watershed — never before in any common law country (or elsewhere to my knowledge) had such measures been used to restrain a person perceived as dangerous.[18] The constitutional validity of the legislation was never challenged.[19] The Kable case provides a second chance.[20]

## 2. *Equality Before the Law*

The question whether the Act violates the doctrine of equality before the law raises a series of questions. Is that doctrine part of Australian law? If so, does the doctrine apply to an Act of the New South Wales Parliament? If so, is the doctrine infringed by the Act? If so, is the infringement justified in the instant case? It is proposed to consider these questions in turn.

### *A. Is the Doctrine Part of the Law?*

The doctrine of equality is a fundamental principle of justice and of the common law. In essence it means that like cases should be treated alike, and different cases should be treated differently. In *Leeth v The Commonwealth*[21] the doctrine was affirmed by Toohey, Deane and Gaudron JJ. Deane and Toohey JJ referred to the "essential or underlying theoretical equality of all persons under the law and before the courts" which "is and has been a fundamental and generally beneficial doctrine of the common law and a basic precept of the administration of justice under our system of government .... ".[22] Gaudron J stated that "[a]ll are equal before the law" and went on to say that the principle was "fundamental to the judicial process".[23] Toohey, Deane and Gaudron JJ thought that equality of treatment was implied by the Australian Constitution. The various express constitutional provisions dealing with equality (sections 92 and 117) were merely instances of an underlying doctrine.[24] Moreover, the principle of equality was an aspect of judicial power. The power to discriminate could not be conferred upon courts exercising the judicial

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18 David never killed anyone but had an alarming propensity to self-mutilation and to giving voice to fearful fantasies: see Fairall, P A, "Violent Offenders and Community Protection in Victoria — The Gary David Experience" (1993) 17 *Crim LJ* 40. Williams, C R, "Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case" (1990) 16 *Mon LR* 161; Wood, D, "A One-Man Dangerous Offenders Statute — The *Community Protection Act* 1990 (Vic)" (1990) 17 *MULR* 497.

19 Anecdotal reports suggest that attempts to obtain legal aid funding for a constitutional challenge were not successful.

20 There are significant factual differences between the cases. Kable was motivated, indeed obsessed, by the need to retain some degree of control over and contact with his children. David engaged in self-mutilation and threatened indiscriminate killing.

21 (1992) 174 CLR 455 at 485.

22 Ibid.

23 Id at 502.

24 See the comments in *Leeth v Commonwealth* above n21 at 484–5 per Deane and Toohey JJ to the effect that particular provisions in the Constitution can be seen as instances which implement some underlying principle and not as a basis for denying the existence of the doctrine by invoking the *expressio unius* rule. This is particularly important in relation to s117 which clearly does not govern the Act but does support an underlying principle of equality of treatment.

power of the Commonwealth. Brennan J held that discriminatory laws could be justified if within power, but equally, a Commonwealth law which attached different maximum penalties according to the locality of the court of trial would be "offensive to the constitutional unity of the Australian people".[25] Mason CJ, Dawson and McHugh JJ rejected the proposition that Commonwealth laws cannot be discriminatory or must operate uniformly throughout the Commonwealth. It seems that support for a constitutional doctrine of equality before the law is finely balanced.[26]

The right to equality of treatment before the law is guaranteed by the International Covenant on Civil and Political Rights.[27] Australia is a signatory and has recently ratified the Optional Protocol which allows individuals to petition the Human Rights Committee if denied a right guaranteed by the Covenant.[28] The terms of the Covenant are not automatically incorporated into domestic law. However, the content of Australia's international obligations is a relevant factor in determining the proper scope and development of the common law,[29] and the exercise of administrative decisions.[30] Furthermore, it is well established that courts should, in construing statutory provisions which are ambiguous or lacking in clarity, adopt an interpretation in harmony with Australia's international obligations.[31] This rule has no application in the present case. It is doubtful whether legislation could be set aside on the ground that the legislature itself had failed to consider a relevant matter, such as the existence or terms of an international convention, before voting the measure into law.

### B. *Does the Doctrine Apply to an Act of the New South Wales Parliament?*

An affirmative answer is justified if either the right to equality of treatment is an entrenched common law right or discriminatory laws cannot be for the "peace, welfare, and good government of New South Wales", or discriminatory laws are prohibited by the Australian Constitution, to which the State legislature is subject.[32] Some of these issues are considered below.

### C. *Is the Doctrine Infringed by the Act?*

It is submitted that the Act infringes the principle of equality. Specifically, it violates the principle that like cases be treated alike. No other prisoner in Australia is

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25 Above n21 at 475.

26 See also *Street v Queensland Bar Association* (1989) 168 CLR 461.

27 All persons shall be equal before the courts and tribunals: art 14.1.

28 The Optional Protocol to the International Covenant on Civil and Political Rights confers upon individuals the right to petition the Human Rights Committee of the United Nations in relation to Covenant violations. See Charlesworth, H, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 *MULR* 428; Mathew, P, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Syd LR* 177.

29 *Dietrich v The Queen* (1992) 177 CLR 292.

30 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 422; see Allars, M, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law" (1995) 17 *Syd LR* 204.

31 See the remarks by Brennan J in *Mabo v Queensland* (1992) 107 ALR 1 at 29.

32 *Constitution Act* 1902 (NSW) s5.

tested for future violence before being released after the expiration of the head sentence. Kable is treated differently from all other prisoners, even those with relevantly similar characteristics that is, those who have killed and are likely to kill again. The effect of the Act is to incarcerate Kable for conduct which in others would not be a ground for incarceration except pursuant to a criminal trial.

The conduct which gave rise to alarm and ultimately to the Act itself was conduct which constituted an offence under Federal law.[33] Kable is exposed whilst under the reach of the Act to an increased penalty for certain kinds of anti-social or criminal behaviour. Elsewhere in Australia he would, for improper use of the postal service, be liable to a maximum of one year in prison.[34] This does not amount to formal inequality but in "pith and substance" it amounts to unequal treatment.[35]

### *D. Is the Infringement Justified by Necessity?*

Discriminatory or differential treatment may be justified but only if it is a rational (that is, non-arbitrary) and a proportionate response to the problem sought to be addressed by the legislation.[36] In the Court of Appeal Mahoney JA anxiously considered whether the legislature was "justified" in passing the Act.[37] He considered this was relevant to whether the Act was properly characterised as "outrageous".[38] He was at pains to justify, in principle, the need for preventive detention in some cases. However, the implication in this part of the judgment appears to be that if the legislation is not justified, the resulting breach of human rights may have legal consequences. Mahoney JA considered that there would be no breach of human rights if the circumstances warrant the legislation.[39]

In the event, Mahoney JA considered that the legislation was justified. That leaves the important question hanging: what if he had held that the legislation was "unjustified"? What bearing would the resulting breach of human rights have upon validity? The following passage is very confusing: "In considering such a question, two questions will ordinarily arise: what circumstances will provide justification for preventive detention legislation; and who is to be the judge of it".[40]

Mahoney JA was "not satisfied" that the Act was the "unacceptable evil" described by counsel. It represented "the least worst of the solutions available".[41] He thought this case was *sui generis*. Preventive detention was justified. "There was a clear, weighty and present danger posed by Mr Kable's possible release".[42] This aspect of the decision is highly doubtful. The passing

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33 *Crimes Act* 1914 (Cth) s85S (improper use of the postal services).
34 Ibid. It is assumed that the *Community Protection Act* 1994 (NSW) lacks extraterritorial reach.
35 This argument does not in any way depend upon s117 of the Constitution.
36 See the comments in *Leeth v The Commonwealth* at 448 per Deane and Toohey JJ.
37 Above n2 at 7 per Mahoney JA.
38 Ibid.
39 Appeal Book above n2 at 210, transcript at 7.
40 Above n37.
41 Id at 13.
42 Appeal Book above n2 at 211; at 8 per Mahoney JA.

of "one person" preventive detention legislation can hardly be seen as a proportionate or rational response to the problem of social protection.

Even as the legislation was debated in the Parliament, traditional methods were available to take action against Kable. There was the possibility of laying additional criminal charges under Federal law. There was the possibility of binding him over to keep the peace. The sudden discovery that criminal law is primarily concerned with punishment for past wrongs rather than social protection is hardly reason for so drastic a measure as the *Community Protection Act*.

## 3. *Implied Rights*

It has been said that some common law rights lie so deep that even parliament cannot override them.[43] In the *BLF* case[44] Street CJ rejected this notion, preferring the theory that State legislation might be invalidated on the ground that it was not for "peace, welfare, and good government".[45] He considered that laws which do not serve the peace, welfare, and good government of New South Wales should be struck down as unconstitutional. Judicial supervision of the legislative process was not limited to matters of form.[46] This view was apparently repudiated by the High Court,[47] where the "deep rights" issue was noticed but not decided. The present appeal provides an opportunity to re-examine both theories of judicial review.

The scientific and ethical objections to preventive detention are well known.[48] Preventive detention, as the name suggests, is not concerned with punishment but with prevention and community protection. The detainee is removed from society not because of past criminality but because of fears of future violence. Past criminality may of course provide some evidence of future tendencies. The point is that preventive detention looks to the future. As such, it is fraught with uncertainty and risk.

The standard model involves incarceration following a diagnosis of sexual abnormality or chronic recidivism. Indefinite detention following an "acquittal" by reason of insanity is perhaps the oldest form of preventive detention.

The present Act is extraordinary not only in its particularity but because the Act may be invoked at any time, whether or not Kable has been charged with or

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43 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 per Cooke P.

44 *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372; see Fairall, P A, "Peace, welfare and good government: limitations on the powers of the New South Wales Parliament" (1988) 26 *L Soc J* 38.

45 The *Constitution Act* 1902 (NSW) s5 provides that the Legislature shall, "subject to the provisions of the Commonwealth of Australia Constitution Act, have power to makes laws for the peace, welfare, and good government of New South Wales in all cases whatsoever".

46 The view of the Chief Justice was shared by Priestly JA at 421 but not by Mahoney JA at 413. Kirby P at 406 and Glass JA at 407 reserved judgment on the "peace, welfare, and good government" point. Kirby P agreed with Street CJ in rejecting the "deep rights" theory, which he saw as undemocratic and dangerous at 405.

47 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.

48 Wood, D, "Dangerous Offenders and the Morality of Protective Sentencing" [1988] *Crim LR* 424; Wood, D, "Dangerous Offenders and Civil Detention" (1989) 13 *Crim LJ* 324.

is even suspected of a crime. In other words, the factual basis for a preventive detention order does not include commission of any particular offence.

Parliament has a long standing power to pass so-called private Acts, dealing with one named individual.[49] Moreover, by and large, private Acts serve beneficent purposes: in the past private Acts have been used to facilitate divorce, and remove anomalies or stigmata which might otherwise be personally crippling. However, it does not follow that a preventive detention measure that applies to one individual only is beyond legal challenge. If a flaw is to be found in the *Community Protection Act* 1994 (NSW), it may well lie in the combination of two elements: preventive detention and the *ad hominem* nature of the Act.

## 4. *Arguments From the Body Politic*

The thrust of some recent decisions of the High Court is that the federal system that came into being with federation has a particular political character that governs relations between individuals and the State. The effect is that certain discrete rights, such as freedom of communication in relation to political matters, are implied into the Constitution.[50] In *Australian Capital Television Pty Ltd v Commonwealth of Australia*[51] the High Court held that an attempt to restrict political advertising on television for a specified period prior to an election constituted an unwarranted interference with the implied freedom of political expression contained within the Australian Constitution. In *Theophonus v Herald & Weekly Times*[52] the Court extended the reasoning to extract from the Constitution a freedom of communication in political matters, and a constitutional defence to an action in defamation. In *Stephens v West Australian Newspapers Ltd*[53] the freedom of communication implied by the Commonwealth Constitution was extended to communications about certain political matters appertaining to a State legislature.

What are the incidents of the representative democracy which federation brought into existence? If that political entity is one in which freedom of political expression is protected, then freedom from arbitrary arrest and seizure, freedom of assembly, and other traditional civil liberties should be equally protected. Arguably, freedom of assembly is no less vital for the maintenance of a representative government or representative democracy than freedom of communication on political matters. If that is so, then it is but a short step to strike down laws which sanction the arrest and detention without a criminal trial of a specific person (to the exclusion of all others) by reason of antisocial behaviour.

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49 See *Benning v Wong* (1969) 122 CLR 249 at 288.

50 Clearly such implied rights cannot stand in the face of incompatible provisions of the Constitution. For examples, legislation providing for the disenfranchisement of all persons of a particular ethnic group would no doubt violate the *Racial Discrimination Act* 1975 (Cth). But it would not violate the Constitution, which permits discriminatory voting rules: s25.

51 (1992) 177 CLR 106.

52 (1994) 182 CLR 104.

53 (1994) 182 CLR 211.

## 5. *Conclusion*

The enactment of legislation which provides for the detention without trial of a named individual is not only unprincipled but dangerous. Legislation such as this is open to abuse. As Levine J noted:

> if the legislature chooses to pass an Act of this kind with a view to the protection of the community, exquisite care must be taken to avoid that which is intended to be a shield being converted into a weapon in the hands of the mischievous, the spiteful, the vindictive, the jealous, the revengeful or similarly motivated individual or individuals to use by way of actual or threatened false allegation against an innocent person who might then become the subject of inquiry.[54]

How one should take exquisite care against such false allegations is not clear. Moreover, there is no "innocence" under this legislation, just as there is no "guilt". We have stepped through the looking glass into the world of probability statements, actuarial tables, predictions of future dangerousness, and so on. We have left the world of criminal law behind and entered a world of pseudo science, where evidence is heard from psychiatrists, psychologists and social workers, some with little first-hand knowledge.[55] In this brave new world the rule of law gives way to a rule of speculation, generalisation and fear.

Some citizens, reflecting on the likes of Gary David or Gregory Kable, may have slept more soundly when the respective *Community Protection Acts* were passed. David died in jail long after his sentence for attempted murder had expired — some might say this is in keeping with our robust convict past. Conscience may be assuaged by the old saying: the safety of the populace is the highest law (*salus populi suprema lex*). Before we speak thus we are wise to reflect: could such legislation be abused or perverted? Could it be used against political adversaries or for political purposes? Could it be used against persons with lifestyle differences? What of the abortionist, the prostitute, or the local drunk who beats his or her spouse on Saturday nights? What of AIDS sufferers? As Street CJ said: "The greater the hostility directed against a person ... the greater the temptation to distort the fundamental precepts of our democracy by setting at naught the great principles of British justice".[56]

Such draconian and ill-conceived measures as the *Community Protection Act* have no place in the Australian legal system. It is hoped that the High Court will invalidate the legislation.

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54 Above n14.

55 In the present case, for example, Professor Paul Wilson gave evidence for the Crown. His evidence was based upon an examination of many documents but no subject interview was conducted.

56 Above n44 at 379.