

# *Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?*

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## *Abstract*

The High Court has decided that Australian courts can order imprisonment for 'non-punitive purposes'. This paper attacks this conclusion. Imprisonment is always punitive, and to the extent that the High Court's recent decisions ignore this, they are incorrect, inconsistent with precedent, and inconsistent with the methodology the Court has previously applied to the characterisation of laws alleged to infringe Ch III of the Constitution. The principle that a person can be punished only for a breach of the law is fundamental to the separation of judicial power under the Constitution, and an incident of that principle is that punishment can be ordered only by a court after a criminal trial. This principle should be applied in Australia whenever an order is made relegating a person to a punitive environment.

## *1. Introduction*

In the *Boilermakers* case,<sup>1</sup> the High Court recognised that Ch III of the Commonwealth Constitution contemplates the separation of the judicial power of the Commonwealth and that this gives rise to a number of implications. One is that

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

only Ch III courts can exercise federal judicial power,<sup>2</sup> and another is that Ch III courts exercise only judicial power and powers incidental to the exercise of judicial power.<sup>3</sup> Since the Constitution established an integrated court system, and contemplates the exercise of federal jurisdiction by the courts of States and Territories, State or Territory legislation that purports to confer upon a court a function that impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, will be struck down as invalid.<sup>4</sup> That is the net effect of the High Court's decision in *Kable v Director of Public Prosecutions (NSW)*<sup>5</sup> and after *North Australian Aboriginal Legal Aid Service v Bradley*<sup>6</sup> it applies to the Territories.

However while the High Court has been willing to accept these novel and controversial jurisdictional extensions of Ch III, it seems to have been quite unable to develop convincing principles to support the 'institutional integrity' of Australian courts.<sup>7</sup> In one decision, the Court upheld a short-term pay deal for a magistrate in the Northern Territory that allowed the appointee to 'cash in' his judicial pension to facilitate an arrangement between the judge and the executive government that he would leave office after two years.<sup>8</sup> Although the Northern Territory has now rectified this problem by requiring judicial remuneration arrangements to be set by an independent remuneration tribunal, it appears that 'institutional integrity' under Ch III imposes no impediment to the development of a special, undisclosed remuneration arrangement that contemplates a departure from judicial office before the statutory retirement age.<sup>9</sup> More recently the Court has upheld the practice of 'acting' judicial appointments, confirming that there can be many grades of judicial tenure in Australia.<sup>10</sup> It is difficult to see how this practice can be compatible with judicial independence.<sup>11</sup> Once it is accepted that

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2 This reconfirmed the High Court's conclusion in *New South Wales v Commonwealth* ('*Wheat Case*') (1915) 20 CLR 54 at 88–89 (Isaacs J).

3 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271–272 (Dixon CJ, McTiernan, Fullagar & Kitto JJ).

4 This formulation is adapted from the statement made by Gleeson CJ in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67.

5 *Kable* (1996) 189 CLR 51.

6 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163–164 (McHugh, Gummow, Kirby, Hayne, Callinan & Heydon JJ).

7 The proposition that implications drawn from Chapter III of the Constitution can limit the power of State Parliaments contradicts the dogma that States enjoy parliamentary supremacy: see Gerard Carney, 'Wilson and Kable: the Doctrine of Incompatibility — An Alternative to Separation of Powers' (1997) 13 *Queensland University of Technology Law Journal* 175. The principle that Chapter III operates in the Territories has been questioned in many judgments throughout the 20<sup>th</sup> century: see further Patrick Keyzer, 'The "Federal Compact", the Territories and Chapter III of the Constitution' (2001) 75 *Australian Law Journal* 124.

8 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

9 See Patrick Keyzer, 'Judicial Independence in the Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Chapter III of the Constitution?' (2004) 32 *University of Western Australia Law Review* 30.

10 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 86 (Gummow, Hayne & Crennan JJ). See also Douglas Drummond, 'Towards a More Compliant Judiciary?' (Pt 1) (2001) 75 *Australian Law Journal* 304.

s 72 of the Constitution is not an exhaustive statement of the principles of judicial independence to apply to courts vested with federal jurisdiction, general principles of judicial independence should apply. A judge who is appointed for a short period does not have as much independence as a judge who is appointed until retirement age. No amount of historical rationalisation can obscure that fact.

Historically, the criminal trial has been a bulwark of liberty in Australia. Unfortunately, this historical practice has now been subverted. In *Fardon v Attorney-General (Qld)*,<sup>12</sup> a majority of the High Court held that *imprisonment* can now be ordered for ‘*non-punitive purposes*’. In this article I address this extraordinary proposition. I argue that the High Court has failed to provide a convincing or consistent account of the constitutional underpinning for the judicial power to order punishment by imprisonment in Australia. I critically analyse the High Court’s selective re-interpretation of its previous decisions in this area, particularly *Kable v Director of Public Prosecutions (NSW)*.<sup>13</sup> I also criticise the High Court’s abandonment of its previous authorities on the methodology to be applied in characterising statutes that are alleged to infringe Ch III of the Constitution. I argue that the principle that should be applied to govern the boundary between legislative and judicial power in this context is that liberty should be deprived only after due process of law,<sup>14</sup> and, as an incident of this principle, that within our system of constitutional justice imprisonment should be ordered only after a finding of criminal guilt after a fair trial by a properly-constituted court.<sup>15</sup>

## 2. *From Kable to Fardon: the Backflips*

*Kable v Director of Public Prosecutions (NSW)*<sup>16</sup> concerned legislation that authorised a court of a State to order the re-imprisonment of a person who had already served his sentence of imprisonment.<sup>17</sup> In addition, the legislation was *ad hominem* in nature, singling out Mr Kable. For these reasons, the legislation was struck down by a majority of the Court. It is salutary to set out the central integers

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11 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 94–95, 105–106 (Kirby J). I have not overlooked the fact that s 72 of the Constitution is not expressed to apply to the States or Territories. But that does not preclude an implication that courts that may be invested with the judicial power of the Commonwealth must not have their judicial independence undermined.

12 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575. I was counsel for the unsuccessful appellant in this case, and I apologise to readers for indulging in the sin of seeking to vindicate in commentary what I failed to achieve in argument.

13 *Kable* (1996) 189 CLR 51.

14 I utilise the expression ‘due process’ here to cover the same range of principles described by Fiona Wheeler in her excellent article ‘Due Process, Judicial Power and Chapter III in the New High Court’ (2004) 32 *Federal Law Review* 205.

15 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26–27 (Brennan, Deane & Dawson JJ); *Kable* (1996) 189 CLR 51 at 96–97 (Toohey J), 106 (Gaudron J), 120 (McHugh J) and 132 (Gummow J).

16 *Kable* (1996) 189 CLR 51 (‘*Kable*’).

17 The *Community Protection Act* 1994 (NSW).

of the reasoning of the majority in this case: in particular the approach that the members of the majority took to these two issues: that is, whether the legislation should be struck down because it authorised the imprisonment of a person on the basis of a prediction rather than for a proven criminal offence, and whether the legislation should be struck down because it singled-out Mr Kable.<sup>18</sup> It is clear that the majority struck down the New South Wales legislation for *both* reasons.

- Toohey J, the senior justice in the majority, held that the legislation was incompatible with Ch III because it authorised a Ch III court to order the imprisonment of a person although that person had not been adjudged guilty of any criminal offence.<sup>19</sup> Toohey J said that the extraordinary character of the legislation was ‘highlighted’ by its *ad hominem* operation.<sup>20</sup>

- Gaudron J said that:

The proceedings which the Act contemplates are not proceedings otherwise known to the law. And except to the extent that the Act attempts to dress them up as legal proceedings (for example, by referring to the applicant as ‘the defendant’, by specifying that the proceedings are civil proceedings and by suggesting that the rules of evidence apply), they do not in any way partake of the nature of legal proceedings ... And as already indicated, the applicant is not to be put on trial for any offence against the criminal law.<sup>21</sup>

While Gaudron J did identify that Mr Kable was singled-out by the legislation in that case, this feature of the legislation was not the focus of Her Honour’s decision.<sup>22</sup> The passage extracted here and a careful reading of the balance of Gaudron J’s judgment makes it clear that Her Honour’s critique of the legislation was in general terms; not narrowly based on the singling-out point.<sup>23</sup>

- McHugh J struck down the legislation because it purported to vest functions in the Supreme Court of New South Wales that were incompatible with the exercise of the judicial power of the Commonwealth by the Supreme Court of that State.<sup>24</sup> McHugh J emphasised that it is implicit in Ch III that a State cannot legislate in a way that has the effect of violating ‘the principles that underlie Ch III’.<sup>25</sup> After providing a ‘brief summary of the central provisions of the Act’, McHugh J concluded that ‘its *object*’ was ‘to detain the appellant *not for what he has done* but for what the executive government of the State and its Parliament fear that he

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18 Contrast the abbreviated treatment of *Kable* offered by Callinan and Heydon JJ in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 653.

19 *Kable* (1996) 189 CLR 51 at 96–97.

20 *Kable* (1996) 189 CLR 51 at 98.

21 *Kable* (1996) 189 CLR 51 at 106.

22 *Kable* (1996) 189 CLR 51 at 109.

23 *Kable* (1996) 189 CLR 51 at 98.

24 *Kable* (1996) 189 CLR 51 at 115, 116 referring to *Commonwealth v Queensland* (1975) 134 CLR 298 at 314–315.

25 *Kable* (1996) 189 CLR 51 at 115, quoting Barwick CJ, Stephen and Mason JJ in *Commonwealth v Queensland* (1975) 134 CLR 298 at 314–315.

might do' (emphasis added).<sup>26</sup> On this ground, then *and also* because of the *ad hominem* character of the law, McHugh J held it invalid. This is an important point and it should be reinforced again. One of the reasons that McHugh J gave for striking down the New South Wales legislation was because its object was to detain the appellant in prison not for what he had done but for what he might do.

- Gummow J, the final member of the majority in *Kable*, said that:

[W]hilst imprisonment pursuant to Supreme Court order is punitive in nature, it (was) not (made) consequent upon any adjudgment by the Court of criminal guilt. Plainly ... such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction .... [N]ot only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree.<sup>27</sup>

Gummow J also noted that the New South Wales law singled out Mr Kable.<sup>28</sup> However, like Toohey and Gaudron JJ, Gummow J did not place particular emphasis on the fact that the legislation singled-out Mr Kable. Like Toohey, Gaudron and McHugh JJ, Gummow J *did* place emphasis on the fact that Mr Kable was being subjected to imprisonment not for what he had done but for what he might do.<sup>29</sup>

Robert Fardon relied on the majority judgments in *Kable* in his challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).<sup>30</sup> That legislation differed from the New South Wales legislation struck down in *Kable* in what turned out to be a significant respect: the Queensland law did not single out Mr Fardon, but authorised the Attorney-General to single out particular people who can be the subject of applications for re-imprisonment without a fresh finding of criminal guilt. So Fardon relied on the other principle accepted by the majority in *Kable*, viz, that a person cannot be punished for what he might do.<sup>31</sup> It is an elementary principle of the rule of law in Australia that a person may only be punished for a breach of the law, 'but he can be punished *for nothing else*'.<sup>32</sup>

This basic principle of due process is entirely consistent with our common law, our history and traditions,<sup>33</sup> our judicial procedures, remedies and methodology.<sup>34</sup>

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26 *Kable* (1996) 189 CLR 51 at 120.

27 *Kable* (1996) 189 CLR 51 at 132.

28 *Kable* (1996) 189 CLR 51 at 125.

29 *Ibid.*

30 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

31 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26–29 (Brennan, Deane & Dawson JJ); *Kable* (1996) 189 CLR 51 at 97 (Toohey J) and 131 (Gummow J).

32 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27–28 ('*Chu Kheng Lim*') (Brennan, Deane & Dawson JJ), quoting Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, 1959) at 202.

33 *Chu Kheng Lim* (1992) 176 CLR 1 at 66–67 (McHugh J); *Kable* (1996) 189 CLR 51 at 107 (Gaudron J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

34 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 606–607 (Deane J).

Historically and traditionally, an order of imprisonment could only be made by a court following the commission of a criminal offence, a charge being proven beyond reasonable doubt<sup>35</sup> after a fair trial<sup>36</sup> (a plea of guilty aside) and the person being found guilty of the offence with which he or she was charged.<sup>37</sup> The presumption of innocence applied.<sup>38</sup> The power to order the imprisonment of a person without a criminal trial did not exist at Federation.<sup>39</sup>

Why has the High Court of Australia allowed this now? To allow legislatures to imprison people without the predicate commission of a fresh crime and without a criminal trial breaks the nexus between crime and punishment that is part of the fundamental logic of our system of law.<sup>40</sup> The function of punishment is to communicate the censure an offender deserves for his or her *past* crime. One is not punished *in advance*, except where the rule of law, as we have always known it, does not apply. The focus of judicial power on past events is not accidental. Judicial power is characterised by the application of the law to past events or conduct.<sup>41</sup> But in *Fardon v Attorney-General (Qld)*<sup>42</sup> the High Court effectively overruled *Kable*, and decided by majority that State Parliaments *can* validly enact legislation that enables a court to re-incarcerate a prisoner after their sentence of imprisonment has ended, in circumstances where the prisoner has committed no new crime, and after a hearing that bears no real resemblance to a criminal trial. A majority of the High Court held that ‘detention’ in a prison will not be characterised as punitive in nature if it is ordered for non-punitive purposes.<sup>43</sup>

Gleeson CJ characterised the legislation as authorising preventive detention, not punitive detention.<sup>44</sup> McHugh J flatly stated that

the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment.<sup>45</sup>

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35 *Azzopardi v The Queen* (2001) 205 CLR 50 at 64–65 (Gaudron, Gummow, Kirby & Hayne JJ); *RPS v The Queen* (2000) 199 CLR 620 at 630, 634 (Gaudron A-CJ, Gummow, Kirby & Hayne JJ).

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

37 *Azzopardi v The Queen* (2001) 205 CLR 50 at 64–65 (Gaudron, Gummow, Kirby & Hayne JJ).

38 See, for example, *State v Coetzee* [1997] 2 LRC 593 at 677–678 (Sachs J, Constitutional Court of South Africa), quoted in *R v Lambert* [2002] 2 AC 545 at 569–570 (Lord Steyn, House of Lords); *The People v O’Callaghan* [1966] IR 501 at 508 (Ó Dálaigh CJ) and 516 (Walsh J) (quoted with approval in *Ryan v DPP* [1989] IR 399 at 404–405 (Finlay CJ, Supreme Court of Ireland)).

39 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9(1), entered into force 23 March 1976; *Woolmington v DPP* [1935] AC 462 at 481 (Viscount Sankey LC, House of Lords); *In Re Winship* 397 US 358 (1970) at 363–364 (Brennan J, Supreme Court of the United States); *R v Oakes* [1986] 1 SCR 103 at 120 (Dickson CJ, Supreme Court of Canada); *Polyukhovich v The Queen* (1991) 172 CLR 501 at 607.

40 *Azzopardi v The Queen* (2001) 205 CLR 50 at 65 (Gaudron, Gummow, Kirby & Hayne JJ).

41 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188; *Ha v New South Wales* (1997) 189 CLR 465 at 503–504 (Brennan CJ, McHugh, Gummow & Kirby JJ).

42 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (‘*Fardon*’).

43 *Fardon* (2004) 223 CLR 575 at 592 (Gleeson CJ), 597 (McHugh J), 610 (Gummow J), 647 (Hayne J) and 654 (Callinan & Heydon JJ).

Gummow J, the other member of the Court who also sat in *Kable*, said that

the making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted.<sup>46</sup>

Hayne J agreed with Gummow J.<sup>47</sup> Callinan and Heydon JJ said that

the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective *rather than a punitive enactment*.<sup>48</sup>

How could the High Court – in particular McHugh and Gummow JJ – reach their conclusions after what they had previously said in *Kable*? The majority in *Fardon* can only have reached the conclusion that prison can be ordered for non-punitive reasons by either ignoring what they had said in *Kable* or by ignoring the fact that prison is a punitive environment.

While we can and should expect that judges will change their mind from time to time, it is reasonable for lawyers and their clients to expect that judges will provide a full account of the reasons why they have chosen to diverge from previous decisions, or for declining to apply those decisions.<sup>49</sup> Precedent is a central feature of the operation of our court system.<sup>50</sup> As the High Court explained in 1949:

The decisions of a superior court have a double aspect. They determine the controversy between the parties, and in deciding the case they may include a statement of principle which it is the duty of that court and of all subordinate courts to apply in cases to which that principle is relevant. Continuity and coherence in the law demand that, particularly in this Court, which is the highest court of appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases.<sup>51</sup>

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44 *Fardon* (2004) 223 CLR 575 at 592 (Gleeson CJ: ‘Unless it can be said that there is something inherent in the making of an order for preventive, as distinct from punitive, detention that compromises the institutional integrity of a court, then it is hard to see the foundation for the appellant’s argument.’); 597 (McHugh J); 610 (Gummow J); 647 (Hayne J) and 654 (Callinan & Heydon JJ).

45 *Fardon* (2004) 223 CLR 575 at 597.

46 *Fardon* (2004) 223 CLR 575 at 610.

47 *Fardon* (2004) 223 CLR 575 at 647.

48 *Fardon* (2004) 223 CLR 575 at 654.

49 See Frank Kitto, ‘Why Write Judgments?’ (1992) 66 *Australian Law Journal* 787 at 790.

50 See further Patrick Keyzer, ‘When Is an Issue of “Vital Constitutional Importance”? Principles Which Guide the Reconsideration of Constitutional Decisions in the High Court of Australia’ (1999) 2 *Constitutional Law and Policy Review* 13.

Members of the Court sometimes express the opinion that they are ‘bound’ by previous decisions.<sup>52</sup> And the goals of continuity and coherence in the development of the law have sometimes compelled members of the Court to abandon their resistance to a decision they do not like.<sup>53</sup> But *Kable* was controversial, as it appeared to qualify heavily the dogma that the States enjoy parliamentary supremacy. The decision was widely criticised. Many of the attempts to have the principles in *Kable* applied foundered.<sup>54</sup> Judges openly expressed their dissatisfaction with the decision (including Hayne J, before His Honour was elevated to the High Court).<sup>55</sup> And members of the High Court are under no obligation to accept their previous decisions. Isaacs J emphasised this in the *Federated Engine-Drivers’* case:

The oath of a Justice of this Court is “to do right to all manner of people according to law”. Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.<sup>56</sup>

On this footing, a clear conviction that a previous decision is wrong must find expression in the appropriate judgment.<sup>57</sup> And as Brennan CJ, McHugh, Gummow and Kirby JJ said in *Ha v New South Wales*:

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- 51 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493 at 495–496. Similar statements were made in *Baker v Campbell* (1983) 153 CLR 52 at 102–103 (Brennan J); *Jones v Commonwealth* (1987) 61 ALJR 348 at 349 (Mason CJ, Wilson, Brennan, Deane, Dawson & Toohey JJ) and *Grollo v Palmer* (1995) 184 CLR 348 at 362 (Brennan CJ, Deane, Dawson & Toohey JJ). Of course, the court that is invited to exercise its discretion to reopen or overrule is not restricted to two courses of action. For example, where it has been considered possible to confine the operation of a decision to a particular category of cases, members of the court have adopted this course: see *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 71–74 (Dixon CJ) and the excise cases.
- 52 For example, in *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 93 (during argument) and 102, Latham CJ, Rich and McTiernan JJ considered themselves to be ‘bound’ by the decision of Rich ACJ, Starke, Dixon and McTiernan JJ in *Andrews v Howell* (1941) 65 CLR 255.
- 53 For example, Gibbs and Stephen JJ in *Queensland v Commonwealth* (1977) 139 CLR 585 (‘*Second Territorial Senators Case*’), which upheld the constitutional validity of the Senate Territorial representation scheme. Gibbs and Stephen JJ had dissented in *Western Australia v Commonwealth* (1975) 134 CLR 201 (‘*First Territorial Senators Case*’).
- 54 See *Wynbyrne v Marshall* (1997) 7 NTLR 97; *R v Moffatt* [1998] 2 VR 229; *Nicholas v The Queen* (1998) 193 CLR 173; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; *Felman v Law Institute of Victoria* [1998] 4 VR 324; *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694; *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564; *Silbert v DPP (WA)* (2004) 217 CLR 181. See further Peter Hanks, Patrick Keyzer & Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (7<sup>th</sup> ed, 2004) at [6.4.49] – [6.4.52].
- 55 *R v Moffatt* [1998] 2 VR 229.



If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law.<sup>58</sup>

Nevertheless,

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court.<sup>59</sup>

Most of the members of the majority of the High Court failed to explain their divergence from *Kable in Fardon*.<sup>60</sup> The majority of the Court failed to refer to their judgment in 1995 that recognised that imprisonment is punishment, even though it was brought to their attention.<sup>61</sup> In *Witham v Holloway*,<sup>62</sup> Brennan, Deane, Toohey and Gaudron JJ, four justices of the five presiding, said that the potential for imprisonment in contempt proceedings gave rise to a conclusion that such proceedings are correctly classified as criminal in nature. This is because:

Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. *And there can be no doubt that imprisonment and the imposition of fines ... constitute punishment.*<sup>63</sup>

As Barwick CJ, Menzies, Stephen and Mason JJ observed in *Power v The Queen*:

We cannot understand how ... imprisonment, either with or without hard labour, can, however enlightened the prison system is, be regarded as otherwise than a severe punishment.<sup>64</sup>

To suggest that prison ceases to be a punitive environment because it is authorised for other purposes, as the majority of the Court concluded, is ludicrous. Imprisonment is *always* punitive in effect.<sup>65</sup> As Norval Morris observed, prison 'is

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56 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278 (Isaacs J).

57 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 548 (Viscount Simonds, Privy Council).

58 *Ha v New South Wales* (1997) 189 CLR 465 at 504 (Brennan CJ, McHugh, Gummow & Kirby JJ).

59 *Queensland v Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J).

60 Gummow J did, but plainly diverged from his previous opinion on the critical point raised by *Fardon*.

61 *Witham v Holloway* (1995) 183 CLR 525 at 534 (Brennan, Deane, Toohey & Gaudron JJ).

62 *Witham v Holloway* (1995) 183 CLR 525.

63 *Witham v Holloway* (1995) 183 CLR 525 at 534 (emphasis added). See also McHugh J at 545.

64 *Power v The Queen* (1974) 131 CLR 623 at 627 (Barwick CJ, Menzies, Stephen & Mason JJ).

65 See for example Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W. Hastie trans, 1887 ed) at 195; Edgar A Doll, 'Principles and Methods of Individualized Penal Treatment' (1936) 26 *Journal of Criminal Law and Criminology* 695 at 697; Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) at [57].

today the core of the world's penal systems; *it is the norm of punishment* in men's minds [*sic*]; it is the heart of all present criminal law systems'.<sup>66</sup> Indeed, the High Court's failure to take judicial notice that imprisonment is punishment is quite shocking. Australian prisons are, on any sensible view, punitive environments. Indeed, Australian prisons are often characterised by overcrowding, substandard facilities, climactic extremes, terrible food and very little for prisoners to do.<sup>67</sup> The Australian Law Reform Commission has described a 'great number of Australian prisons' as being characterised by poor sanitation and hygiene conditions and as subjecting prisoners to sensory deprivation.<sup>68</sup> Australian prisons are characterised by a lack of appropriate accommodation for differently classified inmates, and generally fail to make adequate provision to accommodate people who are mentally ill or who have intellectual disability.<sup>69</sup> Activities programs are often inadequate.<sup>70</sup> Psychiatric services are often inadequate or unavailable.<sup>71</sup> Prisoners can lack educational opportunities and opportunities to develop life skills.<sup>72</sup> They are often denied human rights.<sup>73</sup>

In 1998 the Australian Medical Association described the health of Australian prisoners as 'appalling'<sup>74</sup> and there is little evidence to suggest that there have been improvements. Many inmates have alcohol and/or drug abuse problems, a quarter use heroin, two-thirds share needles, and up to two-thirds have hepatitis C.<sup>75</sup> Prisoners are at a significantly greater risk of being homicide victims than people in the general population.<sup>76</sup> Prisons are horrible places. It is ludicrous to suggest that they are anything other than punitive environments.

To reach their conclusion that prison can now be ordered for non-punitive purposes, the High Court also abandoned its own recent precedents on the proper methodology to employ when characterising legislation that is alleged to infringe Ch III of the Constitution, which requires the consideration of the *substantive effect* of the legislation under challenge.<sup>77</sup> The conclusion that the majority

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66 Norval Morris, in Tadeusz Grygier (ed), *Criminology in Transition* (1965) at 267, quoted in David Biles, 'Imprisonment and its Alternatives' (1981) 55 *Australian Law Journal* 126 at 126.

67 Richard Edney, 'Overcrowded Prisons, Degraded Prisoners: *Res Ipsa Loquitur?*' (2000) 5 *Deakin Law Review* 81.

68 Australian Law Reform Commission, above n65 at [46].

69 Edney, above n67.

70 *Ibid.*

71 Cathy Pereira, 'The Tyranny of Distance: Disadvantage in Queensland's Regional Prisons' (2001) 26 *Alternative Law Journal* 74.

72 Richard Edney, 'Hard Time, Less Time: Prison Conditions and the Sentencing Process' (2002) 26 *Criminal Law Journal* 139.

73 *Ibid.*

74 Australian Medical Association, 'Prisoner Health Shocking; Reform Needed Urgently: AMA' (Press Release, 18 October 1998), quoted in Vicki Dalton, 'Death and Dying in Prison in Australia: National Overview, 1980-1998' (1999) 27 *Journal of Law, Medicine and Ethics* 269 at 273.

75 See further Wendell Rosevear, 'Heal Rather Than Punish' (1998) 10(9) *Australian Medicine* 12-13.

76 Vicki Dalton, *Prison Homicide in Australia: 1980 to 1988* (1999) *Trends and Issues in Crime and Criminal Justice* No 103 (Australian Institute of Criminology).

ignored the effect of the Act is reinforced by the fact that four of the justices in the majority emphasised the statute's putative objects of 'care control and treatment' set out in s 3 of the Act,<sup>78</sup> but *none* of those justices referred to s 50 of the Act, which plainly indicates that the 'care' and 'treatment' are to take place in prison. The fact that treatment can take place in prison does not alter the character of prison as a punitive environment.<sup>79</sup> The character of the *Dangerous Prisoners (Sexual Offenders) Act* should have been determined by reference to its operation and effect.<sup>80</sup> The general principle of characterisation that is applied when a Commonwealth constitutional limitation or restriction on State power is in issue was settled by Brennan CJ, McHugh, Gummow and Kirby JJ in *Ha v New South Wales*:

When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices.<sup>81</sup>

This principle of characterisation applies equally to Ch III as it does to Ch IV of the Constitution. As Brennan, Deane and Dawson JJ observed in *Chu Kheng Lim v Minister for Immigration*:

In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the *Constitution's* concern is with substance and not mere form.<sup>82</sup>

Accordingly, the Court should have concluded in *Fardon* that, regardless of Queensland's stated intentions, the *Dangerous Prisoners Act* violated the fundamental principle that a person can be punished only for a breach of the law.

Indeed, if a person can be punished only for a breach of the law, it is difficult to accept that *Behrooz v Secretary of the Department of Immigration*<sup>83</sup> was correctly decided. While it is true, at least on a theoretical level,<sup>84</sup> that people in

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77 *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane & Dawson JJ); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561 ('Whether the Act constitutes an impermissible interference with judicial process, or offends against Ch III of the *Constitution*, does not depend upon the motives or intentions of the Minister or individual members of the legislature. The effect of the legislation is to be considered in context ...' (Gleeson CJ, Gaudron, Gummow, Kirby & Hayne JJ)); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 572 (Gummow & Hayne JJ).

78 *Fardon* (2004) 223 CLR 575 at 587 (Gleeson CJ), 597 (McHugh J) and 654 (Callinan & Heydon JJ).

79 Doll, above n65.

80 *Ha v New South Wales* (1997) 189 CLR 465; *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane & Dawson JJ); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 572 (Gummow & Hayne JJ).

81 *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow & Kirby JJ).

82 *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane & Dawson JJ). See also *Re Wakim; Ex p McNally* (1999) 198 CLR 511 at 572 (Gummow & Hayne JJ).

83 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

immigration detention can sue in tort if they are assaulted or suffer abuse or violence in detention,<sup>85</sup> the principles outlined here, if applied, would render it unconstitutional for any court or agency to order a person into immigration detention where the detention is *punitive* in character.<sup>86</sup> While the constitutional validity of immigration detention is not doubted,<sup>87</sup> requiring a Ch III judge (or any other person or agency) to order that a person be detained in what is objectively a *punitive* environment in the absence of a criminal trial conflicts with the principles of due process identified above. Establishing the character of the detention would be a matter of evidence in each case. But it is surprising and indeed wrong, in light of the Court's clear precedents on characterisation that require an analysis of the practical operation of laws said to infringe Ch III of the Constitution, to turn a blind eye to the very compelling evidence that has emerged of the deplorable conditions that can operate in Australian immigration detention centres.<sup>88</sup> Again, recognition and application of the fundamental principles of due process identified above can help to remove this problem.

### 3. *An Open Door to Warehousing the Undesirables?*

The principle of due process enunciated by the majority in *Kable* has been abandoned. So too have the principles of characterisation that make it possible to determine whether State legislation infringes the due process principle of *Kable*. It seems that now the High Court will accept that prison is not punitive if a State Parliament says that it is not. So what limits apply to prevent the States from using prison to warehouse social undesirables?<sup>89</sup>

Many Australian constitutional lawyers would shrug this off as a question of social policy somehow removed from principles of constitutional due process. But the problem with this approach is not only that it ignores the facts, it does violence to the institutional integrity of courts by undermining the logic of the criminal justice system in the process. If imprisonment can be ordered for reasons other than a finding of criminal guilt, then no prison term is finite.<sup>90</sup> Beside destroying the deterrence rationale for sentencing,<sup>91</sup> this development cuts our constitutional

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84 Access to justice is the critical problem here: see Claire O'Connor, 'The Impact of Detention on the Mental Health of Immigration Detainees: Implications for Failure to Deliver Adequate Mental Health Services – Who Cares?' (2007) 9 *University of Technology, Sydney Law Review* (forthcoming).

85 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 (Gleeson CJ), 507 (McHugh, Gummow & Heydon JJ) and 543 (Hayne J).

86 An analogy can be developed with the propositions stated by the Queensland Court of Appeal in *Attorney-General v Francis* [2007] 1 Qd R 396 at 401, where it was suggested that if it were appear to a court that the preventive detention purportedly authorised by legislation was 'truly punitive' in character, then it would be arguable that a court could not make an order of any kind under such legislation.

87 *Chu Kheng Lim* (1992) 176 CLR 1.

88 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 519–520 (Kirby J).

89 See also Vicki Mullen, 'Fundamental Rights and the Separation of State Legislative and Judicial Power' (1999) 2 *Constitutional Law and Policy Review* 1.

jurisprudence adrift from the rich normative reference points provided by the jurisprudence of liberty and due process.<sup>92</sup>

Once the majority in *Fardon* cut Australian constitutional jurisprudence adrift from that principle, they were only able to offer the most unconvincing arguments to stop the legislatures from expanding the use of preventive imprisonment. Gummow J (with whom Hayne J agreed) characterised the preventive detention of serious sexual offenders as an ‘exception’ to the ordinary principle: that the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.<sup>93</sup> However Gummow J did not elaborate on the ambit of this ‘exception’. Does it only apply to serious sexual offenders? Callinan and Heydon JJ said:

In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes.<sup>94</sup>

And on what basis should the Court be vigilant? What principles would the Court seek to protect, now that it has abandoned the principle that a person shall only be punished for a breach of the law? It is, with respect, very difficult to imagine a more illegitimate exercise than characterising imprisonment as a variety of ‘non-punitive’ preventive detention.

#### 4. Conclusion

In 1996, five justices of the High Court, including McHugh and Gummow JJ, said that Ch III of the Constitution provides ‘the guarantee of liberty’.<sup>95</sup>

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90 See further Patrick Keyzer & Sam Blay, ‘Double Punishment? Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The *Fardon* Communication’ (2006) 7 *Melbourne Journal of International Law* 407.

91 See Patrick Keyzer, Cathy Pereira & Stephen Southwood, ‘Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues’ (2004) 11 *Psychiatry, Psychology and Law* 244.

92 See Wheeler, above n14; *Coward v Stapleton* (1953) 90 CLR 573; *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J); *Williams v The Queen* (1986) 161 CLR 278 at 296 (Mason & Brennan JJ) and *O’Brien v Northern Territory [No 2]* (2003) 173 FLR 455 at 461 (Martin CJ) and 464 (Mildren J) (Court of Appeal of the Northern Territory).

93 *Fardon* (2004) 223 CLR 575 at 612 (Gummow J).

94 *Fardon* (2004) 223 CLR 575 at 654 (Callinan & Heydon JJ).

95 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ).

This was not a throw-away line. It was an evocation of the purpose of the separation of judicial power: preserving individual liberty and preventing the tyranny of the majority by ensuring that liberty should not be denied without due process of law.<sup>96</sup> It is fundamental that a purpose of courts is to preserve liberty that can be removed only upon due process of law. Liberty is the most fundamental of the basic rights.<sup>97</sup> That is why it has been acknowledged that the determination of criminal guilt is the most important function of the judiciary.<sup>98</sup> And the power of imprisonment, the exclusive province of courts exercising judicial power in accordance with traditional judicial processes, should not be outflanked by legislation purporting to authorize the exercise of the judicial power of imprisonment under the guise of civil commitment proceedings.<sup>99</sup> Again, only one type of process is due when imprisonment is the result: the criminal trial.<sup>100</sup>

For these reasons the legislation upheld by the High Court in *Fardon v Attorney-General (Qld)*,<sup>101</sup> which is unprecedented in the common law world,<sup>102</sup> plainly inflicts *double* punishment.<sup>103</sup> The *Dangerous Prisoners Act* imposes double punishment because it requires a judge of the Supreme Court of Queensland to order the detention in prison of someone convicted and sentenced for a criminal offence, who has satisfied the penalty imposed at sentence, without any further determination of criminal guilt justifying the use of judicial power.<sup>104</sup> A court making an order under it is *required* to have regard to the prior offences of a person in determining whether or not he should continue to be a prisoner in circumstances where no new crime has been committed. Up until 3½ years after the conclusion of his prison sentence Mr Fardon remained a prisoner.<sup>105</sup> He was subject to substantially the same regime of imprisonment as if convicted of a criminal offence but without being charged, tried, or convicted of an offence against the criminal law of Queensland. This result was repugnant to the principle of due process that punishment should only be ordered by a court, and then only for a breach of the law.

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96 *Chu Kheng Lim* (1992) 176 CLR 1 at 26–29 (Brennan, Deane & Dawson JJ).

97 *Whittaker v The King* (1928) 41 CLR 230 at 248 (Isaacs J).

98 *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane & Dawson JJ).

99 *Chu Kheng Lim* (1992) 176 CLR 1 at 26–29. See also George Zdenkowski, 'Community Protection through Imprisonment without Conviction: Pragmatism Versus Justice' (1997) 3(2) *Australian Journal of Human Rights* 8.

100 As Kirby J observed in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 178–179.

101 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld).

102 See Keyzer, Pereira & Southwood, above n91.

103 Keyzer and Blay, above n90; see further Bernadette McSherry, Patrick Keyzer & Arie Freiberg, *Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development* (2006) Report to the Criminology Research Council, Melbourne at 81–83 <<http://www.aic.gov.au/crc/reports/200405-03.html>> accessed 1 November 2007.

104 *Fardon v Attorney-General (Qld)* [2003] QCA 416 at [80] (McMurdo P).

105 Mr Fardon was released from prison on a supervision order in December 2006: see *Attorney-General (Qld) v Fardon* [2006] QCA 512.